

## Case T-91/92

W. H. M. Daemen

v

Commission of the European Communities

(Officials — Open competition — Written test — Breach by a candidate of his anonymity — Decision by the selection board nullifying a candidate's paper — Annulment of decision)

Judgment of the Court of First Instance (Fifth Chamber), 16 December 1993 ... II - 1491

### Summary of the Judgment

*Officials — Competition — Competition based on tests — Conduct of tests — Anonymity rule — Breach attributable to a candidate — Paper of the person concerned nullified (Staff Regulations of Officials, Art. 29, and Annex III)*

JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)  
16 December 1993 \*

In Case T-91/92,

W. H. M. Daemen, residing in Margraten (The Netherlands), represented by E. J. J. M. Kneepkens, of the Maastricht Bar,

applicant,

\* Language of the case: Dutch.

v

**Commission of the European Communities**, represented by M. B. M. P. Smulders, of its Legal Service, acting as Agent, with an address for service in Luxembourg at the office of N. Anecchino, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for the annulment of the decision by which the Selection Board in Open Competition COM/A/720 nullified one of the applicant's papers on the ground of breach of the rule of anonymity,

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

composed of: A. Kalogeropoulos, President of the Chamber, R. Schintgen and K. Lenaerts, Judges,

Registrar: M. J. Palacio González, Administrator,

having regard to the written procedure and further to the hearing on 24 November 1993,

gives the following

**Judgment**

- 1 On 13 December 1991, the applicant sat the three eliminatory written tests (a), (b) and (c) in Open Competition COM/A/720, organized by the Commission for the constitution of a reserve list for the recruitment of administrators in career bracket A 7/A 6 (OJ 1991 C 52 A, p. 16). In spite of having failed to obtain a sufficiently high mark in these examinations, the applicant was, by letter dated 15 May 1992, admitted to the other written test, (d) (drafting) and (e) (a practical test), following

an increase in the number of vacant posts to be filled through the competition, and the lowering of the pass mark required for admission to the following tests.

2 According to written instructions given by the Commission to the candidates on 19 June 1992, the day of test (e), their names had to 'appear only on [their] envelopes and on the self-copying paper in the place provided for that purpose.' The instructions continued: '*Any signature, name or special mark on the other pages of the definitive text will/would lead to the paper being annulled.*'<sup>1</sup> In addition, because, for this test, the candidates were required to use self-copying paper, in the form of triple sets of sheets, each set producing two automatic copies, they were further requested in the instructions to be careful to only use one triple set at a time. It was stated in the instructions: 'Write the number of the competition, your name and forename and your candidate number at the foot of the first triple set only — the first two sheets which are shorter — on the yellow sheet, ... Only answers written on the self-copying paper will be corrected ...'.

3 After the tests were over, the two examiners appointed by the Selection Board awarded the applicant a mark below 20/40 for test (e). Under Section VI.2 of the Notice of Competition this was the minimum mark required for admittance to the oral test. One of the examiners noticed, however, that the applicant's name and forename were visible, faintly but clearly, on the pink sheets constituting pages 2 and 3 of his paper. There was no indication of the applicant's identity on the original of the paper, corrected by the other examiner, but his name and forename did appear on the yellow sheet corresponding to pages 2 and 3 of his paper. The Selection Board therefore decided to annul the applicant's paper without awarding a mark.

4 The applicant was informed of the Selection Board's decision by letter dated 10 September 1992. He replied in a letter dated 5 October 1992, imputing responsibility to the Commission for the mistake which he had made while handling the materials and which had revealed his identity.

<sup>1</sup> In bold in the original text.

- 5 It was in those circumstances that the applicant brought this action on 28 October 1992.
- 6 By document lodged at the Court Registry on 7 December 1992, the Commission raised a plea of inadmissibility under Article 114(1) of the Rules of Procedure, on which the applicant submitted his observations on 30 December 1992. By order of 10 March 1993, the Court (Fifth Chamber) decided to reserve its decision on the plea of inadmissibility for the final judgment. As a measure of organization of procedure, it request the Commission to produce the original of the paper at issue. The Commission responded to this request on 13 April 1993 by lodging some of the sheets of the paper written by the applicant. The written procedure followed the normal course and was concluded when the rejoinder was lodged at the Court Registry on 7 July 1993. Upon hearing the report of the Judge-Rapporteur, the Court (Fifth Chamber) decided to open the oral procedure.
- 7 By letter dated 9 November 1993, the applicant informed the Court that he did not wish to present argument in the oral procedure. At the hearing in open court on 24 November 1993 only the Commission presented oral argument and replied to oral questions put by the Court. In addition, at the request of the Court, the Commission produced an unused sample of the material issued to the candidates at the examination in issue, and also all the sheets of the original of the applicant's paper on which his name appeared, in order to enable the Court to check the precise circumstances which might have made this possible.

### **Forms of order sought**

- 8 The applicant claims that the Court should:

- annul the decision at issue so that his paper may still be declared valid and may be corrected;
- order the defendant to pay the costs.

9 The Commission contends that the Court should:

- declare the present action inadmissible or dismiss it as unfounded;
- make an appropriate order as to costs.

### Pleas in law and arguments of the parties

#### *Arguments of the parties*

10 The Commission submits that the applicant cannot rely on a procedural irregularity which occurred before the contested decision, if he does not show that he would be in a more favourable position if that irregularity had not taken place (judgments of the Court of Justice in Case 115/73 *Serio v Commission* [1974] ECR 341, in Case 9/76 *Morello v Commission* [1976] ECR 1415 and in Case 124/75 *Perinciolo v Council* [1976] ECR 1953). As it is, according to the Commission, the applicant would gain nothing from annulment of the contested decision since, not having obtained the minimum mark required in the test in which his paper was nullified, he would not in any event be admitted to the next test in competition COM/A/720 (the oral test). The Commission thus concludes that the applicant has not established any interest in contesting the legality of the decision by which his paper was annulled.

11 On the substance of the case, the Commission notes that the applicant, having obviously used two sets of self-copying paper one on top of the other, wrote his name on the sheet intended for that purpose and did not then take the trouble to examine the other copies to detect the irregularity, notwithstanding the fact that the instructions, which were clear and unambiguous and which were distributed to the candidates in the competition in question, contained a warning to them and a reminder of the consequences attaching to any irregularity. According to the Commission, the appearance of a candidate's name, whether involuntary or not, compromises, *ipso facto*, the impartiality of the Selection Board and the therefore equal treatment of candidates. The applicant is therefore entirely responsible for the mistake which occurred in this case, and, as a result, the nullification of the paper is a measure justified in the general interest, which the rule of anonymity is intended to protect.

- 12 Furthermore, according to the Commission, the applicant does not specify, even briefly, which of the grounds referred to in Article 173 of the EEC Treaty forms the basis of his action, thereby disregarding Article 19 of the Protocol on the Statute of the Court of Justice of the EEC, Article 44 of the Rules of Procedure of the Court of First Instance and the case-law of the Court of Justice (see Joined Cases 19/60, 21/60, 2/61 and 3/61 *Fives Lille Cail v High Authority* [1961] ECR 281, 588).
- 13 Finally the Commission considers that the allegations made against it by the applicant is not supported by the facts and that, if only for practical reasons, it cannot reasonably be demanded of it that it take measures to guarantee that none of the thousands of candidates sitting written examinations in the competitions it organizes infringes the rule of anonymity. It points out, however, that it has taken the necessary measures to keep breaches of the rule of anonymity to a strict minimum by distributing, at the beginning of each written examination, 'instructions to candidates' which have proved to be adequate to prevent thousands of other candidates from allowing their names to appear on their papers.
- 14 The applicant insists on the contradictory nature of the position adopted by the Commission, which, on the one hand, asserts that he did not obtain a sufficiently high mark in the test in question and so refuses to accept that he has an interest in contesting the legality of the disputed decision, and, on the other hand, states that it decided not to mark the paper but to nullify it. The applicant further maintains that he has an interest in having his application to the Court examined on its merits, if only with respect to the question of costs. He states, in that respect, that under the administrative case-law of the Member States and, in any event, that of the Netherlands, he would have an interest in bringing proceedings. Finally, he stresses that it is not impossible that the Selection Board may later adjust its criteria and admit other candidates to the following test, as it has already done in the same competition, as is clear from the Commission's letter to the applicant of 15 May 1992.
- 15 As regards the substance of the case, the applicant states that he put his name on the paper in question unwittingly. That this happened was due to the use of the self-copying paper issued to the candidates by the Commission, the result being that when he wrote his name in the place prescribed for the purpose it was also reproduced at another, inappropriate, place on his paper. The Commission was responsible for this because the warning given to the candidates on the day of the examination was unclear as regards the problems which could arise from using the

forms distributed. The applicant thus maintains that although, before the examination began, he read the instructions, drawing the candidates' attention to the fact that if a candidate's name appeared in a place not prescribed for the purpose his paper would be nullified, that information was wholly inadequate. He stresses, in that respect, that the candidates had not been warned that even the last page of each triple set — the page which he believes was the cause of the mistake — was self-copying and that they had therefore check their papers at the end of the test to see that their names had not appeared on them by accident.

- 16 The applicant claims, furthermore, that the Commission's attitude may be described as inadequate, because the Commission did not act with sufficient vigilance *vis-à-vis* the candidates regarding the application of its own rules, that is to say, it did not adequately ensure that the candidates would not involuntarily infringe the rule of anonymity. The Commission thereby infringed legal principles generally recognized in the Member States, particularly the principle of sollicitude, which is recognized in administrative law and which must be observed, as the Court has repeatedly held.

### *Findings of the Court*

- 17 The Court considers it appropriate to examine the substance of the case before ruling, if need be, on the question of admissibility.
- 18 The Court finds, firstly, that each set of writing paper issued to the candidates at the examination in question consisted of three sheets, one white, one pink and one yellow, and that only the first two sheets, the white and the pink, were self-copying, whereas the last sheet of each set, which was yellow, was not. Consequently, the applicant's statement that even the last sheet of the sets distributed to the candidates was self-copying does not reflect the facts and his complaint that the Commission should have warned the candidates on this point is unfounded.

19 Secondly, the Court finds that the applicant's name was correctly entered in the space provided for the purpose at the foot of the yellow sheet, which was longer than the other two sheets of the first triple set used by him, which corresponded to page 1 of his paper. His name also appeared on the pink and yellow sheets of the second triple set used by him which corresponded to page 2 of his paper. From these it must be concluded that when the applicant wrote his name at the foot of the yellow sheet of the first set, he must have put one set on top of the other, in such a way that, due to the pressure of his writing, his name was reproduced, in a carbon copy, on the pink and yellow sheets of the second set, but not on the first, white, sheet, as the last page of each set was not self-copying.

20 Finally the Court considers that the Commission's warning to the candidates against using more than one set of sheets at a time was sufficient for any normally attentive and diligent candidate. Consequently the applicant, who, in order to write, had put on top of one another two triple sets, corresponding to the first and second pages of his paper, failed to heed that warning and must be held entirely responsible for the fact that his name appeared in an unauthorized place on his paper, in contravention of the rule of anonymity to which the examination was subject in accordance with the instructions given to the candidates in competitions held by the Community institutions (see Case T-27/92 *Camera-Lampitelli v Commission* [1993] ECR II-873, paragraph 59 et seq.).

21 It follows that the application must be dismissed as unfounded, without there being any need to examine the plea of inadmissibility raised by the Commission.

## Costs

22 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs, if they have been applied for in the successful party's pleadings. However, Article 88 of those Rules provides that in proceedings brought by servants of the European Communities the institutions are to bear their own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

1. Dismisses the application;
2. Orders the parties to bear their own costs.

Kalogeropoulos

Schintgen

Lenaerts

Delivered in open court in Luxembourg on 16 December 1993.

H. Jung

A. Kalogeropoulos

Registrar

President