JUDGMENT OF THE COURT (Fourth Chamber)
10 June 1987 *

In Case 307/85

A. Gavanas, a reviser at the Economic and Social Committee, residing in Brussels, represented and assisted by V. Biel, of the Luxembourg Bar, 18 A rue des Glacis, with an address for service in Luxembourg at Mr Biel's Chambers,

applicant,

v

Economic and Social Committee of the European Communities, represented by its Director for Personnel, C. A. F. d'Ansembourg, acting as Agent, assisted by R. O. Dalcq, of the Brussels Bar, 56 avenue Franklin Roosevelt, 1050 Brussels, with an address for service in Luxembourg at the office of Jörg Käser, Manager of the Legal Directorate of the European Investment Bank, 100 boulevard Konrad-Adenauer,

and

Council of the European Communities, represented and assisted by D. Lagasse, of the Brussels Bar, 82 avenue Franklin Roosevelt, 1050 Brussels, with an address for service in Luxembourg at the office of Jörg Käser of the European Investment Bank,

defendants,

APPLICATION for the annulment of Competition ESC/LA/57/83 and consequently of the decision to appoint Mr Ts. to the post of Head of the Greek Translation Division, which was made by a decision of the Council on 29 January 1985,

THE COURT (Fourth Chamber),

composed of: C. Kakouris, President of Chamber, T. Koopmans and G. C. Rodríguez Iglesias, Judges,

* Language of the Case: French.

Advocate General: C. O. Lenz
Registrar: S. Hackspiel, Administrator

having regard to the Report for the Hearing and further to the hearing on 13 November 1986,

after hearing the Opinion of the Advocate General delivered at the sitting on 21 January 1987,

gives the following

Judgment

1 By an application lodged at the Court Registry on 11 October 1985 Antonios Gavanas, an official at the Economic and Social Committee of the European Communities, brought an action for the annulment of (a) Competition ESC/LA/57/83 for the post of Head of the Greek Translation Division and (b) the decision to nominate Mr Ts. to that post, adopted by the Council on 29 January 1985.

2 Reference is made to the Report for the Hearing for the facts of the case, the course of the procedure 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.

I — Admissibility

A — *Whether the Council can be made a defendant*

3 The defendants submit that the action should not be brought against the Council but only against the Economic and Social Committee, which is responsible for the contested acts. The Council acted only in its capacity as appointing authority for officials in certain grades at the Economic and Social Committee pursuant to the third indent of the first paragraph of Article 57 of the Rules of Procedure of the Economic and Social Committee of 19 August 1974 (Official Journal 1974, L 228, p. 1).

4 Pursuant to Article 1 of the Staff Regulations of Officials, the Economic and Social Committee is to be treated as an institution of the Communities for the purposes of those Staff Regulations.

5 Under Article 2 of the Staff Regulations, 'each institution shall determine who within it shall exercise the powers conferred by the Staff Regulations on the appointing authority. In respect of officials of the Economic and Social Committee, the rules of procedure of that Committee shall determine who shall exercise the powers conferred by the Staff Regulations on the appointing authority'.

6 In respect of higher grades, including Grade LA 3, Article 57 of the Rules of Procedure of the Economic and Social Committee, referred to above, provides that those powers are to be exercised 'by the Council, acting on a proposal from the Bureau and with the agreement of the Commission, as regards application of Articles 1, 13, 15 (second paragraph), 16, 22, 29 to 32, 38, 40, 41, 49 to 51, 78 and 87 to 90 of the Staff Regulations'.

7 As the Court held in its judgment of 7 April 1965 (Case 28/64 *Müller* v *Council* [1965] ECR 237), it follows from Article 2 of the Staff Regulations 'that the appointing authority acts in the name of the institution which designated it, so that acts concerning the legal position of officials and which may adversely affect them must be attributed to the institution to which they are attached'. Moreover, according to the same judgment, 'an appeal must be brought against the institution from which the act having an adverse effect emanated'.

8 It follows from the foregoing that in exercising the powers of the appointing authority pursuant to Article 57 of the Rules of Procedure of the Economic and Social Committee, the Council acts in the name of the Economic and Social Committee. Consequently, in cases such as this, the action must be directed against the Economic and Social Committee.

9 This action is accordingly inadmissible in so far as it is directed against the Council.

B — *The admissibility of submissions alleging irregularities in the competition*

10 In support of his action for annulment the applicant has put forward several submissions based on alleged irregularities: (a) in the organization, conduct and

results of the competition and (b) in the appointment of Mr Ts. The Economic and Social Committee contends that the submissions concerning the competition are inadmissible.

11 First of all, according to the Economic and Social Committee, the applicant has no legal interest in seeking the annulment of the competition since in his application he did not raise a claim for the annulment of the appointment decision but simply sought a declaration that the appointment 'was without foundation'.

12 The objection cannot be upheld. It is true that the applicant's conclusions raise the claim that 'the appointment of Mr Ts. is without foundation . . . '. However, it is clear both from the complaint and from the application as a whole, in particular its subject-matter as defined by the applicant, that the application seeks the annulment of the competition and of the appointment which resulted from it.

13 Secondly, the Economic and Social Committee considers that the application is out of time in so far as it alleges irregularities in the acts of the selection board. The applicant should have brought an action against those acts directly without submitting a preliminary complaint; consequently, he cannot rely on the time-limit for submitting a complaint in calculating the time-limit for bringing the action.

14 That objection is also unfounded. As the Court has consistently held (see in particular the judgment of 5 April 1979 in Case 117/78 *Orlandi* v *Commission* [1979] ECR 1613), although a preliminary complaint against a decision of a selection board is not a necessary condition for the admissibility of an action, its effect must not be that the period for bringing the matter before the Court expires while the applicant is awaiting a reply to his complaint.

15 Thirdly, the Economic and Social Committee objects that the submissions based on alleged irregularities in the competition are inadmissible because the applicant acquiesced in them and thus renounced his right to seek the annulment of the competition, inasmuch as he did not protest against either the organization or the results of the competition.

16 This objection must also be rejected. Since the illegality of acts preliminary to the act adversely affecting the official, in particular acts of the selection board, may be relied on in the course of proceedings against the final decision in which they culminated, the fact that the applicant did not bring a direct action against the acts of the selection board cannot be regarded as acquiescence.

II — Substance

A — *Illegality of the competition procedure*

17 The applicant argues that the Secretariat of the Economic and Social Committee had no power to organize the competition. Under Article 57 of the Rules of Procedure of the Economic and Social Committee the competent authority was the Council. The competition, he says, was therefore absolutely void and cannot be ratified.

18 It is true that under Article 57 of the Rules of Procedure of the Economic and Social Committee, referred to above, the powers of the appointing authority in cases such as this are to be exercised by the Council, acting on a proposal from the Bureau and with the agreement of the Commission. Its powers under Article 29 (1) of the Staff Regulations, on the initiation of the competition procedure, and under Article 30, concerning the appointment of the selection board, are expressly included among those powers.

19 It appears from the documents before the Court that from the beginning that provision has been interpreted and applied by the institutions concerned and by the Economic and Social Committee as meaning that the Economic and Social Committee is not prevented from organizing and conducting competitions, in accordance with the tacit approval of the Council and the Commission, which nevertheless retain their power to intervene. That interpretation reflects the need for flexibility and rapidity in the functioning of the administration.

20 In this case, moreover, the approval of the Council and the Commission may be inferred from the fact that they took part in the act which completed the procedure, that is to say the appointment of the successful candidate, without raising any objection.

21 Consequently, this submission must be rejected.

22 The applicant further submits that the lowering of the age-limit in comparison with the preceding competition was illegal since it was intended to favour Mr Ts., by making it possible for him to take part.

23 As a matter of principle, in a well-run administration an age-limit must be fixed on the basis of considerations reflecting the interest of the service. In this case, it appears from the documents before the Court that a previous competition had not been successful. There is no indication in the documents before the Court that the age-limit was lowered not in order to increase the number of candidates and so make possible a wider choice but to favour a particular candidate.

24 Consequently, this submission must also be rejected.

25 The applicant submits that he was treated in a discriminatory manner during the course of the competition. In that regard he points to the fact that during the first competition he was forbidden to carry out the duties of Head of the Greek Translation Division, whereas Mr Ts. carried out those duties during the disputed competition. Furthermore, since March 1983 the Director-General of the Economic and Social Committee, who was also chairman of the selection board, has worked with Mr Ts. for the requirements of the service and passed over the applicant.

26 It is not necessary to decide whether or not the applicant's allegations are correct; the exercise of the administration's discretion in respect of the organization of its departments cannot influence the results of the competition and cannot therefore be regarded as a defect which could render the competition illegal.

27 This submission must therefore also be rejected.

28 The applicant argues that the translated text given to the participants to revise as part of the examination was a legal text and not, as was stated in the notice of competition, a general text.

29 That argument has no foundation in fact. In paragraph 7 (d) of the notice of competition, on the 'nature of the tests', the nature of the text to be revised was not specified. The selection board was thus free to choose texts for the tests. Furthermore, a legal text is not without relation to the work involved in the post to be filled and to the qualifications required in the notice of competition.

30 Finally, the applicant accuses the selection board of going beyond its powers by considering the candidates' personalities.

31 This submission is also without foundation. It appears from the documents before the Court that the selection board referred to the candidates' personalities only to the extent necessary to determine their ability to carry out the tasks associated with the post. In so doing the selection board did no more than ascertain the candidates' qualifications as required by Vacancy Notice No 84/81, among which was 'ability to direct the work of an administrative unit . . . '.

B — *Illegality of the appointment procedure*

32 The applicant argues that the proposal for the appointment of Mr Ts. made to the Council by the Bureau of the Economic and Social Committee on 17 October 1984 was illegal. By proposing Mr Ts. without reference to the other candidates on the list of suitable candidates the Secretary-General of the Economic and Social Committee exercised decision-making powers which were not his in respect of the choice from the list of suitable candidates drawn up by the selection board; furthermore, the Bureau's proposal was not the result of an examination of the comparative merits of the candidates. Since the applicant and Mr Ts. were classified *ex aequo* on the list, such an examination should have resulted in his being selected since he was older and had more professional experience.

33 It appears from the list of suitable candidates in the disputed competiton and from the documents before the Court that Mr Ts. was first on the list, the applicant was second and his qualifications, in the selection board's opinion, were not superior to those of Mr Ts.

34 The minutes of the 274th meeting of the Bureau of the Economic and Social Committee, on 17 October 1984, refer to a careful examination of all the candidates in accordance with the procedure laid down in the Staff Regulations. It appears from the documents before the Court that each member of the Bureau had a copy of the list of suitable candidates and could have called for a discussion of the matter had he thought it necessary.

35 In view of those considerations this submission must also be rejected.

C — *Misuse of powers*

36 The applicant argues that the entire competition procedure up to and including the appointment of Mr Ts. is vitiated by a misuse of powers. He alleges that it was decided to appoint Mr Ts. well before the organization of the competition. That may be inferred, he says, in particular from the following factors examined in the analysis of the preceding submissions: the lowering of the age-limit, the alleged exclusion of the applicant from consultation with his superiors on matters concerning the Greek Translation Division, the examination by the selection board of the candidates' personalities and the absence of any comparative examination of the candidates to be proposed by the Bureau of the Economic and Social Committee to the Council. The applicant adds the fact that the Director-General, who was also chairman of the selection board, anticipated the decision of the appointing authority by informing Mr Ts. on 19 July 1984 that he was to be appointed Head of the Greek Division and the fact that Mr Ts. openly took over the duties of Head of Division before his appointment and even gave a party to celebrate the event.

37 It should be recalled that a misuse of powers is not deemed to exist unless it is proved that the appointing authority in taking the measure in question has followed an objective other than the legal one (judgment of 25 November 1976 in Case 123/75 *Küster* v *Parliament* [1976] ECR 1701).

38 None of the applicant's allegations constitute such proof. Indeed, the allegations concerning the lowering of the age-limit, the exclusion of the applicant from consultation with his superiors, the examination of the candidates' personalities and the absence of any comparative examination of the candidates on the list of suitable candidates have already been rejected. It has not been proved that the Director-General anticipated the decision of the appointing authority; the Economic and Social Committee has stated, without being contradicted, that the Director-General simply called both the applicant and Mr Ts. to his office in order to inform them of the result of the competition and of the forwarding of the list of suitable candidates to the Bureau of the Economic and Social Committee. Finally, the fact that Mr Ts. carried out the duties of Head of Division and the party held by him do not constitute proof of any misuse of powers by the appointing authority.

39 Since none of the applicant's submissions have been upheld, the application must be dismissed as unfounded.

Costs

40 Under Article 69 (2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been asked for in the successful party's pleadings. However, under Article 70 of the Rules of Procedure the institutions are to bear their own costs in actions brought by servants of the Communities.

On those grounds,

THE COURT (Fourth Chamber)

hereby:

(1) Dismisses the application;

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

Kakouris Koopmans Rodríguez Iglesias

Delivered in open court in Luxembourg on 10 June 1987.

P. Heim
Registrar

C. Kakouris
President of the Fourth Chamber