JUDGMENT OF THE COURT (FIRST CHAMBER)
OF 4 APRIL 1974 [1] [2]

Manlio Serio
v Commission of the European Communities

Case 115/73

Summary

1. *Officials — Recruitment — Selection — Considerations — Knowledge and experience relating to a specific national sphere — Account taken — Acceptability (Staff Regulations, Article 27)*

2. *Officials — Recruitment — Competition on basis of both qualifications and tests — Qualifications taken into account after the tests — Acceptability (Staff Regulations, Annex III, Article 5 (1) and (4))*

1. Though the Staff Regulations declare that no posts shall be reserved for nationals of any specific Member State, the appointing authority may, in engaging an official, legitimately treat knowledge and experience relating to a specific national legal system as a decisive factor in selection.

2. It follows from Article 5 (1) and 5 (4) of Annex III to the Staff Regulations that the qualifications offered by each candidate enable the Selection Board in the first place to decide which candidates are to be admitted to the tests. After the result of the tests has been taken into account, however, these provisions do not prevent qualifications from also being taken into consideration for the purpose of making the appointment.

In Case 115/73

MANLIO SERIO, an official of the Commission of the European Communities, represented by Remo Serio, of the Salerno Bar, with an address for service in Luxembourg at the chambers of Maître Joseph Guill, 23, rue Seimetz,

applicant,

1 — Language of the Case: Italian.

2 — With a view to simplification and clarity, the Court has decided to make slight changes in the form of its judgments. In particular, the phrases beginning 'Upon reading,' etc., which formerly preceded the operative part of the judgment, are now omitted. The reader will find in the body of the judgment a mention, in appropriate places, of all the documents formerly referred to in that way.

V

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser Giorgio Pincherle, with an address for service in Luxembourg at the office of its Legal Adviser Pierre Lamoureux, 4, boulevard Royal,

defendant,

Application for annulment of competition procedure COM/388/71 and the appointment made thereunder, and for damages.

THE COURT (First Chamber)

composed of: R. Monaco, Rapporteur, acting President of Chamber J. Mertens de Wilmars and C. Ó Dálaigh, Judges,

Advocate-General: J. P. Warner
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts

I — Facts and procedure

The facts and the arguments developed by the parties in the course of the written procedure may be summarized as follows:

1. In notice of competition COM/388/71, the Commission set in motion the internal competition procedure to fill a post in Category/Career Bracket A 5/A 4. Among the qualifications required in the notice was 'theoretical and practical knowledge of Dutch law'. By letter of 8 November 1971 addressed to the Director-General of Administration, the applicant declared that, because of this requirement, the notice was vitiated as being *ultra vires* and discriminatory, and asked that it be withdrawn. This letter, together with a previous one of 19 October 1971, was rejected by the Administration on 29 February 1972. The applicant applied for the post and, on 14 March 1972, was admitted to the written tests provided for under the competition procedure. In a letter from

the Administration dated 13 June 1972 he was informed that he had not been successful. On receipt of this letter, the applicant challenged its accuracy in a letter dated 16 June 1972 addressed to the office of the President of the Commission, drawing attention to the fact that his name appeared on the list of suitable candidates. By letter of the same day, which reached the applicant on 21 June 1972, the Administration wrote to him again confirming that his candidature had not been successful and at the same time that his name had appeared on the list of suitable candidates.

By decision of 31 May 1972, the Commission appointed Mr Christian Timmermanns, of Dutch nationality, to the vacancy. On 23 July 1972 the applicant lodged a complaint under Article 90 (2) of the Staff Regulations.

The complaint was rejected by decision of 15 January 1973, which was notified to the applicant on 23 January 1973. On 23 March 1973 he brought the present proceedings.

2. After hearing the report of the Judge-Rapporteur and the opinion of the Advocate-General, the First Chamber of the Court, by order of 8 November 1973, decided to hear two witnesses and to invite the Commission to supply certain information in writing before 20 November 1973.

II — Conclusions of the parties

The applicant claims that the Court should:

'— declare the appeal to be admissible;

— declare null and void competition procedure COM/388/71 and the subsequent appointment of Mr Christian Timmermanns;

— order the defendant to pay compensation to the applicant for the material damage he has suffered on the basis of the difference between the salary he would have received if he had been appointed to the post and the salary he actually received up to date of judgment;

— declare the applicant entitled to compensation for moral damage by virtue of the fact that he has been wilfully, repeatedly and unlawfully deprived of his career prospects, the amount of compensation being assessed *ex aequo et bono* by the Court;

— order the defendant to pay all costs and, in any case, find in favour of the applicant under the provisions of Articles 69, 70, 71, 72 and 73 of the Rules of Procedure.'

The applicant is moreover prepared to adduce further evidence and invites the Court to call for detailed evidence in support of the various allegations contained in the statements submitted in justification of his claim.

The *defendant* claims that the Court should:

'— reject the application in its entirety and order the applicant to pay the costs.'

III — Submissions and arguments of the parties

The applicant maintains that the disputed competition procedure was vitiated as being *ultra vires* and discriminatory because theoretical and practical knowledge of Dutch law was among the qualifications required in the notice of competition. In support of this plea, he points out that it would be rather unrealistic to pretend that a theoretical and practical knowledge of Dutch law was not the prerogative of the Dutch, especially in view of the difficulty which a non-Dutch person would have in acquiring a practical knowledge of Dutch law. Secondly, given the kind of work carried out by the Division

concerned and by the officials working in it, the need, in doing their work, to have regard to all the national legislations makes it impossible to lay down knowledge of one particular legislation as a qualification and to confine appointments to officials of a particular nationality. Finally, it is not true that the test on knowledge of Dutch law was not an elimination test, since the results of such a test played an important part in the assessment of the two candidates.

Moreover, the attitude adopted by the Administration in the present case is merely the result of a predetermined plan to give preference to the appointed candidate from the time he joined the staff and this plan blocks the applicant's promotion. In evidence submitted in support of his contention, the applicant draws attention to a series of circumstances pointing to the existence of such a 'plan', which (he says) the disputed competition helped to carry into effect.

Again, according to the applicant, the tests in the disputed competition were conducted irregularly. There were two candidates taking part in the competition, one of Dutch nationality, the other an Italian. The decision of the chairman of the Selection Board to forward the candidates' answers in the original as well as in the French translation made it impossible to preserve the necessary secrecy concerning the names of the candidates and enabled each of them to be identified.

Moreover, the files submitted for study by the Commission when making the appointment did not contain the documents referring to the university education and professional experience of the applicant, although they were attached as an appendix to the application form. This omission, which could hardly have been by chance, affected the decision of the appointing authority as there was on this point a great difference between the respective merits of the two candidates. It is also in conflict with the essence of a competition on the basis of tests as well as on the basis of qualifications not to treat qualifications as anything more than as a condition of admission to the tests; in a competition of this kind, an assessment of a candidate's merits must be based not only on the result of tests but also on qualifications. The applicant believes, therefore, that in these circumstances, the Selection Board did not show the requisite objectivity. Among other things, he points out that a member of the Selection Board was a member of the Joint Committee which was asked to consider both the disputed notice of competition and a previous notice; he adds that, although there is nothing to suggest that the Legal Department representative on the Selection Board was other than fair, it is impossible to ignore the connexion which, because of their functions, exists between this official and the Director of the Directorate-General involved.

Finally, the applicant draws the attention of the Court to the marks obtained by the two candidates in the general and special tests and to the details of the marks obtained by each candidate: he states that the figures giving the markings could easily be rigged.

The *Commission* in the first place rejects the suggestion that the disputed competition procedure was carried out with a view to giving an advantage to 'a candidate of a particular nationality'. It emphasizes the need, in an important sector of the Directorate-General concerned, to have an evenly balanced staff to cope with the Commission's responsibilities under the Treaty. Maintaining this balance does not conflict with the prohibition in Article 27 of the Staff Regulations. The structure of the department concerned and the kind of work it is called upon to perform make it desirable, even if not essential, for it to have a specialist in Dutch law. Not that 'practical knowledge' of a particular legislation is the same as 'professional experience'.

Finally, the main qualification called for in the notice of competition was 'thorough knowledge of private law, especially commercial law', without reference to any particular legislation. As an additional qualification, knowledge of Dutch law had advantages from the point of view of the department but it was not an essential qualification.

The Commission goes on to deny that the applicant has been the target of animosity which has interfered with his career and rejects his allegations on the subject. It also makes the comment that he cannot support his case by reference to the Commission's alleged improper behaviour in the form of injurious acts which he did not challenge at the proper time and whose supposed illegality he may not plead in connexion with the present case.

Furthermore, the Commission reiterates that every precaution was taken to ensure that the competition processes were correctly carried out. The test papers were sent to the markers in French translation and not as written by the candidates. The originals were made available to the examiners in order that, after the papers had been marked, they could if they wished check the accuracy of the translations on which they had made their assessment.

After rejecting the contention that the Selection Board had not been objective, the Commission emphasizes that in this case, as in many others, qualifications were taken into account in deciding which candidates were to be allowed to compete and, later, to be admitted to the written tests. It would not be correct to say that qualifications enter into the assessment of a candidate's merits during the appointment procedure; they are part of the competition procedure but appointment represents later stage, during which the appointing authority, on the basis of the list of suitable candidates and the reasoned report of the Selection Board with which it has been provided, decides which candidate to appoint. As in all other cases, the personal files of candidates containing their performance reports were placed at the disposal of the authority.

In his reply, the *applicant* reiterates the contention that the disputed competition procedure formed part of a deliberate plan to promote a candidate of a particular nationality. He submits supporting evidence on this point and again presses for witnesses to be called.

In a detailed statement, the applicant maintains that, while he does not dispute the need to strike a fair balance between nationalities within the division, its composition, both before and after the competition, ignores the principle emphasized by the Commission. Insisting that theoretical and practical knowledge of Dutch law was not needed in the department, the applicant goes into greater detail on the factual evidence adduced to prove the existence of a preconceived plan in favour of the candidate named, and the Administration's prejudice against himself. He denies that, in arguing his case, he has no right to refer to past events; in order to furnish proof of an occurrence, he says it is essential to shed light on the past and to look at the present case against the background of relevant evidence from the past. If he failed to take action on these matters at the proper time, this was because he regards legal proceedings as the last resort for making the Administration recognize one's rights. He draws special attention to the circumstance in which he was resettled in his original Division. He states that the instruction of the Director-General that he should be resettled was issued some days after he had learned from his Divisional Head that there was no possibility of his being appointed to an A 5/A 4 post which had become vacant, and that there could be no question of his being promoted in the Division to which be had been 'temporarily' posted.

On the question of the anonymity of candidates, the applicant replies that he is unable to appreciate the subtle

distinction drawn by the defendant between *giving* the test papers to the examiners and *placing them at their disposal*. He declares that the chairman of the Selection Board himself told him that the original test papers were sent to the examiners as well as a translation, and requests the Court to question that official in this connexion.

Finally, in regard to the significance of qualifications in a competition 'on the basis of both qualifications and tests', as in the present case, the applicant replies that, in Articles 1 (b) and 5 of Annex III, the Staff Regulations clearly provide for three kinds of competition: one on the basis of qualifications, one on the basis of tests, and one on the basis of both qualifications and tests. If the defendant institution were correct in its statement that qualifications were taken into account in competititon COM/388 only for the purpose of admission to the tests, the consequence is that, contrary to the wording of the competitition notice, it was a competition 'on the basis of tests' and not 'on the basis of both qualifications and tests'.

In reply to this, the *defendant* states that the applicant is confusing a fair balance between officials of different nationalities in the interests of efficiency in certain departments and a 'geographical balance' based on a distribution of posts in proportions reflecting the comparative importance of each Member State. In its statement, the Commission was referring exclusively to balance in the interests of efficiency. After reiterating its standpoint on the issues in dispute, especially on the thesis that the applicant had been the victim of discrimination and of prejudice against him on the part of the Administration, the defendant returns to the question of the rôle played by qualifications in a competition 'on the basis of both qualifications and tests' and to the question of keeping candidates' names secret. On the first question, the defendant states that, while, possibly, the notice might make qualifications a means of assessing the merits of a candidate in addition to the results of tests, it was inconceivable that, in exercising the powers conferred on it in this field, the appointing authority should not be free to conduct a competition on the basis of qualifications and tests in such a way that it becomes rather more a competition on the basis of qualifications than on the basis of tests, or *vice versa*. In this instance, qualifications were a condition of admission not only to the competition but also to the tests. On the second point, the Commission reiterates that the original test papers were not made available to the examiners until *after* they had been marked.

Finally, on the merits of the claim for damages, the defendant comments that, to justify it, the applicant makes a series of allegations (concerning deliberate interference with his career, prejudice on the part of the Director-General, Mr Vogelaar, etc.) based on a subjective and tendentious interpretation of events and which fail to hang together as coherent, clear and relevant evidence of the 'culpable' determination of the Administration to deprive him of all prospects of promotion. With regard to his resettlement in his original Division in February 1973 and to the refusal to promote him in that Division, the defendant states that both these occurrences are explained by the fact that at that time, the Division was being transferred to a Directorate-General. For the applicant, promotion in the Division would have meant advancement in a department which was now part of another Directorate-General.

IV — Oral procedure

The oral observations of the parties were made at the hearing on 12 December 1973 and 13 February 1974.

The Court (First Chamber) heard Mr Christian Timmermans and Mr Karl Gleichmann on 12 December 1973.

The Advocate-General delivered his opinion on 19 March 1974.

Law

1 The main object of the application lodged with the Registry on 23 March 1973 is to obtain annulment of competition procedure COM/388/71 and of the appointment made by the Commission as the result of this procedure.

Its object is also to obtain a ruling that the Commission should make good the moral damage done to the applicant as the result of unlawful discrimination against him in the competition.

2 The applicant alleges that the competition was arranged and organized in such a way as to favour a particular candidate.

He maintains, in the first place, that, prior to publication of the notice of the competition which is the subject of the dispute, the successful candidate had stated that the Head of the Division in which the post was vacant had offered him a post in Grade A 5 within the Division and that he had accepted it.

This allegation was not borne out when, during the hearing of 12 December 1973, the Court examined the witnesses.

3 The applicant further maintains that the discriminatory manner in which the competition was conducted is also demonstrated by the fact that a thorough knowledge, theoretical and practical, of Dutch law was laid down in the notice of competition as an essential qualification.

He contends that the nature of the work in the Division concerned and, more particularly, the need, in carrying it out, to take into account the national legislation of all the Member States did not warrant such a condition.

4 Although the Staff Regulations prohibit a post from being reserved for the nationals of any specific Member State, the appointing authority may nevertheless, in appointing an official, legitimately treat knowledge and experience associated with the legal system of a particular nation as a decisive factor when making its choice.

In the present case, given the functions carried out by the Division in which the vacancy arose and its interest in company law, the appointment of an official having a knowledge of Dutch law is justifiable in view of the changes which had taken place just previously in Dutch company law.

Moreover, the subjects chosen for the main test were relevant to the kind of work carried out in the Division in which the disputed vacancy arose.

5 The applicant also contends that the competition procedure was carried out irregularly as a result of the composition of the Selection Board, and because it had at its disposal not only the French translation but also the originals of the test papers.

The applicant maintains that because one of the two candidates admitted to the tests was Dutch and the other was of Italian nationality, it was thus possible to identify each candidate and it made it impossible to ensure that their identity was concealed from the examiners.

He also mainains that the marks awarded by the Selection Board for the tests were the subject of some 'manipulation'.

6 In view of their gravity, these allegations could be accepted only if accompanied by adequate proof.

This has not been forthcoming.

In particular, the Commission's contention that the original test papers were made available to the members of the Selection Board so that, after they had finished marking them, they could, if they wished, check the accuracy of the texts which they had marked, is borne out indirectly by the covering note to the test papers which appears in the administrative file relating to the procedure in issue.

7 The applicant further maintains that, as the disputed competition was 'on the basis of both qualifications and tests', the Commission was wrong in making the appointment solely on the basis of the tests and without paying regard to the qualifications of each candidate.

Under the first and fourth paragraphs of Article 5 of Annex III of the Staff Regulations, the Selection Board 'shall draw up a list of candidates who meet the requirements set out in the notice of competition' and 'where the competition is on the basis of both tests and qualifications, the Selection Board shall state which of the candidates on the list shall be admitted to the tests'.

Accordingly, the qualifications offered by each candidate enable the Selection Board first to decide which candidates can be admitted to the tests.

These provisions do not, however, prevent their being taken into consideration at a later stage than when the decision is taken on admission to the tests.

The qualifications constitute a criterion which, after due weight has been given to the results of the tests, may be taken into account when the decision is taken whom to appoint.

However, in the present case, in view of the results of the tests, especially that of the principal test, the qualifications offered by the applicant do not appear to be of a kind which should have secured a decision in his favour.

8 For these reasons, the claims for annulment of competition COM/388/71 and of the disputed appointment are unfounded.

Nor, consequently, can the claims for damages, based on the alleged irregularity of these acts, be upheld.

The application must therefore be dismissed.

Costs

9 By Article 69 (2) of the Rules of Procedure, the unsuccessful party shall be ordered to pay the costs if a submission has been made to that effect.

Nevertheless, under Article 70 of the Rules of Procedure, the costs incurred by the institutions in actions brought by servants of the Communities are not recoverable.

On those grounds,

THE COURT (First Chamber)

hereby:

1. Dismisses the application.
2. Orders each party to bear its own costs.

Monaco Mertens de Wilmars Ó Dálaigh

Delivered in open court in Luxembourg on 4 April 1974.

A. Van Houtte
Registrar

R. Monaco
Acting President

OPINION OF MR ADVOCATE-GENERAL WARNER DELIVERED ON 19 MARCH 1974

My Lords,

The applicant in this case was an unsuccessful candidate for a post of Principal Administrator on the staff of the Commission.

The vacancy for the post, which was subsequently the subject of an internal competition, was initially announced by means of a notice of vacancy which fixed the closing date for applications at 17 June 1971. It appears that under this procedure a person who applies in response to the notice of vacancy is considered, unless he withdraws, as a candidate in any subsequent competition relating to the same post.

The post in question was of grade A 5/A 4 in the division concerned with European company law. The notice of vacancy specified that candidates should have, if possible, a thorough theoretical and practical knowledge of Dutch law and, among the linguistic qualifications required, it was stated that a satisfactory knowledge of both Dutch and English was desirable. The gist of the applicant's allegations is that the post had been earmarked for a Dutch candidate, who was in fact appointed, and that it was for this reason that those qualifications were required.

On 15 June 1971 the applicant sent to the Director-General of Personnel and Administration a note asking for the notice of vacancy to be cancelled, and in the event of the post being re-advertised, for the deletion of any reference to Dutch law or to the Dutch language. He stated that the post had previously been occupied by a German national who had no knowledge of Dutch law or of Dutch and whose work in the post had led to his promotion; he argued that the work in the division did not require any such knowledge, and he alleged that a Dutch national had already been offered the post and had been invited to apply for it.