JUDGMENT OF THE COURT (Second Chamber)
14 June 1988 *

In Case 161/87

Gert Muysers and Walter Tülp, officials of the Court of Auditors of the European Communities, represented by Victor Biel, of the Luxembourg Bar, 18 A rue des Glacis,

applicants,

v

Court of Auditors of the European Communities, represented by Michael Becker and Marc Ekelmans, acting as Agents, assisted by T. A. Stoll, having an address for service in Luxembourg at the Court of Auditors, 29 rue Aldringen,

defendant,

APPLICATION for the annulment of the decision of the Court of Auditors of 29 April 1987 refusing to admit them to the tests in a competition (Competition No CC/A/8/85),

THE COURT (Second Chamber),

composed of: O. Due, President of Chamber, K. Bahlmann and T. F. O'Higgins, Judges,

Advocate General: C. O. Lenz
Registrar: J. A. Pompe, Assistant Registrar

having regard to the Report for the Hearing and further to the hearing on 9 February 1988,

after hearing the Opinion of the Advocate General delivered at the sitting on 8 March 1988,

* Language of the Case: German.

gives the following

Judgment

1 By application lodged at the Court Registry on 1 June 1987, Gert Muysers and Walter Tülp, officials of the Court of Auditors of the European Communities, brought an action for the annulment of the decision of the Court of Auditors of 29 April 1987 refusing to admit them to the tests in a competition (Competition No CC/A/8/85).

2 The applicants and 12 other officials submitted their candidatures for an internal competition held by the Court of Auditors to fill a post of Administrator in career bracket A 7/A 6. The candidates were informed by letters of 2 August 1985 that the Selection Board had decided that none of them could be admitted to the written tests. Mr Muysers was informed that his professional experience was not relevant to the duties attaching to the vacant post and hence the requirement laid down in point IV.2 of the notice of competition were not satisfied. Mr Tülp was informed that his academic qualifications were not sufficient to make him eligible for a post in category A and therefore he did not satisfy the requirement set out in point IV.1 (a) of the notice of competition. All the candidates were given the opportunity to submit additional observations, but the Selection Board informed them by letters of 28 October 1985 that it confirmed its decisions of 2 August 1985 rejecting their candidatures.

3 On 30 October 1985, the Court of Auditors informed all the candidates that the competition procedure had been suspended pending the possible institution of Court proceedings. Four candidates brought actions contesting the decisions of the Selection Board of 2 August and 28 October 1985 refusing to admit them to the tests. In judgments of 23 October 1986 in Case 321/85 *Schwiering* v *Court of Auditors* [1986] ECR 3199, and in Joined Cases 322 and 323/85 *Hoyer* v *Court of Auditors* [1986] ECR 3215 and of 4 February 1987 in Case 417/85 *Maurissen* v *Court of Auditors* [1987] ECR 551, the Court annulled the aforementioned decisions.

4 The competition procedure was resumed by a decision of the appointing authority of 30 March 1987, although it was confined to the four candidates who had been successful in the proceedings before the Court. Two members of the Selection Board were replaced at their own request.

5 On 31 March 1987, the applicants submitted a request to the President of the Court of Auditors to the effect that their candidatures should also be considered in the resumed competition procedure, but that request was rejected by the President of the Court of Auditors on 29 April 1987. On 15 and 19 May respectively Mr Tülp and Mr Muysers each lodged a complaint. Those complaints were rejected by the Court of Auditors on 26 May 1987.

6 Reference is made to the Report for the Hearing for a fuller account of the facts of the case 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.

Admissibility

7 The Court of Auditors has raised an objection of inadmissibility on the ground that the action is out of time, as the decisions of the Selection Board are no longer open to challenge because the period prescribed by Article 91 of the Staff Regulations for bringing an action has expired. It contends that the request made by the applicants on 31 March 1987 to the President of the Court of Auditors could not start time running again with regard to the decisions of the Selection Board of 2 August and 28 October 1985. Nor can it be considered that that request was justified on the ground that new facts have arisen.

8 At the hearing, the applicants put forward a number of arguments in support of the admissibility of their application. They maintain, first, that the prescribed period for bringing an action did not start to run from 28 October 1985 because the Appointing Authority suspended the decisions of the Selection Board on 30

October 1985. The applicants are challenging primarily the Appointing Authority's decision of 30 March 1987 by which the competition procedure was resumed but confined to four candidates and not the Selection Board's decisions of 2 August and 28 October 1985. In that connection they draw attention to the fact that the complaints lodged against the decision of 29 April 1987 refusing to allow the applicants to take part in the competition were expressly rejected. Secondly, they claim that in its judgments of 23 October 1986, cited above, the Court held the whole competition procedure to be invalid — including, therefore, the decisions taken by the Selection Board. Finally, the applicants argue that new facts had arisen to justify the submission of their request of 31 March 1987, in particular the delivery of the Court's judgment of 4 February 1987 in Case 417/85, cited above, and the appointment of a new Selection Board.

9 With regard to the applicants' argument that time began to run as from the decision of 30 March 1987 by which the competition procedure was resumed, and not from the Selection Board's decisions of 2 August and 28 October 1985 on the ground that the procedure was suspended by decision of 30 October 1985, it should be noted that the decision to suspend the competition procedure as such did not have the effect of invalidating or suspending the decisions of the Selection Board which were open to challenge. It should also be noted that the decision of 30 March 1987 by which the competition procedure was resumed in no way concerns the applicants and does not constitute a new decision with regard to their legal position since it implements the Court's judgments of 23 October 1986 and 4 February 1987 with regard to the four candidates who were successful in their action contesting the decisions concerning them taken by the Selection Board on 2 August and 28 October 1985. It follows that the decision of 30 March 1987 gives the applicants no new right of action and the fact that their complaints against the decision of 29 April 1987 were expressly rejected is thus irrelevant.

10 With regard to the applicants' contention that the Court, in its judgments of 23 October 1986, held the whole competition procedure to be invalid with the result that the decisions taken by the Selection Board were rendered ineffective, it should be noted that there is no way in which those judgments, which ruled solely on the decisions taken concerning the four abovementioned candidates, may be interpreted as meaning that the Court held the whole competition procedure to be invalid.

11 With regard to the applicants' argument based on the claim that new facts had arisen, it must be noted that Article 90 (1) of the Staff Regulations provides that any official may request the appointing authority to take a decision relating to him. However, the Court has consistently held that that right does not allow an official to circumvent the time-limits laid down in Articles 90 and 91 of the Staff Regulations for the lodging of a complaint and an appeal by indirectly calling in question by means of a request a previous decision which has not been challenged within the period prescribed. Only the existence of new substantial facts may justify the submission of a request for a review of such a decision.

12 The applicants' argument that the Court's judgment of 4 February 1987 in Case 417/85 *Maurissen*, constitutes a new fact cannot be accepted. In that case the Court annulled the Selection Board's decision refusing to allow the applicant to take part in the tests because the Selection Board had not taken into consideration the additional documents produced by the applicant after he had filed his initial candidature. In the present case, however, since the Selection Board rejected Mr Tülp's candidature on the ground that his academic qualification was not sufficient to make him eligible for category A and Mr Muyser's candidature because his professional experience was not relevant to the duties attaching to the vacant post, the dispute involves only the question whether the assessment of the information provided by the applicants was well founded and not the production of any additional documents. Indeed, the applicants in their complaint made no objections relating to the production of documents.

13 Finally, it should be noted that the change in the membership of the Selection Board does not constitute a new fact inasmuch as it involved the replacement, at their own request, of certain members of the existing Board, and such a change does not mean that a new Selection Board has been appointed as part of a new competition procedure.

14 In view of the foregoing, the action must be declared to be out of time and dismissed as inadmissible.

Costs

15 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 those rules, institutions are to bear their own costs in proceedings brought by servants of the Communities.

On those grounds,

THE COURT (Second Chamber)

hereby:

(1) Dismisses the application as inadmissible;

(2) Orders the parties to bear their own costs, including those relating to the application for interim measures.

Due Bahlmann O'Higgins

Delivered in open court in Luxembourg on 14 June 1988.

J.-G. Giraud
Registrar

O. Due
President of the Second Chamber