JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)
17 December 1997

Case T-159/95

Luigia Dricot and Others
v
Commission of the European Communities

(Officials – Internal competition for advancement from Category C to Category B – Decision of the selection board failing candidates in the oral test – Consistency between complaint and application – Principle of equal treatment for men and women – Principle of non-discrimination – Scope of the obligation to state reasons – Assessment by the selection board)

Application for: annulment of the decisions of the Selection Board for Internal Competition COM/B/9/93 awarding the applicants, in the oral test in that competition, a mark below the minimum required by the notice of competition and, consequently, refusing to enter their names on the list of suitable candidates.

Decision: Application dismissed.

Abstract of the Judgment

The applicants, who are officials of the Commission in Category C, submitted applications for Internal Competition COM/B/9/93, which permitted advancement from Category C to Category B and was held for the purpose of drawing up a list of suitable administrative assistants in Grades 5 and 4 of Category B to perform supervised administrative duties consisting of routine office work as administrative assistants, secretarial assistants and technical assistants.

The applicants were admitted to the oral tests, which were held between September and 17 November 1994.

By letter of 18 November 1994 the applicants were informed that since they had failed to obtain the minimum marks required in the oral tests their names had not been entered on the list of suitable candidates.

Between 12 and 17 February 1995 the applicants submitted complaints under Article 90(2) of the Staff Regulations of Officials of the European Communities (Staff Regulations). Those complaints were all drawn up in identical terms and subsequently supplemented by further memoranda from the applicants dated 10 May 1995, which were also drawn up in identical terms. Henceforth those complaints and memoranda will be referred to as the complaint and the memorandum.

Following the expiry of the time-limit for replying to the complaint the Commission expressly rejected it by a decision of 25 July 1995 which was sent to the applicants at the end of August 1995.

Admissibility

Instead of bringing the Selection Board's decision directly before the Court, the applicants submitted an administrative complaint to the appointing authority. In doing so they were required to comply with all the procedural constraints associated with the path which they chose, that of a preliminary complaint through administrative channels (paragraph 21).

See: 52/85 *Rihoux and Others* v *Commission* [1986] ECR 1555, para. 11

If it is not to be declared inadmissible, a plea put forward before the Community judicature must first be raised in the context of the pre-litigation procedure, so that the appointing authority is in a position to know in sufficient detail the criticisms which the official concerned is making against the contested decision. The plea must also be relied on in the complaint itself (paragraphs 22 and 23).

See: T-57/89 *Alexandrakis* v *Commission* [1990] ECR II-143, para. 8; T-58/91 *Booss and Fischer* v *Commission* [1993] ECR II-147, para. 83; T-262/94 *Baiwir* v *Commission* [1996] ECR-SC II-739, para. 40

A plea raised in the complaint may of course be developed in the course of the pre-litigation procedure by additional memoranda, provided that the criticisms made therein are based on the same matters as the grounds of challenge put forward in the initial complaint. That condition also applies if a plea is to be submitted before the Court of First Instance (paragraph 24).

See: *Alexandrakis* v *Commission*, cited above, para. 9; *Booss and Fisher* v *Commission*, cited above, para. 83; *Baiwir* v *Commission*, cited above, para. 41

The position is different, however, where a plea which has no connection with the grounds of challenge relied on in the complaint is first submitted following the expiry of the time-limit laid down in Article 90 of the Staff Regulations. The complaints procedure established by that article is subject to strict conditions as to time which meet the requirement of legal certainty and the need to avoid any discrimination or arbitrary treatment in the administration of justice (paragraph 25).

See: 276/85 *Cladakis* v *Commission* [1987] ECR 495, para. 11

The fact that those of the applicants' grounds of challenge which are alleged to be inadmissible are presented as parts of a plea rather than as individual pleas does not mean that they escape the requirements laid down in the abovementioned case-law (paragraph 26).

Accordingly, it is necessary to ascertain, in respect of each part of the plea alleged to be inadmissible, whether the Commission, interpreting the complaint with an open mind, was in a position to know in sufficient detail the criticisms which the applicants had made against the contested decisions (paragraph 27).

See: 133/88 *Del Amo Martinez* v *Parliament* [1989] ECR 689, para. 11; *Baiwir* v *Commission*, cited above, para. 42

As regards the parts of the second plea alleging, respectively, a breach of the notice of competition, inasmuch as the Selection Board is said to have put questions which bore no relation to the information set out in that notice, and a breach of the rules governing the proceedings of the Selection Board, inasmuch as not all the members of the board were present at all the oral tests of all the candidates, the complaint

makes no reference thereto either expressly or by implication. Accordingly, those parts must be declared inadmissible (paragraph 28).

The fact that the Commission none the less dealt with the substance of those parts of the plea in its decision expressly rejecting the complaint and that it did not state that they were out of time cannot render them admissible, since that would be contrary to the system of peremptory time-limits laid down in Articles 90 and 91 of the Staff Regulations and, consequently, would restore a right of action which has definitively lapsed (paragraph 29).

See: T-130/89 *B.* v *Commission* [1990] ECR II-761, summary publication; T-6/90 *Petrilli* v *Commission* [1990] ECR II-765, summary publication; T-19/90 *von Hoessle* v *Court of Auditors* [1991] ECR II-615, para. 23

As regards the part of the plea which alleges a breach of the principle of equal treatment and non-discrimination between candidates in the competition, the complaint refers in particular to an alleged discrimination on the ground of sex and also to an alleged breach by the Selection Board of the fifth paragraph of Article 5 of Annex III to the Staff Regulations. The complaint also refers to the principle of equal treatment and non-discrimination (paragraph 30).

The argument concerning the latter principle was developed in the memorandum of 10 May 1995. That ground of challenge may therefore be regarded as closely linked to grounds of challenge put forward in the complaint (paragraphs 31 to 33).

The part of the plea alleging breach of the principle of equal treatment and non-discrimination between candidates in a competition therefore has the same object as the claims set out in the complaint and only contains grounds of challenge based on the same matters as those set out in the complaint. It is therefore not inadmissible for being inconsistent with the complaint (paragraph 34).

Substance

First plea in law, alleging breach of the obligation to state reasons

The requirement to state reasons laid down in Article 25 of the Staff Regulations must be assessed according to the circumstances of the case, in particular the content of the decision, the nature of the grounds relied on and the interest which the person to whom it is addressed may have in receiving explanations (paragraph 49).

See: T-80/92 *Turner* v *Commission* [1993] ECR II-1465, para. 62

By the contested decisions the applicants were informed that they had failed to obtain the 50% mark required in the oral test and in that regard the precise marks they had obtained were communicated to them (paragraph 51).

Admittedly, that statement of reasons is not exhaustive inasmuch as it does not disclose the Selection Board's assessments or marking criteria more detailed than those mentioned in the notice of competition. Those matters are, however, covered by the secrecy of the deliberations of the Selection Board, and the obligation to state reasons must therefore be reconciled with observance of the secrecy surrounding the proceedings of the Selection Board by virtue of Article 6 of Annex III to the Staff

Regulations. It follows that communication of the marks obtained in the various tests constitutes an adequate statement of the reasons on which the Selection Board's decisions were based. Such a statement of reasons is not prejudicial to the candidates' rights. It enables them to know the value placed on their performance and to ascertain, if such be the case, that they have not in fact obtained the number of marks required by the notice of competition in order to be admitted to certain tests or to all the tests (paragraphs 52 to 54).

See: C-254/95 P *Parliament* v *Innamorati* [1996] ECR I-3423, paras 24, 31 and 32

Second plea in law, alleging a number of irregularities in the course of the oral test

The part of the plea alleging breach of the fifth paragraph of Article 5 of Annex III to the Staff Regulations

The notice of competition provided that 'the Selection Board shall draw up the list of suitable candidates consisting at the maximum of the 60 candidates who have obtained the best total marks in tests (a), (b) and (c)'. It follows that since the Selection Board was bound by the wording of the notice of competition it was not entitled to draw up a list containing more than 60 candidates (paragraph 66).

See: T-158/89 *van Hecken* v *ESC* [1991] ECR II-1341, para. 23

Although the fifth paragraph of Article 5 of Annex III to the Staff Regulations provides that the list of suitable candidates drawn up by the Selection Board is wherever possible to contain at least twice as many names as the number of posts to be filled, it is merely a recommendation to the Selection Board, intended to facilitate the appointing authority's decisions, and therefore cannot authorise the

Selection Board to go beyond the framework imposed on it by the notice of competition (paragraph 67).

See: 122/77 *Claes (née Agneessens) and Others* v *Commission* [1978] ECR 2085, para. 22

The part of the plea alleging manifest error of assessment on the part of the Selection board of the applicants' suitability to perform the duties attaching to a post in Category B

The Selection Board in a competition enjoys a wide discretion, and the Community judicature has no jurisdiction to review its value judgments unless the rules which govern the proceedings of selection boards have been infringed (paragraph 72).

See: T-17/90, T-28/91 and T-17/92 *Camara Alloisio and Others* v *Commission* [1993] ECR II-841, para. 90; T-6/93 *Pérez Jiménez* v *Commission* [1994] ECR-SC II-497, para. 42; T-46/93 *Michaël-Chiou* v *Commission* [1994] ECR-SC II-929, para. 48

It is therefore not for the Court to review the Selection Board's assessment of the applicants' suitability to perform the duties attaching to a post in Category B (paragraph 73).

The part of the plea alleging breach of the principle of equal treatment and non-discrimination between candidates in a competition

While it is true that an official may not, in proceedings brought against a decision of a Selection Board for a competition, put forward pleas based on an alleged irregularity in the notice of competition, when he has not challenged in good time the provisions of the notice which, in his view, adversely affect him, it none the less

remains that a candidate in a competition is not to be deprived of the right to challenge all the elements, including those defined in the notice of competition, comprising the justification for the individual decision concerning him taken on the basis of the conditions laid down in the notice, inasmuch as only the decision applying them affects his legal position individually and enables him to ascertain with certainty how and to what extent his personal interests are affected (paragraph 80).

See: T-132/89 *Gallone* v *Council* [1990] ECR II-549, para. 20; T-60/92 *Noonan* v *Commission* [1993] ECR II-911, paras 21 and 23

In the present case the applicants could scarcely ascertain how their interests would be affected before it became apparent that none of the files to be dealt with in the drafting test corresponded to their particular experience. The general wording of the notice of competition did not preclude the possibility that a file, in particular the one entitled 'administrative', might contain elements related to the field of secretarial work. It was therefore only when the applicants were faced with the choice of file to be dealt with that they were in a position to know with certainty how and to what extent their personal interests were affected. Consequently, this part of the plea must be regarded as admissible (paragraph 81).

However, the applicants' argument cannot be upheld (paragraph 82).

There is a breach of the principle of equal treatment laid down in Article 5(3) of the Staff Regulations where two categories of persons whose factual and legal situations disclose no essential difference are treated differently (paragraph 83).

See: T-18/89 and T-24/89 *Tagaras* v *Court of Justice* [1991] ECR II-53, para. 68

Having regard to the wide discretion which the appointing authority enjoys in deciding upon the abilities required for the posts that are to be filled and in determining, in the light of those criteria and in the interests of the service, the rules and conditions under which a competition is organised, the absence of a choice relating to the field of secretarial work in the written test does not show that the applicants suffered discrimination in the oral test (paragraph 86).

See: *Gallone* v *Council*, cited above, para. 27

The part of the plea alleging breach of the principle of equal treatment for men and women

In order to determine whether there is a difference in treatment, it is necessary to compare the treatment of two categories of persons whose factual and legal situations disclose no essential differences (paragraph 98).

See: *Tagaras* v *Court of Justice*, cited above, para. 68

In the present case the applicants find that there is unequal treatment in the fact that the posts to be filled in competitions for advancement from Category B to Category A are always awarded, whereas that is not so in the case of competitions for advancement from Category C to Category B, as the statistics testify. They maintain that it is for the Commission to justify that difference (paragraph 99).

That argument cannot be upheld. The applicants are comparing competitions each of which has its own specific character and is autonomous as regards the results at which it arrives. Furthermore, the statistics to which the candidates refer indisputably relate to competitions where the number of candidates and the number of posts to be filled varied and the details of the notice of competition and the composition of the selection board were different. They also concern two distinct categories (B and C) and not two functions of equal value (paragraph 100).

It follows that the factual and legal situations which the applicants have put forward in order to show unequal treatment disclose essential differences. Consequently, the circumstances of the present case do not disclose any discrimination against employees of the female sex (paragraphs 101 and 102).

Operative part:

The application is dismissed.