JUDGMENT OF THE COURT (FIRST CHAMBER) OF 10 JULY 1975 [1]

Berthold Küster v European Parliament

Case 77/74

Summary

Officials — Periodical report — Replacement by the judgment of a selection board — Inadmissibility
(Staff Regulations, Article 43)

The judgment of a selection board cannot take the place of the periodical report.

In Case 77/74

BERTHOLD KÜSTER, an official of the European Parliament, residing at Bertrange (Luxembourg), represented by Victor Biel, Advocate of the Cour Supérieure de Justice of the Grand-Duchy of Luxembourg, with an address for service in Luxembourg at the Chambers of his counsel, 18a rue des Glacis,

applicant,

v

EUROPEAN PARLIAMENT, Luxembourg, represented by its Secretary-General, Hans Robert Nord, as Agent, assisted by Alex Bonn, Advocate of the Luxembourg Bar, with an address for service at the Chambers of its counsel, 22 Côte d'Eich,

defendant,

Application for the annulment of internal competition A/45 and of the appointment made thereunder.

1 — Language of the Case: French.

THE COURT (First Chamber)

composed of: J. Mertens de Wilmars, President of Chamber, R. Monaco (Rapporteur) and A. O'Keeffe, Judges,

Advocate-General: G. Reischl
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts

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

I — Facts and written procedure

1. By Notice of Vacancy No 892 of 28 September 1973 a post of Head of Division in the Directorate-General 'Research and Documentation' was declared vacant as at 1 January 1974. The wording of the notice stated that the post in question was in the first instance to be filled by way of 'promotion' or 'transfer within the institution'.

On 3 October 1973 the applicant submitted his candidature on the basis of this form of recruitment.

By notice of 23 november 1973 the internal competition A/45 was opened in order to fill the said post. By decision of 14 February 1974 the appointing authority appointed Mr Gérard Kieffer to the post.

By letter of 17 March 1974 the applicant submitted a complaint against this appointment within the meaning of Article 90 (2) of the Staff Regulations. Since no reply on the part of the appointing authority was received in relation to this complaint the applicant lodged the present application on 16 October 1974.

2. On hearing the report of the Judge-Rapporteur and the views of the Advocate-General, the Court (First Chamber) decided to hear Mr Hans Joachim Opitz, Director-General at the European Parliament, as a witness in his capacity as chairman of the Selection Board in internal competition A/45 on two questions relating to the marks awarded by this Selection Board under criteria 7 and 12.

II — Conclusions of the parties

The *applicant* claims that the Court should:

'(1) Before proceeding further, order the Parliament to produce all papers, documents and minutes relating to competition A/45 in order to allow a complete and factual examination of the Selection Board's proposals to take place.

(2) Record that the applicant reserves the right in due course to present all other submissions in support of his application and to submit such offer of proof as may be appropriate.
(3) Rule that the present appeal is admissible in its form and presented within the appropriate time-limit.
(4) Accordingly, rule that the implied rejection of the applicant's complaint to the President of the European Parliament of 17 March 1974 is null and void.
(5) Rule that the promotion which took place on the basis of competition A/45 is irregular and illegal and accordingly annul the same.
(6) Order the Parliament to pay all the costs and expenses of the proceedings.'

The *defendant* claims that the Court should:

'Record that the defendant does not dispute the admissibility of the proceedings.

Record that it produced in the proceedings the reasoned report of the Selection Board in competition A/45 and the list of suitable candidates prepared by the Selection Board, excluding the marks obtained by candidates other than Mr Küster.

Reject the applicant's request for the production of further documents.

Rule that the application is unfounded and reject it.

Make an order for costs in accordance with the relevant provisions.'

III — Submissions and arguments of the parties

The *applicant,* after having pointed out that the appointed candidate had
— at the time of his appointment been a 'temporary servant' with the Secretariat of the political groups and therefore was not entitled to be promoted
— been allotted Step 6 on the occasion of his first classification as an official

submits in particular the following:

(1) Under the provisions of Article 29 of the Staff Regulations the appointing authority is obliged, before opening an internal competition, to state its inability to fill the vacant post by way of promotion or transfer within the institution. Yet the notice of competition merely states that the appointing authority had decided to fill the post by way of competition and makes not the slightest reference to the grounds on which no promotion is possible in the present case. In these circumstances the opening of the competition in question is irregular: the competition was organized with a view to appointing a specific candidate, even if he were the last in the list of suitable candidates, and therefore involves a misuse of powers.

(2) The Selection Board in the present case was appointed by the Secretary-General when in fact, under the provisions which were notified to the staff in 1962, only the president of Parliament can appoint selection boards in respect of competitions in Category A. As regards the decision of the Bureau of Parliament of 7 and 8 October 1971 which, in respect of grades other than A1 and A 2, delegates this competence to the Seretary-General, it was never brought to the notice of the staff and cannot for that reason be used against it.

(3) Contrary to the terms of the notice of competition, according to which the competition would be on the basis of 'qualifications', the Selection Board in fact held oral 'tests' which were the subject of marks. This amounted to an arbitrary alteration of the structure of the competition set out in the aforementioned notice, which rendered the competition procedure null and void.

(4) The applicant points to the absence, amongst the criteria for selection adopted by the Selection Board, of that of experience acquired in the post to be filled (as regards these criteria. cf. Annex 2 to the statement of defence). He finds moreover that the Selection Board had committed several irregularities in marking. It appears in particular, that in the course of the selection procedure, which was done simultaneously by the same Selection Board in respect of the two competitions A/43 and A/45, Mr Gérard Kieffer had in respect of the same criterion (No 12) obtained three more points in Competition A/45 than in Competition A/43, whilst the applicant had obtained three more points in Competition A/43 than in Competition A/45. Moreover, it seems inexplicable how a candidate who at the time of the competitions was a 'temporary servant' could have obtained five points under Criterion No 2, in respect of seniority acquired in the career next below that corresponding to the post to be filled, and seven points under Criterion No 7 (general reports...), when he had never in fact been the subject of a periodical report. In support of these allegations the applicant requires the production of every paper, document and minute relating to Competition A/45, including the personal file of Mr Gérard Kieffer.

The applicant concludes that also in the course of reviewing legality, the Court is competent to investigate facts amounting to irregularity vitiating the activities of a selection board. To accept a contrary view would be equivalent to rendering the fundamental principle of legal protection of officials devoid of any practical meaning.

The *defendant* replies by, in particular, emphasizing:

— the procedure under Article 29 of the Staff Regulations was rigorously respected in the present case, since the appointing authority organized the competition after having found that the first stage of recruitment had produced no convincing result;
— the decision of the Bureau of Parliament which delegated to the Secretary-General the power of appointing the selection board in competitions of Category A for grades other than A/1 and A/2, falls within the legal exercise of an internal power of delegation. As such, this decision is not subject to a requirement of publication. In any event, even if such information were to be necessary or useful the failure to provide it does not affect the validity of the delegation itself;
— the 'interviews' to which applicants were called in the present case do not amount to oral 'tests': they had no purpose other than to allow the Selection Board to verify by direct contact the professional training and the personality of each candidate.

Finally, as regards the criticisms raised against the alleged irregularities committed by the Selection Board, the defendant produces the reasoned report of the Selection Board, but states that it is not inclined in the present case to divulge the marks obtained by the various candidates other than the applicant. It further points out:

— since the criterion of 'general reports' is considered indispensable in the light of the provisions of the Staff Regulations, but cannot on the other hand apply to temporary servants, the solution adopted by the Selection Board has the sole purpose of ensuring that the same treatment is given to all officials;
— since the posts to be filled in Competitions A/43 and A/45 were different, it is not surprising that the same candidate obtained different points in relation to the same criterion of selection;
— the attribution to a 'temporary servant' of points for seniority acquired in the career bracket immediately below the post to be

filled is explained by the necessity of ensuring uniform objective criteria of selection and assessment in respect of all candidates admitted to the competition, including temporary servants. Besides, activity with political groups within the General Secretariat does indeed constitute a career within the institution itself.

The defendant concludes that whilst the Court may and indeed must verify the legality of criteria laid down and applied by a selection board, it nevertheless cannot take the selection board's place by reshaping its assessments as to the qualifications of the various candidates.

In his *reply,* the *applicant* develops his thesis that Article 29 (1) (a) of the Staff Regulations prohibits the appointing authority from opening an internal competition as long as it is possible to fill a vacant post by way of promotion (or of transfer within the institution). This is precisely the case here, since in the reports made on him the applicant has been considered suitable for promotion. To proceed without explanation to the opening of an internal competition on the pretext of wishing to find a wider basis of selection, means reducing the situation of 'promotable' officials to that of officials who can only fill the vacant post by way of competition, and thus prejudicing the rights of the former in their career prospects.

The applicant then points out that the decision of the Bureau of Parliament of 7 and 8 October referred to by the defendant, cannot be analysed simply as an 'internal act of division of competence' but constitutes an 'act designating the appointing authority'. Respect for the principle of legal certainty requires that such an act be brought to the knowledge of the interested parties, all the more so since Article 25 of the Staff Regulations, by providing that specific decisions must be published, implies that notification by way of publication is even more necessary in the case of decisions that are of interest to staff in general. Besides, the need for such publication follows even from the procedure under Article 90 of the Staff Regulations, as to the method of submitting a complaint.

The applicant finally continues to contest the regularity of the criteria for marking which were applied by the Selection Board. He criticizes *inter alia:*

- the criterion of seniority which, above a specific number of years, grants the same points to officials of different seniority:
- the criterion which takes, into account the activity exercised before entry into service with the institution, since this criterion cannot benefit those who joined the Community immediately after concluding their university education.

In its *rejoinder* the *defendant* refers to the Court's Judgment of 12 March 1975 in Case 23/74 *Küster* v *European Parliament* and takes the view that the principles set out in that Judgment allow several of the submissions raised in the present case to be refuted. This is particularly the case with:

- the submission that Article 29 (1) (a) of the Staff Regulations was infringed in that the appointing authority ought, before proceeding to an internal competition, to have exhausted the possibilities of promotion or of transfer within the institution which existed in the present case;
- the submission based on the allegedly irregular nature of the appointment of the selection board due to the non-publication of the decision of the Bureau of Parliament enabling the Secretary-General to make the criticized appointment;
- the submission based on the fact that the competition in question which was a competition based on qualifications, had, through the expedient of interviews with the

candidates, involved oral tests. The Court has in fact rejected the thesis that the competition based on qualifications cannot involve such interviews without turning into one based on tests;

— the submission of misuse of powers.

Alter having refuted certain complaints, based on the manner in which the Selection Board had allocated its marks to the applicant in the competition in question, as well as in Competition A/43, the defendant objects to the allegation of 'manipulation' made by the applicant against the Selection Board. Finally, it insists on the limits on the Court's power of review, particularly as regards the assessment of the criteria of marking adopted by the Selection Board.

IV — Oral procedure

The oral observations of the parties were made at the hearing of 28 May 1975.

In the course of this hearing, the Court heard as a witness Mr Hans Joachim Opitz, Director-General with the European Parliament, the chairman of the Selection Board in relation to the competition in question.

The Advocate-General delivered his opinion on 19 June 1975.

Law

1 By action brought on 16 October 1974 under Article 91 of the Staff Regulations, the applicant asks the Court to annul the implied rejection by the European Parliament of his complaint of 17 March 1974 and consequently to annul the appointment of Mr Gérard Kieffer which took place on 14 February 1974 as a result of Competition A/45.

2 In support of his conclusions he submits *inter alia* that the criticized appointment is irregular since the Selection Board in relation to the competition had, under the heading 'General reports and professional assessments within the Community institutions' attributed points to the appointed candidate, for whom no periodic report in fact existed.

3 It is not denied that the appointed candidate was at the time of his appointment a temporary servant and that he had not, by reason of this fact, been the subject of a report.

4 Nevertheless it is shown by the details which were furnished by the chairman of the Selection Board in the course of the oral procedure that the Selection Board had, on the basis of the aforementioned criterion of selection, accorded this candidate seven points out of ten.

5 Whilst there is nothing to prevent the admission of temporary servants to internal competitions, it is not correct to attribute to them fictitious marks when, by reason of their legal position they do not comply with one of the criteria of selection applied.

6 Besides, whilst it is true that the heading under which the marks in question were granted is not only that of 'general reports' but also that of 'professional assessments within the Community institutions', it nonetheless remains a fact that the conditions which the Staff Regulations place upon the preparation of the periodic report exclude the possibility of this being replaced by the judgment made by a selection board.

7 Moreover, it is shown by the information supplied at the hearing that the number of points attributed under this heading expresses an arithmetic value and at the same time a global assessment of the individual qualities of the candidate, very different from that which forms the basis of the periodic report.

8 In these circumstances this marking must be considered irregular from the point of view of the Staff Regulations and of such a kind as to involve the annulment of the appointment.

9 As is shown by the Selection Board's report annexed to the statement of defence, the appointed candidate could not, in the absence of the marking in question, have achieved the number of points treated as the minimum for inclusion in the list of suitable candidates.

10 Thus the irregularity referred to, which, affects the validity of the appointment in question, causes prejudice to the applicant.

11 There being no need to examine the other claims in the action, the appointment of Mr Gérard Kieffer resulting form Competition A/45 must therefore be annulled.

Costs

12 By Article 69 (2) of the Rules of Procedure the unsuccessful party shall be ordered to pay the costs.

13 The defendant has failed in its plea.

14 The defendant must therefore be ordered to pay the costs of the proceedings.

On those grounds,

THE COURT (First Chamber)

hereby

1. **Annuls the appointment of Mr Gérard Kieffer resulting from Competition A/45;**

2. **Orders the defendant to pay the costs.**

Mertens de Wilmars Monaco O'Keeffe

Delivered in open court in Luxembourg on 10 July 1975.

A. Van Houtte
Registrar

J. Mertens de Wilmars
President of the First Chamber