

JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber)
16 October 1990*

In Case T-132/89,

Vincenzo Gallone, an official of the Council of the European Communities, residing at Brussels, represented by Georges Vandersanden, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Alex Schmitt, 62 avenue Guillaume,

applicant,

v

Council of the European Communities, represented by Gijs Peeters, a member of its Legal Department, acting as Agent, with an address for service in Luxembourg at the office of Jörg Käser, Manager of the Legal Directorate of the European Investment Bank, 100 boulevard Konrad-Adenauer,

defendant,

APPLICATION for the annulment of the steps taken in Open Competition Council/A/281 (Administrators (analysts-computer specialists)) or, at the very least, the decision of the selection board not to admit the applicant to the oral tests in the aforesaid competition,

* 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: H. Jung

having regard to the written procedure and further to the hearing on 12 July 1990,
gives the following

Judgment

Facts of the case

- 1 The applicant, Vincenzo Gallone, is a category B official in the 'New Technologies' Division of the Council. He presented himself as a candidate in Open Competition Council/A/281 (Administrators (analysts-computer specialists)) the notification for which had been published on 31 May 1988 (Official Journal C 142, p. 8) and which had as its object the constitution of a reserve list for recruitment of category A administrators dealing with tasks involving computer analysis.
- 2 Point II of the Notification of Competition described the 'Nature of Work' in the following terms:

'The official job description is as follows: planning, research and supervision on the basis of general directives, or assisting the official responsible for a sector of a division's activities.

In practice, work as an analyst-programmer will consist of drawing up systems specifications and supervising the programming and follow-up of applications in the areas of computerization of administrative tasks and/or office automation using medium-sized configurations in transaction processing and/or in batch processing mode.'

3 Point IV of the Notification described the 'Nature and Marking of Tests' under three headings entitled: 'IV (a) Written tests', 'IV (b) Admission to the oral tests' and 'IV (c) Oral tests'. Heading IV (a) indicated that there would be three written tests and specified that 'each test is eliminatory'.

4 The nature of the three written tests (referred to below as 'written test 1', '2' or '3') was stated as follows:

'1. Test in the official language of the Communities of which the candidate has a thorough knowledge, consisting of a theoretical part dealing with decision-making methods and techniques (statistics, operational research and econometrics) and a practical part (case study), possibly in the form of a questionnaire, to assess the candidate's professional knowledge in the field of analysis of a problem with a view to producing a full program.

2. Test in the same language on a subject related to the work described in II above, to assess the candidate's professional knowledge.

3. Short essay on a general topic in a different official language of the Communities of the candidate's choice, to assess the candidate's drafting ability in a second language.'

5 Finally, under Point IV (b), 'Admission to the oral tests', it was stated:

'To be admitted to the oral tests, candidates must obtain at least 24 out of 40 in written test No 1, 18 out of 30 in written test No 2 and 12 out of 20 in written test No 3.'

6 The applicant's qualifications were accepted as sufficient. He was admitted to the written tests by the selection board and presented himself for them on 16 March 1989. According to the report of 6 July 1989 of the selection board to the appointing authority, those tests took place in Athens, Brussels, Florence and Madrid and 336 candidates participated in them.

- 7 The marking of the candidates' papers took place in accordance with the following procedure. It began with the papers in the language test (written test 3) and resulted in the elimination of two-thirds of the candidates, leaving only about 100 remaining. For tests 1 and 2, the papers were provisionally divided into two groups. The papers in the English, French and Dutch languages were marked in their original version and the candidates who obtained the required number of marks were admitted to the oral tests on 19, 20 and 21 June 1989.
- 8 In the case of the papers written in Italian, as was the applicant's paper, the first part of written test 1 was marked in its original version. The second part of that test, as well as test 2, were translated before being marked. At the conclusion of the marking of the written tests, 28 candidates were admitted to the oral tests, which took place on 5 and 6 July 1989.
- 9 At the beginning of May 1989 the applicant, who was the person in charge, at the Council, of the project on word-processing, was consulted about the typing of the tests in the same competition. On that occasion he was able to view on the screen certain papers of the Italian candidates, including his own.
- 10 On 28 June 1989 the applicant was informed by a letter from the Council's recruitment department that, having regard to the results of the written tests, the selection board had not admitted him to the oral tests.
- 11 On the same day the applicant addressed a letter to the Chairman of the selection board drawing his attention to 'various irregularities in the marking' of the written tests. In a note dated 29 June 1989, the Chairman of the selection board assured him that the rules on confidentiality and non-discrimination between candidates had been scrupulously observed and invited him to state more precisely the reasons for his opinion.

Procedure

- 12 It was in those circumstances that, by application lodged at the Registry of the Court of Justice on 22 August 1989, Mr Gallone brought the present action against the Council, registered under serial number 264/89.

- 13 Before the written procedure was completed, the Court of Justice (Third Chamber), by order of 15 November 1989 made pursuant to the first paragraph of Article 3 of the Council Decision of 24 October 1988 establishing a Court of First Instance of the European Communities, referred Case 264/89 to the Court of First Instance, where it was registered under serial number T-132/89. The written procedure thereafter took place before the Court of First Instance.
- 14 After hearing the report of the Judge-Rapporteur, the Court of First Instance (Fourth Chamber) decided to open the oral procedure without a preparatory inquiry.
- 15 The hearing took place on 12 July 1990. The parties' representatives presented oral argument and replied to questions put by the Court.
- 16 The applicant claims that the Court should:
- (i) declare the application admissible and well founded;
 - (ii) order, if necessary, the appointment of an expert for the purpose of determining the suitability of the tests, as they had taken place, in the light of the requirements stated in the Notification of Open Competition and their relevance for the purpose of assessing the skills of an analyst-computer specialist;
 - (iii) annul the steps taken in Open Competition Council/A/281 (88/C 142/09) or, at the very least, the decision of the selection board in the aforesaid competition not to admit the applicant to the oral tests;
 - (iv) order the defendant to pay all the costs.
- 17 The Council contends that the Court should:
- (i) dismiss the application;

(ii) order the applicant to pay all the costs.

Substance of the case

18 In support of his conclusions, the applicant relies on three pleas in law alleging respectively a breach of the principles of good management and sound administration, a breach of the principle of non-discrimination and a breach of the requirements of the Notification of Competition. The Court finds it convenient to consider those pleas in reverse order.

The plea alleging a breach of the requirements of the Notification of Competition

19 This plea is in two parts. In the first place, the applicant claims that the requirements of the Notification of Competition did not correspond to the profile of the posts to be filled, namely the recruitment of analysts-computer specialists. The Council replies that, if the applicant had wished to challenge the Notification of Competition, he should have contested the decision of the appointing authority which drew it up.

20 It is true that, according to the case-law of the Court of Justice (judgments in Case 294/84 *Adams v Commission* [1986] ECR 977; Joined Cases 64/86, 71/86 to 73/86 and 78/86 *Sergio and Others v Commission* [1988] ECR 1399; Case 181/87 *Agazzi Léonard v Commission* [1988] ECR 3823), an official may not in support of proceedings brought against a decision of a selection board for a competition, put forward submissions 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. Such cannot be the case however when an official pleads irregularities the origin of which may be found in the wording of the notice of competition, but which only occurred in the course of the competition.

21 In the present case it is sufficient to observe that the alleged irregularity pleaded by the applicant did not occur while the competition was being conducted. The first part of this plea in law must therefore be rejected.

- 22 In the second place, the applicant claims that the tests themselves bore no relation either to the description of the tests (Point IV of the Notification of Competition) or to the profile of the posts to be filled (Point II of the said Notification).
- 23 In support of his arguments the applicant provides some examples of the alleged disparity. He claims
- (i) that there was no question on analysis, contrary to Point IV (a) 1 of the Notification;
 - (ii) that the questions on statistics, operational research and econometrics were exclusively of a practical nature, contrary to Point IV (a) 1 of the Notification;
 - (iii) that there were questions on programming, although the competition was not one for programmers, as Point II of the Notification made clear.
- 24 Furthermore, according to the applicant, the questions were ill adapted to the subject of the competition and were too strongly influenced by the examiner/expert appointed by the selection board. The applicant requests the Court to appoint, if necessary, an expert for the purposes of determining whether the questions asked in the written tests were in conformity not only with the Notification of Competition but also with the criteria for assessing the capacities of an analyst-computer specialist.
- 25 In response to those arguments the Council states that the competition in question was the first competition designed for the recruitment of computer specialists of university level. Whilst acknowledging the personal interest of a candidate in not finding himself faced with tests which do not correspond to what is provided in the Notification of Competition, the Council disputes that there was a manifest fault in this respect on the part of the Council. As regards the examples offered by the applicant, the Council maintains that the first question in the second part of written test 1 fell uncontestedly within the field of analysis; that knowledge of a theory can be verified either by questions bearing on that theory or by questions relating to its application; and that a test designed to ascertain the knowledge of an analyst-computer specialist may very well contain more than just questions relating to analysis.

- 26 As regards the allegedly excessive influence of the examiner, the Council replies that the competence of the selection board was ensured by the presence, on the selection board itself, of a computer expert and by the assistance of an examiner. Furthermore, recruitment of category A officials to the General Secretariat of the Council should be undertaken on the basis of considerations much wider than that of technical expertise.
- 27 In this connection, it should be borne in mind at the outset that the essential function of a notice of competition is to give those interested the most accurate information possible about the conditions of eligibility for the post in question so as to enable them to judge whether they should apply for it. The appointing authority enjoys a wide discretion in deciding upon the criteria of ability 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 organized. The selection board has considerable discretion as regards the arrangements for and the detailed content of the tests provided for within the framework of a competition. The Court may not review the arrangements for the conduct of a test except to the extent necessary to ensure that the candidates were treated equally and that the choice made from among them by the selection board was objective. It is likewise not for the Court to review the detailed content of a test, unless that content is not confined within the limits laid down in the Notification of Competition or is not consonant with the purposes of the test or of the competition (see the judgments of the Court of Justice in Case 90/74 *Deboeck v Commission* [1975] ECR 1123; Case 255/78 *Anselme v Commission* [1979] ECR 2323; Case 268/80 *Guglielmi v Parliament* [1981] ECR 2295; Case 67/81 *Ruske v Commission* [1982] ECR 661; Case 144/82 *Detti v Court of Justice* [1983] ECR 2421; Case 39/83 *Fabius v Commission* [1984] ECR 627; Case 40/86 *Kolivas v Commission* [1987] ECR 2643; Joined Cases 64/86, 71/86 to 73/86 and 78/86 *Sergio and Others*, cited above; and Case 228/86 *Goossens v Commission* [1988] ECR 1819).
- 28 As regards the role and influence of the examiner, it is established that selection boards may have recourse to the assistance of examiners whenever they consider this necessary. There is no irregularity if the methods of marking do not differ from one candidate to another and the selection board retains the power to make the final assessment (see the judgments of the Court of Justice in Case 90/74 *Deboeck*, cited above; Case 122/77 *Agneessens v Commission* [1978] ECR 2085; and Case 40/86 *Kolivas*, cited above).

29 In the light of that set of considerations, it must be held that the complaints formulated by the applicant fail to show that the proceedings in the competition in question were conducted in disregard of the limits imposed by the Staff Regulations and case-law on the discretion of the selection board. The second part of the plea must therefore be rejected.

Breach of the principle of non-discrimination

30 In support of this plea the applicant formulates in substance two grounds of complaint. In the first place he argues that the fact that, when they were marked, the test papers were treated in a different manner according to the language of the candidate, was discriminatory,

(i) on the one hand, because there was no guarantee that the translations submitted to the selection board corresponded to the original papers and,

(ii) on the other hand, because the time-lag recorded at the time of the marking of the written tests and the conduct of the oral tests, which took place in two stages, namely from 19 to 21 June and from 5 to 6 July 1989, could allow candidates in the second group to benefit from the experiences of the first.

31 In the second place, the applicant claims that his paper in written test 2, which he saw on the screen, was just as meritorious as those which were handed in by other candidates of Italian mother tongue, admitted to the oral tests, and which he was also able to view on the screen.

32 The Council replies to the first argument that, in so far as the papers comprised mathematical formulae or computer diagrams, the members of the selection board and the examiners had at their disposal not only a translation of the document but a photocopy of the original. In the other cases, they always had the possibility, in case of doubt, of referring to the photocopies of the original documents which were at their disposal.

33 As regards the second argument, the Council explains that the necessary procedure for marking the papers in the different languages gave rise to a lapse of time

between the marking of the tests by the expert and their assessment by the selection board. The results of the written tests were communicated by the selection board to the administration as soon as they were available, that is to say, on 29 May 1989 for the first group and on 26 June 1989 for the second group. Thus the candidates in the first group could be called to the oral test earlier than those in the second group. In any event, a selection board has never been in a position to examine all the candidates in a single day. According to the Council there is nothing to indicate that the lapse of time to which objection is taken resulted in the papers being marked in a different or discriminatory manner or that the candidates in the second group, which included the applicant, were privileged.

34 As regards the third argument, the Council replies that, according to the applicant, the papers which he viewed on the screen were those in written test 2. In the applicant's case, his paper in that test had not been marked by the selection board because the insufficient marks he had obtained in written test 1 had already resulted in his elimination from the competition, each test being eliminatory. In any event, the number of marks obtained by the other candidates of Italian mother tongue were comparable with the average marks for the whole of the candidates in the first round.

35 Although the principle of equality constitutes a fundamental principle in the conduct of a competition (judgment of the Court of Justice in Case 130/75 *Prais v Council* [1976] ECR 1589), it is none the less evident that a competition for recruitment open to candidates from all the Member States, such as the present competition, cannot proceed in conformity with that same principle unless the members of the selection board and the examiners who do not know the language of certain candidates have at their disposal a translation of their papers. The mere fact that certain of the candidates' papers are translated before being marked does not in itself imply discrimination between candidates. In the case in question, the applicant has not shown that the translation of the papers caused the candidates of Italian mother tongue, still less himself, any particular harm. The first argument must therefore be rejected.

36 As regards the argument concerning the interval between the dates of the oral tests, it must be pointed out that, although the principle of equality requires that the written tests be conducted on the same date for all candidates (judgment in *Prais*, cited above), such a condition cannot be imposed in the case of the oral tests which, by their very nature cannot take place at the same time for all candidates and the content of which, moreover is not necessarily the same for all the candidates. In the present case it does not appear that the time-lag which occurred

on the occasion of the marking of the written tests and the conduct of the oral tests was excessive. Furthermore, according to the argument put forward by the applicant, it was the candidates whose mother tongue was not English, French or Dutch, a category that included the applicant himself, who were privileged in so far as they could have benefited from the experience of the other candidates. Finally, since the applicant was eliminated at the stage of the written tests, he does not have an interest in invoking this argument, which must therefore be rejected.

37 As regards the applicant's argument to the effect that his answers in written test 2 were not less meritorious than those of other candidates which he was able to view on the screen, it is sufficient to observe that the applicant, having been eliminated from the written tests on account of his inadequate results in written test 1, cannot establish an interest in invoking that argument.

38 For all those reasons, the second plea cannot be upheld.

Breach of the principles of good management and sound administration

39 The applicant alleges that the Council did not take any steps, in the internal arrangements for the typing and correction of the tests, to prevent an internal candidate who had access to the word-processing system from being able to acquaint himself with the papers of other candidates, to compare them with his own and to alter his own answers or those of the other candidates. That absence of precautions, in particular the lack of confidentiality, impaired in a fundamental manner the objectivity of the proceedings in the competition, thereby rendering the competition absolutely void.

40 At the hearing the Council acknowledged that there had been problems in the marking of the written tests in the competition, the first one organized by the Council with a view to recruiting computer specialists of university level. However, the Council affirms that the candidates' papers were reread and compared at each stage, that they were treated in such a way as to ensure the absolute anonymity of their authors and that, in consequence, the latter were in a position to identify only themselves. Moreover, the applicant's conduct constituted a breach, in its own right, of Article 14 of the Staff Regulations, which requires an official called upon to decide on a matter in the handling of which he has a personal interest to inform the appointing authority. In any event, since the applicant failed written test 1,

which was marked without translation, and since that test was eliminatory, he would have had to be eliminated, regardless of the manner in which written test 2 was marked.

- 41 It should, however, be noted that the Council has annexed to its defence two reports by the selection board, one of which, the supplementary report of 26 October 1989, mentions the 'acute concern' of the selection board as regards the confidentiality of its work and requests the appointing authority to open an inquiry into the circumstances which gave rise to proceedings in this case and to take all appropriate measures for remedying the omissions or failings observed. The applicant relies on those matters in his reply.
- 42 The Court can only deplore the fact that the applicant, an internal candidate in an external open competition, was in a position to have access to his own paper following a written test and, even more so, to the papers of other candidates. However, for his application to succeed, the applicant would have to prove specific harm to his interests or else establish an objective interest in the annulment of all the proceedings of the competition — or, at the very least, of the written and oral tests in their entirety — by reason of a serious and manifest breach of the principles of good management and sound administration adversely affecting the rights of all the candidates.
- 43 As has been pointed out above, the applicant was eliminated from the written tests because his results in test 1 were inadequate. It does not seem that the papers in that test were accessible to an internal candidate, and the applicant has not in any way established that the answers on his paper had been interfered with in any manner whatever subsequent to the conduct of the said test. It follows that he cannot establish that his interests were harmed.
- 44 As regards the alleged objective interest in annulling the competition, it should be noted that the applicant, the only person aware of the possibility for an internal candidate to interfere with the papers, did not think it useful, nor even a matter of urgency, to draw the attention of his superiors to that possibility. Since he failed to react at the appropriate time, it ill becomes him now to seek the annulment of all the proceedings in the competition to the detriment of the successful candidates. In those circumstances the Court, while deploring what happened, does not consider

that there was any breach of the principle of good management of a sufficiently serious nature to entail the annulment of the competition. This plea must therefore also be rejected.

- 45 It follows from all the foregoing considerations that the application must be dismissed.

Costs

- 46 Under Article 69(2) of the Rules of Procedure of the Court of Justice, applicable *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, referred to above, the unsuccessful party is to be ordered to pay the costs if they have been asked for in the successful party's pleading. However, Article 70 of those Rules provided that institutions are to bear their own costs in proceedings brought by servants of the Communities.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber)

hereby

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

Edward

Schintgen

García-Valdecasas

Delivered in open court in Luxembourg on 16 October 1990.

H. Jung
Registrar

R. Schintgen
President