JUDGMENT OF THE COURT (First Chamber)
21 March 1985 *

In Case 108/84

Giovanni De Santis, an official of the Court of Auditors of the European Communities, residing at Goetzange (Luxembourg), assisted and represented by V. Biel of the Luxembourg Bar, with an address for service in Luxembourg at the latter's Chambers, 18 A Rue des Glacis,

applicant,

v

Court of Auditors of the European Communities, represented by its Secretary, J.-A. Stoll, acting as Agent, assisted by L. Defalque of the Brussels Bar, with an address for service in Luxembourg at its headquarters, 29 Rue Aldringen,

defendant,

APPLICATION for the annulment of the Selection Board's decision refusing to admit the applicant to the tests in Competition No CC/A/5/83,

THE COURT (First Chamber)

composed of: G. Bosco, President of Chamber, T. Koopmans and R. Joliet, Judges,

Advocate General: Sir Gordon Slynn
Registrar: D. Louterman, Administrator

**

gives the following

* Language of the Case: French.

** after hearing the Opinion of the Advocate General delivered at the sitting on 31 January 1985,

JUDGMENT

(The account of the facts and issues which is contained in the complete text of the judgment is not reproduced)

Decision

1 By an application lodged at the Court Registry on 19 April 1984, Giovanni De Santis, an official of the Court of Auditors of the European Communities, brought an action for the annulment of the decision of 17 August 1983 by which the Selection Board for Competition No CC/A/5/83 refused to admit him to the tests in the said competition.

2 Mr De Santis has worked at the Court of Auditors since 1978. He was employed initially as a member of the temporary staff in Grade A 4, Step 2, then in Grade A 4, Step 3 and finally in Grade A 6, Step 3. Since 1 January 1983 he has been an official in Grade B 3, Step 3.

3 On several occasions Mr De Santis has sought to be established in Category A. Between 1979 and 1983 he was admitted to the tests in 14 competitions, namely two A 3 competitions, seven A 5/A 4 competitions and five A 7/A 6 competitions. During the same period, Mr De Santis was not admitted to the tests in Competitions Nos CC/A/17/82 and CC/A/5/83, on the ground that his qualifications were insufficient.

4 Section IV.A.1. of Competition Notice No CC/A/5/83, which stipulated the necessary qualifications, required, firstly, a university degree or equivalent professional experience and, secondly, a further six years' experience in employment related to the duties to be performed. Section IV.A.2. of the same notice dealt with the way in which marks were to be awarded in respect of qualifications. It provided that up to 45 points might be awarded in respect of each of the matters mentioned in Section IV.A.1. Only candidates who obtained a total of at least 45 points were to be admitted to the tests.

5 On 19 August 1983, the Selection Board for Competition No CC/A/5/83 notified its decision to Mr De Santis by means of a letter from its President, Sir Norman Price. That letter stated that the marks which had been awarded in respect of Mr De Santis's qualifications in accordance with Section IV.A.2. of the competition notice were insufficient to permit him to be admitted to the subsequent tests.

6 On 17 November 1983, Mr De Santis submitted a complaint under Article 90 (2) of the Staff Regulations to the appointing authority, in this case the President of the Court of Auditors. He contended that the Selection Board's assessment of his qualifications included 'a regrettable but flagrant error' because, according to him, his university degrees and 20 years' professional experience as an auditor could not be disputed.

7 On 23 January 1984, the appointing authority rejected Mr De Santis's complaint on the ground that Articles 28 to 30 and Annex III of the Staff Regulations, which govern the organization of competition procedures, did not permit the appointing authority to interfere in any way with the work of the Selection Board. According to the appointing authority, Mr De Santis should have submitted a complaint directly to the Selection Board.

8 After the rejection of his complaint, Mr De Santis brought the present action, the admissibility of which is not disputed, for annulment of the rejection of his application by the Selection Board and, in so far as is necessary, annulment of the express rejection of his application by the appointing authority. He also seeks annulment of the appointments made on the basis of Competition No CC/A/5/83.

9 In support of his action, the applicant claims that the Selection Board did not give sufficient reasons for its decision, that it departed from the assessments made by other Selection Boards without giving any specific reasons for so doing, that its decision constituted a misuse of power and, finally, that it infringed the principles of legitimate expectation and equality of treatment.

10 With regard to the claim for annulment of the decision rejecting his application, Mr De Santis's first two submissions, which both deal with the extent to which the Selection Board for a competition is obliged to give reasons for its decision and which in reality are merely two distinct arguments in support of the same submission, must be considered together.

11 Mr De Santis relies firstly on the judgment of 13 November 1978 (Joined Cases 4, 19 and 28/78 *Salerno and Others* v *Commission* [1978] ECR 2403) in support of the conclusion that the letter of 19 August 1983 from the chairman of the Selection Board did not satisfy the requirement to state the reasons for the Board's decision because it merely referred to Section IV.A.2. of the competition notice, dealing with the way in which marks were to be awarded in respect of qualifications, and therefore did not permit the candidate to determine from what point of view his qualifications had been judged insufficient.

12 The Court of Auditors replies to that by stating that, in accordance with the judgment of 12 October 1978 in Case 86/77 (*Ditterich* v *Commission* [1978] ECR 1855), the requirements relating to a statement of reasons for any measure adversely affecting a person must be assessed not merely with reference to the measure itself but also with reference to those factors on which it is based and which have been brought to the notice of the person concerned. According to the Court of Auditors, the reference to Section IV.A.2. of Competition Notice No CC/A/5/83 in the letter of 19 August 1983 from the chairman of the Selection Board permitted the applicant to determine the grounds on which his qualifications had been considered insufficient. Moreover, the Court of Auditors appears to contest the admissibility of the submission alleging failure to give a sufficient statement of reasons on the ground that Mr De Santis did not make use of the right recognized by the judgment of 9 June 1983 in Case 225/82 (*Verzyck* v *Commission* [1983] ECR 1991) to seek an individual explanation from the chairman of the Selection Board.

13 Mr De Santis then complains that, contrary to a previous judgment of the Court (Judgment of 5 April 1979 in Case 112/78 *Kobor* v *Commission* [1979] ECR 1573), the Selection Board did not state specific reasons as to why its assessment should be different from those of earlier Selection Boards which had admitted Mr De Santis to the tests in competitions which they were administering.

14 With regard to that point, the Court of Auditors contends that the principle adopted by the Court in the *Kobor* judgment only applies when the candidate refused admission fulfils objective conditions for admission which leave no room for the exercise of discretion, such as the fact of having the degrees required for access to the category and grade involved. On the other hand, when the Selection Board has to determine whether or not the professional experience relied on by the candidate compensates totally or partially for the lack of a degree, its assessment is necessarily subjective and may therefore vary according to the composition of the Selection Board, the quality of the candidates and the needs of the post to be filled. In the view of the Court of Auditors, Mr De Santis's five years of studies are nothing more than secondary studies of a technical nature. Since Mr De Santis did not possess the university degree required in Section IV.A.1 (a) of the competition notice, the Selection Board was obliged to consider whether he had equivalent professional experience.

15 As the Court has held in a previous case, a mere reference, in the letter informing a candidate of the refusal to admit him to the tests, to a condition contained in the competition notice and consisting of several elements does not give 'a sufficient indication to allow [him] to know whether the refusal is well-founded or, on the other hand, whether it is vitiated by a defect which would make it possible to contest its legality', because such a reference is not 'of such a nature as to indicate which of the factors had been found to be lacking' (Judgment of 30 November 1978, *Salerno*, cited above).

16 However, the letter of 19 August 1983 simply referred to Section IV.A.2. of Competition Notice No CC/A/5/83, dealing with the way in which marks were to be awarded in respect of candidates' qualifications. Mr De Santis was thus not able to determine on the basis of that letter whether he had been refused admission to the tests because he lacked the necessary degree or equivalent professional experience (paragraph (a) of Section IV.A.1. of the competition notice) or because his subsequent professional experience was insufficient (paragraph (b)) or on both of those grounds. It was only when he obtained the minutes of the Selection Board's meeting, which were annexed to the rejoinder in these proceedings, that Mr De Santis learned that it was his subsequent experience which had been considered insufficient and that he had obtained only 19 points out of 45 under that heading. At the same time he was able to discover that he had obtained a total of 44 points in respect of his qualifications and experience, whereas a minimum of 45 points was required in the competition notice.

17 The need, emphasized by the judgment in *Salerno* to identify the precise factor which had been found to be lacking is demonstrated in this case by the fact that the Court of Auditors itself was unable to determine from the letter of 19 August 1983 the factor which the Selection Board had regarded as insufficient. Throughout the procedure before the Court, the Court of Auditors insisted that Mr De Santis's experience had not been considered equivalent to the required university degree, while it was in fact his subsequent experience that had been judged insufficient.

18 Moreover, it must not be forgotten that, according to the *Kobor* judgment, an appraisal of a candidate's qualifications which is less favourable than that made in previous competitions is only possible inasmuch as 'the statement of reasons on which the decision is based clearly justifies such a difference of appraisal'.

19 Contrary to the Court of Auditors's contention, that principle also applies to those conditions, such as professional experience acquired after obtaining a degree, which are of such a nature that the Selection Board can only verify whether they are fulfilled by making a partially subjective appraisal. A Selection Board is free to depart from the appraisal made in that regard by previous Selection Boards, but it must then state the special reasons which justify its decision.

20 Even though Mr De Santis's subsequent experience had been regarded as sufficient by other Selection Boards which admitted him to the tests in competitions for which the requirements were the same or more severe, the Selection Board for Competition No CC/A/5/83 did not state the special reasons justifying its less favourable appraisal of that subsequent experience.

21 Nor is it possible to accept the Court of Auditors's argument to the effect that, because Mr De Santis did not make use of the possibility, recognized by the judgment of 9 June 1983 (*Verzyck*, cited above) of seeking an individual explanation from the chairman of the Selection Board, he was not entitled to complain that the Selection Board's statement of reasons for its decision was insufficient. In that judgment, the Court accepted that 'in order to make allowance for the practical difficulties confronting a Selection Board for a competition for which there is a very large number of applications, ...the Selection Board may initially

send to candidates merely information on the criteria for selection and the result thereof and not give individual explanations until later and to those candidates who expressly request them'. In this case, the complaint which Mr De Santis submitted to the appointing authority on 17 November 1983 must be regarded as being in reality a request for an explanation addressed to the Selection Board because that letter could have been transmitted to the chairman of the Selection Board without the Board's independence *vis-à-vis* the appointing authority being in any way affected.

22 In those circumstances, it appears that the decision of the Selection Board for Competition No CC/A/5/83 refusing to admit Mr De Santis to the tests for the said competition is vitiated by a defect of form inasmuch as the statement of the reasons on which it is based is insufficient. For that reason, the disputed decision must be annulled.

23 Because of the annulment of the contested decision on the basis of the applicant's first two submissions, it is not necessary to consider whether his third and fourth submissions are relevant or well-founded.

24 With regard to the claim for annulment of the appointments made on the basis of Competition No CC/A/5/83, it may be recalled that the Court held in the *Salerno* judgment that 'as this was an open competition to constitute a reserve for future recruitment, the rights of the applicants will be sufficiently protected if the Selection Board reconsiders its decision, without its being necessary to question the whole of the results of the competition or to annul appointments made in consequence thereof'. That claim must therefore be dismissed.

Costs

25 Article 69 (2) of the Rules of Procedure provides that the unsuccessful party is to be ordered to pay the costs. Since the Court of Auditors has failed in its essential submissions, it must be ordered to pay the costs.

On those grounds,

THE COURT (First Chamber)

hereby:

(1) Annuls the decision of 17 August 1983 whereby the Selection Board for Competition No CC/A/5/83 refused to admit Mr De Santis to the tests in the said competition;

(2) Dismisses the rest of the application;

(3) Orders the Court of Auditors to pay the costs.

Bosco Koopmans Joliet

Delivered in open court in Luxembourg on 21 March 1985.

P. Heim
Registrar

G. Bosco
President of the First Chamber