

of its substance if, in selecting the candidates to be admitted to the tests, the Selection Board could apply requirements which do not appear in the notice of competition and, therefore, go beyond a comparative examination of the candidates on the basis of the qualifications required. Such a power would be incompatible with the division of powers between, on the one hand, the appointing authority, which has a broad discretion in drawing up the requirements of the competition, and, on the other, the Selection Board, which is bound by these requirements in carrying out its task under Article 30 of the Staff Regulations.

Consequently, in a competition based on qualifications and tests the Selection Board may not exclude a candidate from the tests of the competition on the ground that he does not meet a requirement which was not mentioned in the notice of competition.

2. The annulment of an administrative act challenged by an official constitutes appropriate and, in principle, sufficient reparation for any non-material damage which he may have suffered.

JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)  
28 November 1991 \*

In Case T-158/89,

**Guido van Hecken**, an official of the European Parliament, residing in Berchem (Belgium), represented by F. Herbert, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of N. Decker, 16 Avenue Marie-Thérèse,

applicant,

v

**Economic and Social Committee of the European Communities**, represented initially by D. Brüggemann, Legal Adviser, acting as Agent, assisted by C. Verbraeken, of the Brussels Bar, and subsequently by M. Bermejo Garde, Legal Adviser, acting as Agent, assisted by V. Busschaert, of the Brussels Bar, with an

\* Language of the case: Dutch.

address for service in Luxembourg at the office of Roberto Hayder, representing the Legal Service of the Commission of the European Communities, Wagner Centre, Kirchberg,

defendant,

APPLICATION, first, for the annulment of the decision of the Selection Board in Open Competition ESC/LA/102/87 refusing to admit the applicant to the tests of that competition and, secondly, for compensation for the damage allegedly suffered by the applicant,

THE COURT OF FIRST INSTANCE  
OF THE EUROPEAN COMMUNITIES (Fifth Chamber),

composed of: C. P. Briët, President, D. Barrington and H. Kirschner, Judges,

Registrar: B. Pastor, Administrator,

having regard to the written procedure and further to the hearing on 12 July 1991,  
gives the following

### Judgment

#### Facts

- 1 On 26 February 1988, the Economic and Social Committee (hereinafter referred to as 'the ESC'), published the notice of Open Competition ESC/LA/102/87 based on qualifications and tests, to constitute a reserve for the recruitment of Dutch-language translators in career bracket LA 7/LA 6 (Official Journal, Dutch edition, C 55, p. 16)
- 2 With regard to the qualifications, diplomas and work experience required, the notice stated that, at the closing date fixed for the receipt of applications, candidates had to have a master's degree (in modern languages, economics, social

sciences, business studies, law, etc) or a comparable diploma obtained in the course of specialized language training, or work experience of an equivalent level in the field of translation. Candidates had to provide copies of diplomas evidencing their university education or specialized training and/or copies of supporting documents attesting to their work experience (attestation as to employment or work experience, letters of appointment or contracts of employment, pay slips — the first and the last from each employer — or any other document evidencing the beginning and end of an employment relationship and the nature of the work performed). The notice also required a thorough command of Dutch, a very good knowledge of a second official language of the European Communities and a good knowledge of a third. In addition, it stated that candidates had to satisfy the conditions laid down by Article 28(a)(b) and (c) of the Staff Regulations of the European Communities (hereinafter referred to as ‘the Staff Regulations’).

- 3 On 15 March 1988, the applicant, an official of the European Parliament, where he occupies a post as a translator, sent in an application form, which was received by the ESC on 17 March 1988. This application form contained, among other things, the following information concerning the applicant’s education and work experience:

*‘Higher education*

UFSIA, Antwerp, Belgium 1969-1971 “Kandidaat” in romance philology

UIA, Antwerp, Belgium 1972-1975 “Licentiaat” in romance philology

Coimbra, Portugal 1974-1975 Portuguese language and civilization

UIA, Antwerp, Belgium 1975-1977 Teaching diploma for higher secondary education

*Post-graduate study*

University of Essex, United Kingdom  
from 1985:

Master of Arts in the Sociology of  
Development subsequently converted  
into a course of study leading to a PhD  
in Sociology.

*Work experience*

1976-1978 Centre for Modern Languages, Catholic University of Louvain:  
Assistant lecturer in Portuguese

1975-1978 Gemeentelijk Lyceum (grammar school), Borgerhout: teacher of  
Spanish and non-confessional ethics

1978-1985 University Eduardo Mondlane, Maputo, Mozambique: Assistant  
professor. In addition to teaching Portuguese, translation and  
linguistics, he acted as Assistant to the Dean of the Faculty of Arts  
and as Head of the Department of Modern Languages; translator at  
national and international conferences; research worker at the Centro  
de Estudos Africanos.

since 1987 employment as a freelance translator for Portuguese, English and  
Dutch, paid on a piece work basis.'

- 4 After receipt of the applications, the Selection Board drew up a list of candidates who met the requirements set out in the notice of competition. It selected from that list those candidates to be admitted to the tests by applying a certain number of pre-determined supplementary selection criteria relating to education, work experience and periods of residence abroad which took the form of a points system. A candidate had to obtain at least 1 1/4 points in order to be admitted to the tests.

- 5 By a letter of 25 August 1989, the applicant was informed that the Selection Board had rejected his application. In that letter the applicant was informed that:

‘In accordance with the procedure laid down by the Staff Regulations (first paragraph of Article 5 of Annex III) the Selection Board drew up a list of candidates who satisfy the conditions set out in the notice of competition. At that stage your name was on the list drawn up by the Selection Board.

Since this was a competition based on qualifications and tests, the Selection Board then stated which of the candidates were to be admitted to the tests (fourth paragraph of Article 5 of Annex III to the Staff Regulations; see also the “notice” in the Official Journal cited above, Section II: Procedure). At that stage in the procedure, the Selection Board admitted only those candidates whom it considered best qualified and who satisfied the supplementary criteria which it had defined. The criteria on the basis of which it was decided to exclude you from the competition are marked with a cross in the document annexed hereto.’

- 6 The reasons for which the applicant was not admitted to the written tests ‘following a second selection’ despite his having satisfied the conditions set out in the notice of competition were set out in an annex to that letter, which was worded as follows:

‘II.1 *no* supplementary university education in an area relevant to the activities of the Economic and Social Committee, or in the sphere of languages and/or translation, or *absence* of sufficient supporting documents;

and/or

II.2 *lack of sufficient work experience* in translation (after having obtained a university degree or a specialized diploma in languages or following 8 years’ equivalent experience in translation work) at the level required by the post in question, or *absence* of sufficient supporting documents;

and/or

II.3 *lack of post-graduate experience* of at least one year at a foreign university on the basis of one of the languages of the European Community — other than Dutch — or *absence* of sufficient supporting documents.

(Any one of those reasons is sufficient to cause the candidate to be excluded).’

- 7 By letter dated 30 August 1989 the applicant asked the Selection Board to review its decision on his application or to state correctly the reasons on which the decision was based and to inform him of the result of that review at least one week before the date of the tests. He argued that none of the criteria indicated was bound to lead to his exclusion and that, unlike him, other candidates had been given the opportunity of producing additional supporting documents.
- 8 On 21 September 1989 a telephone conversation took place between the applicant and a member of the Selection Board. The applicant states that he was asked to send to the Selection Board before 4 October 1989, the date fixed for the tests, a ‘document’ from the University of Essex concerning his post-graduate studies, together with an attestation from the TXT translation bureau regarding his work experience.

The ESC maintains that the purpose of this telephone conversation was to draw the applicant’s attention to two specific points: first, the question as to whether his activities at the University of Maputo had also included translation work from or into Dutch (a question which he answered in the negative), and, secondly, the need to provide an attestation relating to his work for TXT. According to the ESC, the applicant stated that he would be able to obtain and forward the document requested within a week. The ESC claims that the applicant raised the question of the ‘relevant’ nature of his sociology studies at the University of Essex and that he was told that there was no supporting document in the file showing that he had successfully followed such a course.

- 9 By letter of 22 September 1989 the applicant sent the ESC a photocopy of a document from the University of Essex certifying that from October 1985 he had been enrolled at that university as a post-graduate student in the sociology of development. In the same letter he again asked the Selection Board to review its decision on his application or to state correctly the reasons for that decision, and to inform him officially of the result of this review at least a week before the date of the tests.
  
- 10 The applicant received the attestation regarding his work for TXT on 4 October 1989. He also sent this to the ESC.
  
- 11 By letter of 5 October 1989 the ESC gave a number of further particulars and replies to the questions put by the applicant in his letters of 30 August and 22 September 1989:

with regard to criterion II.1 (see paragraph 6 above), the ESC observed that the applicant had produced only an attestation of enrolment, which did not prove that he had successfully completed his studies at the University of Essex, and, moreover, the studies in question did not constitute a continuation of his basic studies in accordance with the rules applied by the Selection Board;

with regard to criterion II.2, the ESC stated that the teaching of translation, without translation from or into Dutch, could not be regarded as working as a translator at a level commensurate with the duties to be performed;

with regard to criterion II.3, the ESC stated that the applicant's period at the University of Maputo had been recognized as post-graduate experience.

The ESC explained that the total number of points obtained by the applicant had not been considered sufficient to enable him to be admitted to the tests.

The ESC added that only those candidates who satisfied the requirements for admission to the tests in the light of their application forms but who had not submitted sufficient proof, had received a letter asking them to send the Selection Board supplementary supporting documents. Moreover, the applicant's activities between 1986 and 1988 could, at best, be taken only partly into consideration, since they overlapped with his studies at the University of Essex. The ESC finally stated that the fact that he had passed an open competition held by another institution — for a translator's post in the European Parliament — was not one of the criteria laid down by the Selection Board.

### **Procedure**

- 12 By an application lodged at the Registry of the Court of First Instance on 27 November 1989, the applicant brought this action. The written procedure followed its normal course.
- 13 Upon hearing the report of the Judge-Rapporteur, the Court decided to open the oral procedure without any preparatory inquiry. At the request of the Court, the defendant produced the report of the Selection Board for Open Competition ESC/LA/102/87 regarding the constitution of a reserve for the recruitment of Dutch-language translators, with its annexes.
- 14 The parties' oral argument was heard at the hearing on 12 July 1991. The President declared the oral procedure closed at the end of the hearing.

### **Forms of order sought by the parties**

- 15 The applicant claims that the Court should:

- (i) order the production of all the Selection Board's minutes and documents showing how the selection criteria were determined and applied to the various candidates and also all the documents specifically relating to the applicant's application and complaint;
  
- (ii) declare the application admissible and well founded and, as a result;
  - (1) annul the decision of the Selection Board for Open Competition ESC/LA/102/87 not to admit him to the written tests and to reject his application for the post referred to in the notice of competition;
  
  - (2) order the ESC to pay him damages which can fairly be assessed at BFR 50 000;
  
  - (3) order the ESC to pay the costs in accordance with Article 69(2) of the Rules of Procedure of the Court;

in the alternative,

in the event that the Court should declare the claim unfounded, nevertheless order the ESC to pay the costs under Article 69(3) of the Rules of Procedure in so far as the origin of the application lies in the Selection Board's own negligence and in the fact that the information provided to the applicant was inadequate and late;

in the further alternative,

in the event that the application is dismissed, apply Article 70 of the Rules of Procedure.

16 The ESC contends that the Court should:

- (i) dismiss the claim for measures of inquiry;
- (ii) declare the application admissible but unfounded and, accordingly,
- (iii) dismiss the application for annulment;
- (iv) order each party to bear its own costs.

## Substance

### *The first head of the application: annulment of the Selection Board's decision*

- 17 In support of his application for the annulment of the contested decision, the *applicant* relies on five pleas in law based, first, on non-compliance with the notice of competition and infringement of Article 5 of Annex III to the Staff Regulations; secondly, on infringement of the duty to provide an objective statement of reasons; thirdly, on infringement of the principle of equal treatment; fourthly, on non-compliance with the general principle of sound administration and, fifthly, on the absence of an adequate statement of reasons.
- 18 In support of the first plea in law, the applicant claims that by admitting to the tests only those candidates whom it considered to be best qualified and who satisfied the supplementary criteria which it had laid down, the Selection Board carried out a two-stage selection not envisaged by the notice of competition and not complying with the provisions of Annex III to the Staff Regulations. He points out that, under Article 5 of Annex III to the Staff Regulations, the Selection Board first of all establishes the assessment criteria on the basis of which it then selects the best qualified candidates, who should be admitted automatically to the competition. There should be no question of a second selection made on the basis of 'supplementary criteria'. The applicant refers to the Opinion of Mr Advocate General Van Gerven in Case 225/87 *Belardinelli v Court of Justice* [1989] ECR

2353, at 2364) in which it is stated that this practice places the Selection Board in the position of having both to adopt the rules and to apply them, the candidates only discovering at a later stage the existence of conditions for admission which were not apparent from merely reading the notice of competition. The applicant adds that the mandatory character of the competition notice has also been emphasized by the Court of Justice in Case 67/81 *Ruske v Commission* [1982] ECR 661).

- 19 The ESC contends that in the case of a competition based on qualifications and tests the list of candidates is drawn up in several stages:
- (i) the appointing authority draws up the list of candidates who satisfy the conditions laid down in Article 28(a)(b) and (c) of the Staff Regulations and sends it to the Chairman of the Selection Board (Article 4 of Annex III to the Staff Regulations);
  - (ii) the Selection Board draws up a list of candidates who satisfy the requirements set out in the notice of competition (Article 5, first paragraph, of Annex III to the Staff Regulations);
  - (iii) the Selection Board, on the basis of the criteria adopted by it, draws up a list of candidates to be admitted to the tests (Article 5, fourth paragraph, of Annex III to the Staff Regulations).
- 20 The defendant further considers that where the competition is on the basis of qualifications and tests it is appropriate to establish, first, whether the candidates satisfy the requirements for admission and, subsequently, whether they satisfy the criteria laid down. The expression 'after a second selection' used in the annex to the ESC's letter of 25 August 1989 refers, by definition, to a first selection made on the basis of the requirements set out in the notice of competition in accordance with the first paragraph of Article 5 of Annex III to the Staff Regulations. The ESC observes that after the list of candidates satisfying the requirements set out in the notice of competition had been drawn up, only one selection was carried out, on the basis of the criteria drawn up by the Selection Board. The ESC states that in Case 44/71 *Marcato v Commission* [1972] ECR 427, the Court of Justice recognized the legality of the practice of establishing criteria which do not appear

in the notice of competition and which are therefore not brought to candidates' attention.

- 21 The Court considers that it should be noted that Article 5 of Annex III to the Staff Regulations provides that, after examining the files of those candidates who satisfy the conditions laid down in Article 28(a)(b) and (c) of the Staff Regulations, the Selection Board is to draw up a list of candidates who meet the requirements set out in the notice of competition. Where the competition is based on tests and qualifications, paragraph 4 of Article 5 provides that the Selection Board is to state which of the candidates on the list are to be admitted to the tests.
- 22 Next, it is for the Selection Board to assess in each case whether the certificates produced or the experience of each candidate correspond to the level required by the Staff Regulations and by the notice of competition (see, *inter alia*, the judgments in Case 44/71 *Marcato* and Case 225/87 *Belardinelli*, cited above).
- 23 The Court considers that it should also be borne in mind that, notwithstanding its discretionary power, the Selection Board is bound by the wording of the notice of competition as published. According to the Staff Regulations, the basic function of the notice of competition is precisely to give those interested the most accurate information possible about the conditions of eligibility for the post to enable them, to judge, first, whether they should apply for it (judgments in Case 255/78 *Anselme v Commission* [1979] ECR 2323, *Ruske*, cited above, and Case 289/81 *Mavridis v Parliament* [1983] ECR 1731) and, secondly, what supporting documents are important for the proceedings of the Selection Board and must therefore be enclosed with the application form.
- 24 The system laid down in the first subparagraph of Article 5 of Annex III to the Staff Regulations would be deprived of its substance if the Selection Board could, under the fourth subparagraph of that article, apply requirements which do not

appear in the notice of competition and, therefore, go beyond a comparative examination of the candidates on the basis of the qualifications required. Moreover, such an interpretation would be incompatible with the division which exists, between the powers of the appointing authority, on the one hand, and those of the Selection Board, on the other, whereby the Appointing Authority has a broad discretion in drawing up the requirements of the competition whilst the Selection Board is bound by these requirements in carrying out its task under Article 30 of the Staff Regulations.

- 25 It follows that the Selection Board is not empowered to exclude a candidate from the tests on the ground that he does not meet a requirement which was not mentioned in the notice of competition. Therefore, in this case the Court must assess whether the 'supplementary criteria' laid down by the Selection Board for the admission of candidates to the tests were additional to those required by the notice of competition or whether they merely defined their scope.
- 26 The Court notes that it appears from the report of the Selection Board appointed for Open Competition ESC/LA/102/87 that the Selection Board drew up 'supplementary' selection criteria under three different headings: education, work experience and post-graduate experience at a university abroad.
- 27 As far as education is concerned, the points system adopted by the Selection Board consisted in awarding different points for a university education specifically as a translator or interpreter, complementary specialized university studies, complementary linguistic studies at a university, complementary specialized studies at a university in an area relevant to the ESC, a master's degree or vocational courses in translation as part of a Master of Arts degree in the Netherlands.
- 28 As regards work experience, the Selection Board awarded points for experience of translation or interpreting, provided that the experience had been obtained after the award of a university degree or the acquisition of work experience of a similar level.

- 29 The Selection Board also awarded half a point for a post-graduate stay of at least one year at a foreign university or at the College of Europe, Bruges, or in the case of Dutch-speaking Flemish candidates, in Wallonia; the period had to constitute the continuation of full university studies for which a degree had been awarded and which had already been completed.
- 30 The 'supplementary criteria' drawn up and applied by the Selection Board exceed the admission requirements laid down by the notice of competition. The notice of competition merely required a master's degree and did not require a university education specifically as a translator or interpreter, complementary specialized or linguistic university studies, complementary specialized university studies in an area relevant to the ESC or a master's degree or a vocational course in translation taken as part of a Master of Arts degree in the Netherlands.
- 31 With regard to the second head under which the Selection Board drew up 'supplementary criteria', namely work experience, the Court notes that the notice of competition does not mention work experience except as an alternative to a university degree or to a comparable diploma acquired in the course of language education, which precludes work experience acquired after the award of such a diploma from being taken into account as it was by the Selection Board.
- 32 It follows that the decision of the Selection Board in Open Competition ESC/LA/102/87 not to admit the applicant to the tests for that competition and to reject his application for the post referred to in the notice of competition on the ground that he did not satisfy the supplementary criteria drawn up by the Selection Board was taken contrary to the first subparagraph of Article 5 of Annex III to the Staff Regulations and must, therefore, be annulled without its being necessary to examine the other pleas in law put forward in support of this head of the application.

*The second head of the application: the claim for damages*

- 33 The applicant submits that the alleged irregularities which he has put forward in support of the annulment of the contested decision constitute a service-related fault and have caused him damage. He claims that the disregard by the Selection Board of its duty to have regard to his interests has prevented him from properly looking after his interests, in particular with regard to his career and his situation generally. More specifically, he considers that he has suffered non-material damage because his exclusion from the competition has deprived him of the opportunity to transfer his professional activities to Belgium, where his family has continued to live. In addition, he considers that he has suffered a loss of prestige. Referring to the judgment of the Court of Justice in Joined Cases 10/72 and 47/72 *Di Pillo v Commission* [1973] ECR 763, he suggests that the Court should assess, *ex aequo et bono*, at BFR 50 000 all the damage he has thus suffered.
- 34 In his reply, the applicant adds that, although he cannot prove with certainty that he would have passed the tests in the competition, there are, nevertheless, a number of indications supporting this conclusion. He refers, in particular, to the results obtained by those of his translator colleagues at the Parliament who took part in the competition.
- 35 The ESC contends that, even if the contested decision constituted a service-related fault, the applicant has not for all that adduced any proof of damage. In particular, the applicant has not shown that it is sufficiently probable that if he had been admitted to the tests he would actually have passed them. With regard to the place of residence of his wife and children, this is the result of a decision by his family. The judgment in *Di Pillo* is not germane, the ESC maintains, because it concerns a delay in a decision to dismiss a member of staff following an unfavourable probation report and in that case the person in question had to bear significant expenses in anticipation of a definitive appointment. Lastly, the ESC considers that there is no proof of loss of prestige.
- 36 In its rejoinder, the ESC observes that the fact that a number of the applicant's former colleagues were admitted to the written tests and, moreover, passed the competition does not prove that the applicant himself would have passed the written tests if he had taken part in them. The ESC contends that it may legit-

imately be assumed that the fact that the applicant did not satisfy the criteria drawn up by the Selection Board indeed suggests that it is not absolutely certain that he would have passed the written tests.

- 37 With regard to the claim for compensation for the non-material damage which the applicant considers he has suffered, it should be pointed out that, as the Court has consistently held, the annulment of an administrative act challenged by an official constitutes appropriate and, in principle, sufficient reparation for any non-material damage which he may have suffered. Accordingly it must be considered that the annulment of the decision of the Selection Board in Open Competition ESC/LA/102/87 constitutes in itself appropriate reparation for any non-material damage which the applicant may have suffered (see the judgment of the Court of Justice in Joined Cases 44/85, 77/85, 294/85 and 295/85 *Hochbaum and Rawes v Commission* [1987] ECR 3259 and the judgment of the Court of First Instance in Case T-37/90 *Hanning v Parliament* [1990] II-463).

### Costs

- 38 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the ESC has failed in all essential respects, it must be ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

1. **Annuls the decision of the Selection Board in Open Competition ESC/LA/102/87 not to admit the applicant to the tests of that competition;**

2. **Dismisses the remainder of the application;**
3. **Orders the Economic and Social Committee to pay the costs.**

Briët

Barrington

Kirschner

Delivered in open court in Luxembourg on 28 November 1991.

H. Jung

Registrar

C. P. Briët

President