

JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber)
22 June 1990 *

In Joined Cases T-32/89 and T-39/89

Georges Marcopoulos, a former member of the temporary staff of the Court of Justice of the European Communities, residing in Luxembourg, represented by **Andréas Kalogeropoulos**, of the Athens Bar, with an address for service in Luxembourg in the Chambers of Aloyse May, 31 Grand-rue,

applicant,

v

Court of Justice of the European Communities, represented by Francis Hubeau, Head of the Personnel Division, acting as Agent, assisted by Jean-François Bellis, of the Brussels Bar, with an address for service at the office of its Agent, Erasmus Annex, Court of Justice, Kirchberg,

defendant,

APPLICATION for the annulment of the decision of the selection board in Competition No CJ 75/87, notified to the applicant by letter dated 1 March 1988, refusing to award him the points required for him to be included on the list of suitable candidates in that competition and to allow him to take part in the optional tests and, to the extent necessary, for the annulment of the procedure for that competition (T-32/89) and for the annulment of the decision appointing the members of the selection board in Competition No CJ 75/87, the annulment of the decision notified to the applicant on 24 March 1988 terminating his contract as a member of the temporary staff and for compensation for the damage suffered by the applicant as a result thereof, and for annulment of the decision dated 30 May 1988, notified to the applicant on 13 June 1988, rejecting the complaint lodged by him on 24 March 1988 (Case T-39/89),

* Language of the case: French.

THE COURT OF FIRST INSTANCE (Fourth Chamber)

composed of: D. A. O. Edward, President of Chamber, R. Schintgen and R. García-Valdecasas, Judges,

Registrar: B. Pastor, Administrator

having regard to the written procedure and further to the hearing on 17 January 1990,

having regard to the preparatory measures undertaken and further to the hearing on 4 May 1990,

gives the following

Judgment

Facts

- 1 After working as an interpreter and translator in several institutions of the European Communities, the applicant was recruited on 16 June 1986 by the Court of Justice of the European Communities as a member of the temporary staff to work as a Greek-language interpreter in Grade LA 7, Step 1.

- 2 At the end of 1987 he applied to take part in Competition No CJ 75/87, based on qualifications and tests, organized by the Court of Justice in order to establish a reserve for the recruitment of Greek-language interpreters. The selection board, considering that he fulfilled the prescribed conditions, authorized the applicant, on the basis of the qualifications of which he produced evidence, to take part in the tests.

The selection board was composed of A. Münch, the Head of the Interpretation Division of the Court of Justice, B. Heidelberger, Deputy Head of the same division, and P. Berteloot, a lawyer-reviser in the French-language division of the Translation Directorate of the Court. E. Dalabira, A. Lefkaditi, S. Adamopoulos and V. Cini, who are interpreters, were appointed as examiners in an advisory capacity. The compulsory tests were held on 12 and 14 January and 25 February 1988.

- 3 On 25 February, on completion of the third test, the Chairman of the selection board informed the applicant that he had not attained the minimum of 65% needed to enable him to take part in the optional tests in the competition. By memorandum of 1 March 1988, the Head of the Personnel Division of the Court informed Mr Marcopoulos that he would not be included on the list of suitable candidates. At Mr Marcopoulos's request, the Head of the Personnel Division informed him on 16 March 1988 of the marks obtained in the various tests, which were as follows:

Italian test: 37.5/ 60

French test: 26/ 40

English test: 12/ 20

Total: 75.5/120

The minimum of 65% which candidates were required to obtain was 78 points out of 120.

- 4 By letter dated 24 March 1988, the applicant lodged a complaint against the decisions appointing the members of the selection board.

On the same day a decision of the appointing authority, dated 19 March 1988, terminating the applicant's contract as a member of the temporary staff with effect from 30 June 1988 was served on him by a process server.

Procedure

- 5 In those circumstances, by application lodged at the Registry of the Court of Justice on 22 April 1988, Mr Marcopoulos brought an action for the annulment of the selection board's decision. The action was registered under serial number 124/88.
- 6 On 30 May 1988, the Administrative Committee of the Court of Justice rejected the complaint lodged by Mr Marcopoulos on 24 March 1988. That decision was notified to him on 13 June 1988.

- 7 By application lodged at the Registry of the Court of Justice on 8 July 1988, Mr Marcopoulos brought a second action against the decisions appointing the members of the selection board, terminating his contract as a member of the temporary staff and rejecting his complaint of 24 March 1988. That action was registered under serial number 187/88.

By order of the Court of Justice (Second Chamber) of 13 December 1988, Cases 124/88 and 187/88 were joined for the purposes of the written procedure, the oral procedure and judgment.

- 8 The written procedure was conducted in its entirety before the Court of Justice. By order of 15 November 1989, the Court of Justice referred the cases to the Court of First Instance pursuant to Article 14 of the Council Decision of 24 October 1988 establishing a Court of First Instance of the European Communities.

Case 124/88 was registered in the Court of First Instance as Case T-32/89 and Case 187/88 as Case T-39/89.

- 9 In Case T-32/89, the applicant claims that the Court should:
- (i) annul the decision of the selection board in Competition No CJ 75/87 refusing to award him the points required for him to be included on the list of suitable candidates in that competition and to allow him to take part in the optional tests;
 - (ii) to the extent necessary, annul Competition No CJ 75/87;
 - (iii) before any further step is taken in the proceedings, order the defendant to produce the entire file for Competition No CJ 75/87, in particular the Minutes of the proceedings of the selection board and letters sent by the examiners, E. Dalabira and V. Cini, to the President of the Court of Justice and to the Chairman of the selection board and to hear as witnesses the persons who acted as examiners in the competition, in particular those who were present at the test of interpretation from Italian into Greek which was held on 25 February 1988;
 - (iv) order the defendant to pay all the costs of the proceedings.

The defendant contends that the Court should:

- (i) exclude from the proceedings the letters sent to the applicant by the examiners V. Cini and E. Dalabira, or else hear as a witness the Chairman of the selection board in Competition No CJ 75/87, A. Münch;
- (ii) dismiss the present application as inadmissible, in so far as its admissibility excludes that of the application in Case 187/88 (T-39/89), and in any case as unfounded;
- (iii) make an appropriate order as to costs.

In Case T-39/89, the applicant claims that the Court should

- (i) annul the decisions appointing the members of the selection board in Competition No CJ 75/87;
- (ii) annul the decision terminating the applicant's contract as a member of the temporary staff, notified to him on 24 March 1988, and order the defendant to pay the applicant compensation for the material and non-material damage suffered by him as a result of that decision;
- (iii) annul the decision rejecting his complaint of 24 March 1988;
- (iv) before any further step is taken in the proceedings, order the defendant to produce the entire file for Competition No CJ 75/87, in particular the Minutes of the proceedings of the selection board and letters sent by the examiners, E. Dalabira and V. Cini, to the President of the Court of Justice and to the Chairman of the selection board and hear as witnesses the persons who acted as examiners in the competition, in particular those who were present at the test of interpretation from Italian into Greek which was held on 25 February 1988;
- (v) order the defendant to pay all the costs of the proceedings.

The defendant contends that the Court should:

- (i) exclude from the proceedings the letters sent to the applicant by the examiners V. Cini and E. Dalabira, or else hear as witness the Chairman of the selection board in Competition No CJ 75/87, A. Münch;
- (ii) dismiss the applicant's claims concerning annulment of the decisions appointing the members of the selection board in Competition No CJ 75/87 and the decision rejecting his complaint of 24 March 1988 as inadmissible, in so far as their admissibility excludes that of the application in Case 124/88 (T-32/89);
- (iii) dismiss the applicant's claims concerning the decision to terminate his contract as a member of the temporary staff as inadmissible in the absence of a prior complaint;
- (iv) dismiss the present action as unfounded in any event;
- (v) make an appropriate order as to costs.

- 10 Upon hearing the report of the Judge-Rapporteur, the Court decided to open the oral procedure without any preparatory inquiry. However, it called on the defendant to produce a copy of the reasoned report of the selection board in Competition No CJ 75/87. Both parties were allowed to submit their observations on that report.
- 11 The hearing was held on 17 January 1990. Counsel for each of the parties presented oral argument and answered questions put by the Court. At the end of the hearing, the President declared the oral procedure closed.
- 12 By order of 19 January 1990, the Court decided to reopen the oral procedure in order to appoint an expert who would be called on to answer the following questions:

- (1) What are the legal rules now in force and what is the present practice adopted by national, international and Community institutions regarding the structure, composition and proceedings of selection boards appointed to conduct tests for the recruitment of interpreters which involve interpretation into one language from three other languages?
- (2) To what extent can a professional interpreter, as a member of a selection board, determine a candidate's competence as an interpreter where
- (i) he has no understanding either of the language *from* which the candidate is working or of that *into* which the candidate is working;
 - (ii) he has total understanding of the language *from* which the candidate is working but no understanding of that *into* which the candidate is working;
 - (iii) he has total understanding of the language *into* which the candidate is working but no understanding of that *from* which the candidate is working?
- (3) To what extent, and under what conditions, will a selection board member's inadequate linguistic comprehension be compensated for by the opinion expressed by one or more examiners?
- (4) To what extent should the answers given to the second and third parts of Question 2 be qualified where candidates are being recruited to work in a judicial environment?

13 By order of 5 March 1990, the Court of First Instance, on a proposal from the parties, appointed as expert D. Seleskovitch, the Director of the École supérieure d'interprètes et de traducteurs ('ESIT'), Paris.

- 14 The expert submitted her report on 29 March 1990. In replying to the questions put to her, Mrs Seleskovitch relied on the rules and practices of the school of which she is the director. With respect to the structure of selection boards, she stated:

‘The selection board comprises two permanent members (the Director of ESIT, who is a university professor, and the Deputy Director, who is in charge of the interpretation section), several additional members reflecting the language combination involved and invited assessors. The members of the selection board are entitled to vote but the assessors may only express their views.’

With respect to the composition of selection boards, she stated in particular that the selection board members were long-serving conference interpreters and that the composition of selection boards varied according to the candidates’ language combinations. As regards the selection board members’ ability to appreciate candidates’ competence, she stated as follows:

‘A professional interpreter who is a member of a selection board for a competition cannot himself appreciate a candidate’s professional competence if he has no understanding of the languages from and into which the candidate is working.

An interpreter who has total understanding of the language from which the candidate is working but no understanding of the language into which he is working likewise cannot himself appreciate a candidate’s professional competence.’

- 15 The parties submitted their observations on the expert’s report within the period allowed to them for that purpose.
- 16 The expert gave evidence at the hearing on 4 May 1990. In reply to the questions put to her by the Court as to the number of persons on a selection board who understood the languages involved, Mrs Seleskovitch replied:

‘I do not recall any occasion where only one colleague on the selection board knew both the candidate’s languages. That would appear somewhat inadequate... That would not be enough, in my opinion... in the case of languages such as Danish, for example, it is obvious that a number of people

would be required. It would be unacceptable to have only one person since one person does not go back on his views and if there is no discussion amongst a number of people who have heard the same thing and have understood the same original utterances, it would be very difficult for someone who is not acquainted with both languages . . . [Such a system] would not operate satisfactorily.'

She added that she would not allow a situation where the only member of a selection board capable of understanding the candidate's language combination was a translator and not an interpreter. In response to a specific question she stated that 'a translator cannot be relied on to pass judgment on an interpreter'.

- 17 The parties' representatives presented oral argument and the President then declared the oral procedure closed.

Admissibility

(a) *Case T-32/89 and Case T-39/89 in so far as they relate to the decisions appointing the members of the selection board*

- 18 The defendant considers that the respective grounds on which the applicant contests the result of the selection board's proceedings (Case T-32/89) and the composition of the selection board (Case T-39/89) are mutually exclusive.

- 19 In Case T-32/89, in which annulment is sought of the decision refusing to include the applicant on the list of suitable candidates, the defendant raises an objection of inadmissibility based on the contention that if the decision appointing the members of the selection board were to be regarded as an act adversely affecting the applicant, the action would be premature since, in breach of Article 91(2) of the Staff Regulations, the applicant did not await rejection of his complaint concerning the appointment of the members of the selection board, and the subsequent action, in Case T-39/89, was specifically intended to contest the legality of the decisions appointing the selection board.

- 20 In Case T-39/89, in so far as annulment is sought of the decision appointing the members of the selection board, the defendant raises an objection of inadmissibility

based on the contention that that decision is a preparatory measure which cannot be challenged separately from the decision constituting formal accomplishment of the procedure, and, in the event, that decision is the subject of Case T-32/89.

- 21 It must be observed, with regard to the decision appointing the members of the selection board, that the Court of Justice has held, in relation to Article 173 of the EEC Treaty, that only measures producing binding legal effects of such a kind as to affect the applicant's interests by bringing about a distinct change in his legal position constitute acts against which an action for annulment may be brought (judgment of 11 November 1981 in Case 60/81 *IBM v Commission* [1981] ECR 2639). In the case of acts or decisions adopted by a procedure involving several stages, in particular where they are the culmination of an internal procedure, it appears from the judgment cited above that in principle an act is open to review only if it is a measure laying down the position of the institution on the conclusion of that procedure, and not a provisional measure intended to pave the way for the final decision. Moreover, in staff cases the Court of Justice has consistently held that acts preparatory to a decision do not adversely affect an official within the meaning of Article 90(2) of the Staff Regulations and therefore can be contested only incidentally in an action against measures capable of being annulled (see, for example judgments of 7 April 1965 in Case 11/64 *Weighardt v Commission* [1965] ECR 285 and of 14 February 1989 in Case 346/87 *Bossi v Commission* [1989] ECR 303).
- 22 It must be pointed out that the decision appointing the members of a selection board is a preparatory measure within the competition procedure. Only in an action against the decision adopted on the conclusion of that procedure may the applicant contest the legality of earlier acts which are closely linked to it (see, for example, the order of 24 May 1988 in Joined Cases 78/87 and 220/87 *Santarelli v Commission* [1988] ECR 2699).
- 23 It follows that the application in Case T-39/89 must, in so far as it seeks the annulment of the decision appointing the members of the selection board for the competition, be dismissed as inadmissible, whereas the application in Case T-32/89 for the annulment of the decision adopted by that selection board must be declared admissible and the applicant will be entitled, in Case T-32/89, to contest the legality of the preparatory measure appointing the members of the selection board.

(b) *Case T-39/89, in so far as it relates to the decision to terminate Mr Marcopoulos's contract as a member of the temporary staff*

- 24 The defendant contends that this claim is inadmissible inasmuch as the applicant did not submit a prior complaint to the appointing authority.
- 25 The applicant states that his complaint of 24 March 1988 contains *inter alia* the request that no action consequential on the selection board's decision not to include him on the list of suitable candidates be taken. The decision to terminate his contract, giving effect to the abovementioned decision of the selection board, was notified to him two hours after the submission of his complaint and therefore constitutes an immediate rejection of the complaint. Even if it were assumed that the decision terminating his contract had been adopted and notified before his complaint was submitted, it would be obvious that the complaint was directed against that decision as well and was rejected by the appointing authority's decision of 30 May 1988.
- 26 It must be noted that the action brought against the decision to terminate the contract as a member of the temporary staff was not preceded by a complaint to the appointing authority in accordance with Article 90(2) of the Staff Regulations.
- 27 The complaint made on 24 March 1988 against the decisions appointing the members of the selection board cannot be regarded as being directed also against the decision terminating the applicant's contract as a member of the temporary staff since, when it was submitted, the applicant, as he himself says, was not aware of the termination of his contract. The complaint could not have related to an event of which the applicant was unaware.
- 28 Moreover, there is nothing in the terms of the complaint to indicate any objection to a decision to terminate the applicant's contract. Even though a complaint need not adhere to standard formulations in order to be valid, it must nevertheless be sufficiently explicit to enable the institution to which it is addressed to respond appropriately. In the present case, the appointing authority was not in a position to respond to a complaint concerning termination of a contract as a member of the temporary staff to which no reference was made in the complaint.

- 29 It follows that the application in Case T-39/89 must, pursuant to Article 91(2) of the Staff Regulations, be declared inadmissible in so far as it is directed against the decision terminating the applicant's contract as a member of the temporary staff.
- 30 In view of the foregoing considerations, the application in Case T-39/89 must be declared inadmissible in its entirety.

Substance

- 31 In Case T-32/39, the applicant seeks the annulment of the selection board's decision in Competition No CJ 75/87 on the ground that the board refused to award him the number of points required for him to be entered on the list of suitable candidates for that competition. In support of his claims, the applicant relies on four submissions: first, the improper composition of the selection board; second, the manifest error of appraisal committed by the selection board; third, infringement of the principles of protection of legitimate expectations and of fairness; and fourth, misuse of powers.
- 32 The applicant claims that the proceedings in Competition No CJ 75/87 are illegal because the composition of the selection board for the competition was not in conformity with the 'very nature of the competition procedure', the purpose of which was to constitute a reserve for the recruitment of interpreters whose duties consist in interpreting into Greek from at least three official languages of the European Communities.
- 33 The applicant maintains that none of the three members of the selection board had the requisite knowledge to enable them to understand and evaluate the candidates' performance, since two members had no knowledge of the Greek language and the third, who was a lawyer-reviser in the Translation Directorate of the Court of Justice, was not as proficient in the Greek language as the candidates taking the tests. He adds that in any event the selection board's assessment could only have been based on the opinion of the one member of it who knew Greek.

- 34 The defendant contends that the aim of the tests in a competition for interpreters is not only to enable the selection board to assess the correctness of the candidate's speech in the language into which he is interpreting but also his mastery of interpreting techniques, having regard in particular to the degree of difficulty of the case and the linguistic style of the speakers. It maintains that the three members of the selection board were able to assess the applicant's interpreting technique, that two members of the selection board were long-serving interpreters who regularly served as members of selection boards and that the third member, who had a very good knowledge of Greek, was able to appraise the correctness of the candidate's speech in the language into which he was interpreting. The defendant adds that the selection board had at its disposal the advice of several examiners.
- 35 It is apparent from the expert's report referred to earlier that a professional interpreter serving as a member of a selection board in a competition for conference interpreters cannot himself appreciate the professional competence of a candidate if he has no knowledge of the languages from and into which the candidate is interpreting. The same expert's report concludes that an interpreter who has total understanding of the language from which the candidate is interpreting but not of the language into which he is interpreting likewise cannot himself appreciate the candidate's professional competence.
- 36 It also appears from the explanations given at the hearing on 4 May 1990 that a person qualified to work as a translator is not qualified to serve as a member of a selection board in a competition for conference interpreters because of the fundamentally different methods of observation and evaluation. In particular, the expert explained: 'there are various methods of observation: some observe the language and others observe what is conveyed by means of the language . . . emphasis is not placed on the same things'. The fact that the member of the selection board, who is not qualified to work as a conference interpreter, does not have as his mother tongue the language into which the candidate is interpreting is likely, in the expert's view, to aggravate his inability to understand and assess the candidate's professional performance.
- 37 It follows from all the foregoing considerations that a selection board in a competition for interpreters whose composition does not include any voting member

fulfilling the twofold requirement of perfect command of the language into which the candidate is interpreting and actual professional experience as a professional conference interpreter is not so composed as to guarantee an objective assessment by the selection board of the candidates' professional qualities in their performance in the oral tests. Nor is such a selection board in a position to assure the institution that the recruitment process will secure for it, in accordance with Article 27 of the Staff Regulations, the services of officials of the highest standards of ability.

38 It is undisputed that Mrs Münch, the Head of the Interpretation Division, and Mr Heidelberger, the Deputy Head of that division, the chairman and a member of the selection board respectively, had no knowledge of Greek, the language into which the candidates were to interpret.

39 It is also undisputed that the third member of the selection board, Miss Berteloot, appointed by the Staff Committee, had not worked and was not working as a professional conference interpreter when appointed to the selection board for the competition.

40 In those circumstances, the composition of the selection board in Competition No CJ 75/87, in so far as it included no member fulfilling the dual requirement of perfect command of the language into which the candidate was interpreting and practical experience as a professional conference interpreter was gravely prejudicial to the applicant's interests. Moreover, the principle of sound administration was thereby infringed in so far as there was no guarantee that the institution would secure competent staff. The composition of the selection board must therefore be regarded as improper.

41 The fact that the selection board was able to obtain the advisory opinions of several examiners who were interpreters with a command of the target language for the competition does not alter that conclusion. In a selection board composed as described above, appraisal of the essential aspects of the candidates' performance would fall exclusively to the examiners, they being the only persons qualified to make such an assessment. Moreover, by virtue of the second paragraph of Article 3 of Annex III to the Staff Regulations, examiners have no right to vote. The Court of Justice has consistently held that it is the selection board, and not third parties acting in an advisory capacity, which must retain ultimate control over the proceedings and its discretionary power (see judgments

of 16 October 1975 in Case 90/74 *Deboeck v Commission* [1975] ECR 1123, of 26 October 1978 in Case 122/77 *Agneessens v Commission* [1978] ECR 2805, of 30 November 1978 in Joined Cases 4/78, 19/78 and 28/78 *Salerno v Commission* [1978] ECR 2403 and of 16 June 1987 in Case 40/86 *Kolivas v Commission* [1987] ECR 2643). Accordingly, the presence of examiners cannot make up for the improper composition of the selection board.

- 12 It follows that the submission that the composition of the selection board in Competition No CJ 75/87 was improper must be upheld in so far as it relates to the conduct of the oral tests.
- 13 Accordingly, without there being any need to consider the applicant's other submissions and arguments, the contested decision, namely the selection board's decision refusing to award the applicant the number of points for him to take part in the optional tests, must be annulled.
- 14 The applicant also claimed that the Court should, so far as necessary, annul Competition No CJ 75/87. Since the competition was an open competition for the constitution of a reserve for recruitment, the rights of the applicant are adequately safeguarded if the appointing authority reopens, as far as the applicant is concerned, the competition for the constitution of a reserve list for Greek-language interpreters, there being no need to call in question the results of the competition as a whole or to annul the appointments made on the basis of it (see judgments of 4 December 1975 in Case 31/75 *Costacurta v Commission* [1975] ECR 1563, of 30 November 1978 in *Salerno v Commission*, *supra*, of 28 June 1979 in Case 255/78 *Anselme v Commission* [1979] ECR 2323, of 18 February 1982 in Case 67/81 *Ruske v Commission* [1982] ECR 661, of 13 May 1982 in Case 16/81 *Alaimo v Commission* [1982] ECR 1559, of 9 June 1983 in Case 225/82 *Verzyck v Commission* [1983] ECR 1991, and the Opinion of Mrs Advocate General Rozès at p. 2010, and the judgment of 14 July 1983 in Case 144/82 *Detti v Court of Justice* [1983] ECR 2421).

Costs

- 5 Pursuant to Article 69(2) of the Rules of Procedure of the Court of Justice, which applies *mutatis mutandis* to the Court of first Instance by virtue of the third paragraph of Article 11 of the Council Decision of 24 October 1988, cited above,

the unsuccessful party is to be ordered to pay the costs if they are asked for in the successful party's pleadings. However, Article 70 of those Rules provides that institutions are to bear their own costs in proceedings brought by servants of the Communities.

- 46 In the present proceedings, the defendant has failed in its submissions in Case T-32/89. It must therefore be ordered to pay the costs in that case. Since, in Case T-39/89 the application was inadmissible, the parties must be ordered, pursuant to the provisions cited above, to bear their own costs in that case.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber)

hereby:

- (1) In Case T-32/89, annuls the decision of the selection board in Competition No CJ 75/87 refusing to award the applicant the number of points needed to enable him to take part in the optional tests;
- (2) Orders the defendant to pay the costs in that case;
- (3) In Case T-39/89, dismisses the application as inadmissible;
- (4) Order the parties to bear their own costs in that case.

Edward

Schintgen

García-Valdecasas

Delivered in open court in Luxembourg on 22 June 1990.

H. Jung
Registrar

D. A. O. Edward
President of the Fourth Chamber