

CONSEIL DE L'EUROPE ——— ————— COUNCIL OF EUROPE

COMMISSION DE RECOURS APPEALS BOARD

Appeal No. 172/1993

(FERIOZZI-KLEIJSEN v. Secretary General)

The Appeals Board, composed of:

Mr Nicolas VALTICOS, Substitute Chairman,
Mr Kåre HAUGE and
Mr Alan H. GREY, members,

assisted by

Mr Christos GIAKOUMOPOULOS, acting Secretary, and
Mrs Claudia WESTERDIEK, Deputy Secretary,

has delivered the following decision after due deliberation.

PROCEEDINGS

1. The appeal was lodged on 13 October 1993 and registered on 14 October 1993 under No. 172/1993.
2. On the same date, the appellant applied for a stay of execution “in respect of all measures connected with the contested competition”.
3. On 18 October 1993, the Staff Committee applied to be allowed to intervene under Article 10 para. 1 of the Statute of the Appeals Board, as amended by Committee of Ministers Resolution (92) 32.
4. By order of 26 October 1993, the Substitute Chairman of the Appeals Board accepted the appellant's application and granted a stay of execution in so far as the continuation of the recruitment procedure subsequent to the examinations sat from 25 to 28 October by the selected candidates was concerned.
5. Furthermore, by order of 25 November 1993, the Substitute Chairman allowed the Staff Committee to intervene.
6. On 17 December 1993, the Secretary General submitted her observations.

7. The Staff Committee submitted written observations in support of the appellant's conclusions on 17 January 1994.

8. On 28 January 1994, the public hearing took place at the Council of Europe in the presence of the appellant's representative, Ms L. GENTIT, and Mr E. HARREMOES, Director of Legal Affairs, representing the Secretary General, assisted by Mr H. WENDELBO, Head of Human Resources Division, and Mr R. LAMPONI, Principal Administrative Officer in the Directorate of Legal Affairs.

9. On 3 March 1994, the Secretary General provided the Appeals Board with certain information and documents requested from her at the hearing.

THE FACTS

10. The appellant, who is an Italian national, started work at the Council of Europe on 16 October 1989. She is a temporary member of staff grade B5 in the European Commission of Human Rights.

11. The appellant was allowed to sit the general competitive examination held to recruit Italian nationals for administrative officer posts at the Council of Europe in accordance with Vacancy Notices Nos. 112 and 122/92.

12. On 19 April 1993, the written papers of the above-mentioned examination were held in four examination centres, in Brussels, Paris, Rome and Strasbourg. The appellant sat the examination at the Rome centre, where the examination took place as planned and as stated in the letter which the Head of Recruitment and Training in Personnel Division had sent to the appellant inviting her to sit the examination. In particular, from 9.00 to 10.15 a.m. the candidates were required to sit eliminatory verbal reasoning and numerical reasoning tests (aptitude tests); these were followed, from 10.20 a.m. to 12.20 p.m., by a summary paper and, in the afternoon, by an essay paper.

13. On 22 April 1993, the appellant was informed that the candidates who had sat the examination at the Brussels, Paris and Strasbourg centres had not had to sit the aptitude tests and had sat only the summary and essay papers.

14. This is not contested by the Secretary General, who specifies that:

The aptitude tests sat by the candidates at the Rome examination centre were eliminatory, in that candidates who failed these tests were to be eliminated immediately, without their written papers being corrected. Only candidates who passed both the aptitude tests and the written papers were to be invited to the oral examination.

The organisation of aptitude tests is entrusted to a private company specialised in such tests, and entails the presence of a consultant responsible for explaining to the candidates the purpose of the tests and the manner in which they are to take place. In the case in question, it was considered that it would be too expensive and complicated to call in, simultaneously, an Italian-speaking consultant for each of the four examination centres. Personnel Division therefore decided that only the candidates at the Rome examination centre would sit the aptitude tests. In the case of the candidates at the Brussels, Paris and Strasbourg centres, only those who passed the written papers would sit the eliminatory aptitude tests, in Strasbourg, before the orals.

The pass mark for the aptitude tests was set with reference to a "percentile", i.e. the percentage of candidates obtaining results below a given figure. The "percentiles" chosen for the examination in question were 50 for the verbal test and 30 for the numerical test. This implied that

candidates in the lower 50% in the verbal test or in the lowest 30% in the numerical test would be eliminated. The pass mark is based on a sample of at least 100 people.

15. The appellant did not pass the aptitude tests in Rome and was therefore eliminated from the competitive examination without her other written papers being corrected.

16. On 16 June 1993, she lodged an administrative complaint on the ground that there had been irregularities in the competitive examination procedure. She requested that the examination be invalidated. This complaint was dismissed on 17 August 1993.

17. The candidates who had sat the examination in Brussels, Paris and Strasbourg and had passed the written papers were invited to Strasbourg from 25 to 28 October 1993 to sit the aptitude tests. These tests were eliminatory, in that candidates who failed were not admitted to the oral examination, irrespective of their results in the written papers.

THE LAW

18. In her appeal, as in her administrative complaint of 16 June 1993, the appellant requests that the written examination held on 16 April 1993 be invalidated on the grounds that the examination procedure led to unequal treatment of the candidates and was therefore irregular.

19. The appellant considers that to require only some of the candidates to sit eliminatory aptitude tests is discriminatory and therefore contrary to the principle of equity and equality of opportunity. As a candidate at the Rome examination centre, she had to start the examination with particularly difficult and complicated tests requiring great concentration, even before embarking on the summary and essay, which was not the case for the candidates at the other centres. According to the appellant, the inequality is obvious, given that some of the candidates - those from the Brussels, Paris and Strasbourg centres - invited to Strasbourg for the rest of the procedure were selected solely on the basis of the essay and summary while others - those from the Rome centre - were selected on the basis of both the above-mentioned papers and the aptitude tests. The appellant has doubts, moreover, as to whether the aptitude tests sat in Strasbourg by the candidates from the Brussels, Paris and Strasbourg centres who had passed the written papers were applied as rigorously. Lastly, the appellant contends that the candidates invited to sit the aptitude tests in Strasbourg in October 1993 had the advantage of being able to prepare solely for these tests, in the knowledge that they had already passed the other papers.

20. The Staff Committee observes that the difference in the treatment of candidates stems from the fact that, on the one hand, the total duration of the tests was longer in the case of the candidates at the Rome centre and, on the other, that the candidates at the Brussels, Rome and Strasbourg centres had more time to prepare for the aptitude tests. It also points out that the irregularity in the recruitment procedure in the present case stems from the fact that candidates were selected for the next stage of the competitive examination on the basis of different criteria. In the case of the Rome centre candidates, the selection was based on aptitude tests, in that only those who had passed the tests were considered for selection on the basis of the summary and essay papers, whereas in the case of the candidates at the other three centres, the opposite procedure applied: only the candidates who had passed the written summary and essay papers were allowed, six months later, to sit the aptitude tests. The Staff Committee points out that the aptitude tests and the written papers are on no account interchangeable.

21. The Secretary General observes that the organisation of the competitive examination and the procedure followed, as described above, could not have been detrimental to the appellant, who knew that the aptitude tests which she had sat would be eliminatory. As these tests took place correctly in Rome and as the appellant failed them, she cannot take advantage of an alleged

irregularity in the examination procedure at the other centres. Her allegation that the candidates were in different psychological states and suffered different degrees of tiredness is not backed up by evidence; indeed, the statistics for the results of the aptitude tests at the four centres tend to prove the contrary. In this connection the Secretary General points out that, of the 274 candidates at the Rome centre, 148 passed the aptitude tests (54%), whereas of the 20 candidates at the other centres, who sat the tests six months later, only 8 passed (40%). The Secretary General concludes that the appellant has no direct and existing interest that the Appeals Board investigates the examination arrangements at the various examination centres, since her results in the aptitude tests could not have been affected by the way in which the examination was organised in Brussels, Paris or Strasbourg.

22. The Secretary General further points out that the decision to set up four examination centres was taken in the candidates' interests, with a view in particular to ensuring that their travel expenses for their journeys to the centres at which the written examination were to be held were reasonable. As it would have been difficult to ensure that Italian-speaking consultants were present simultaneously on the same day at the four centres, the order of the papers was changed at the outset. The arrangements for the examination procedure were therefore decided on by the Secretary General, who exercised her discretion in the matter in the interests of the Organisation and all the candidates.

23. The Secretary General also contends that no rule was broken and that the examination procedure was not in breach of the principles of equity and equality of opportunity. The criterion for being allowed to sit the oral was, in the case of all the candidates, that they should have passed both the aptitude tests and the written papers. Irrespective of the order in which the candidates sat the tests and the written papers, the principle of equality was not, in the final analysis, undermined in any way.

24. Lastly, the Secretary General argues that the alleged irregularity is a purely technical one, which is not substantive and is not likely to be detrimental to the candidates. Accordingly, even assuming that an irregularity is found to have existed, it cannot be considered grounds for invalidating the examination papers in question.

25. Insofar as the Secretary General contests the appellant's entitlement to appeal, on the ground that she has no direct and existing interest in doing so, the Board has the following observation:

Under Article 59 para. 1, first sentence, of the Staff Regulations, "a staff member who has a direct and existing interest in doing so may submit to the Secretary General a complaint against an administrative act adversely affecting him". Furthermore, paragraph 6(d) of that Article provides that the complaints procedure shall be open, *mutatis mutandis*, "to candidates outside the Council who have been allowed to sit a competitive recruitment examination, provided the complaint relates to an irregularity in the examination procedure".

26. The Board notes that the appellant was allowed to sit competitive recruitment examination papers and that her complaint relates to an alleged irregularity in the examination procedure in question, within the meaning of the above-mentioned provision. In this respect, her entitlement to lodge a complaint is not open to dispute.

27. It is clear from Article 59 para. 1 of the Staff Regulations that the appellant can complain only of acts which adversely affected her own legal status: her appeal cannot concern an act which affected the position of the other candidates. There is, however, no reason why the appellant should not refer to the situation of the other candidates as evidence of the irregularity about which she wishes to complain. Insofar as it concerns the decision to eliminate the appellant from the competitive examination, the appeal relates to "an administrative act adversely affecting" her, within the meaning of Article 59 para. 1 of the Staff Regulations. Moreover, the appellant's direct

and existing interest in having the decision in question set aside is obvious, in the Board's view. The Secretary General's argument that the decision was not really detrimental to the appellant in fact concerns the merits of the appeal and is not a reason for inadmissibility.

28. It follows that the appeal is admissible and that the merits must be considered.

29. In its case law the Board has pointed out that the Secretary General, who is invested with the authority to make appointments (Article 36 (c) of the Statute of the Council of Europe and Article 11 of the Staff Regulations) and is primarily responsible for the organisation of the Secretariat, is best placed to know and assess the needs of the Organisation and to strike a fair balance between the various criteria that serve as a basis for choices (ABCE, No. 170/92, Müller-Rappard v. Secretary General, decision of 25 September 1992, paragraph 16). The Secretary General is therefore empowered, in matters of recruitment, to decide *inter alia* on the arrangements for the examination. These powers must however be exercised with due respect for the rule of law and in accordance with the regulations in force and the general principles of law.

30. Article 12 para. 3 of the Staff Regulations provides that "vacancies in Category A representing the start of a career shall ... be filled by recruitment from outside the Council or by transfer". Under paragraph 1 of this Article, "recruitment should be aimed at ensuring the employment of staff of the highest ability, efficiency and integrity". Moreover, under Article 15 of the Regulations on Appointments, "a competitive examination shall be held when posts in the starting grades of categories A, L and B are to be filled by recruitment".

31. The Board believes that the above-mentioned provisions show the importance of recruitment by competitive examination, not only for the subsequent careers of staff members (cf. CJEC, Detti judgment of 14 July 1983, Volume 1983, pp 2422 et seq), but also for the organisation. The competitive examination procedure should be such as to ensure that the candidates who are really the most capable are appointed. In other words, at all stages of the competitive examination, whether it is being organised or held or the papers are being marked, all candidates must be treated on an equal footing and completely impartially (ILOAT, Judgment No. 107, 9 May 1967; ILOAT, Judgment No. 202, 14 May 1973; CJEC, No. 130/75, Prais v. Council judgment of 27 October 1976, Volume 1976, p. 1599).

32. As the principle of equality cannot be separated from the very concept of a competitive examination, candidates in such an examination are entitled to expect that papers held simultaneously in different places will be identical and will be held under similar conditions (cf., mutatis mutandis, CJEC, above-mentioned Detti judgment).

33. In the present case, the appellant contends that there was an irregularity in the competitive examination procedure, insofar as she herself - and the other candidates at the Rome examination centre - sat different papers from the candidates at the Brussels, Paris and Strasbourg centres. The Staff Committee supports the appellant's argument and contends that the candidates allowed to sit the next stage of the competitive examination were selected on the basis of different criteria.

34. The Secretary General denies the allegations of the appellant and the Staff Committee, arguing that the candidates were treated equally despite the difference in the order in which they sat the tests.

35. The Board notes that the appellant was eliminated from the competitive examination because she failed the aptitude tests which all candidates at the Rome centre sat on 19 April 1993. In order to consider whether the principle of equality of treatment was observed in the examination in question, the Board must look at the situation on the candidates at the other centres.

36 It notes that the candidates at the Brussels, Paris and Strasbourg centres did not have to sit

the aptitude tests on 16 April 1993. Some of them were eliminated from the competitive examination on the basis of their results in the summary and essay papers, while those who passed these papers had to sit the aptitude tests six months later, in October 1993.

37. Given the importance of observing the principle of equality in the competitive examination procedure, this difference in treatment cannot be justified on the financial grounds put forward by the Secretary General. It is such as to cause the appellant to have legitimate doubts as to whether the recruitment procedure was properly conducted.

38. There was therefore an irregularity in the competitive examination procedure.

39. Furthermore, contrary to the Secretary General's secondary argument, the irregularity in question is not a purely technical one, but is a substantive one, likely to be detrimental to the appellant.

40. The difference in treatment is, indeed, likely to affect the appellant's situation. As the Secretary General says, the pass mark for the aptitude tests is set with reference to the percentage of candidates who obtain results below a given figure. If the aptitude tests of the candidates at the other centres had been taken into consideration, this would have affected the pass mark for the tests in question. Yet the aptitude tests of the candidates at the other centres could not be taken into consideration: some of the candidates never sat them, and the others sat them six months later.

41. In the circumstances, the difference in the order in which the examination took place could have affected the appellant's chances.

42. This is compounded by the fact that she had to sit the aptitude tests in the knowledge that she would also have to sit the written papers on the same day, whereas this was not the case for the candidates at the other centres.

43. Without speculating about the result of the competitive examination, the Board therefore considers that, given the difference in the conditions under which the competitive examination took place at the different examination centres, the appellant was at a disadvantage in comparison with the candidates at the Brussels, Paris and Strasbourg centres.

44. In her appeal the appellant requested that all the written papers in the competitive examination be invalidated. The Board can, however, take a decision only in respect of the case before it. In this particular case, the contested act which adversely affected the appellant is the decision to eliminate her from the competitive examination. Although it has ascertained that the conditions under which the competitive examination was organised were unfair, the Board does not consider itself competent to declare that other acts relating to the examination procedure should be invalidated (cf., mutatis mutandis, CJEC, C-242/90, P. Albani et al v. the Commission, judgment of 6 July 1993).

On these grounds, the Appeals Board:

Declares the appeal admissible;

Declares it founded;

Annuls the decision to eliminate the appellant from the competitive examination; and

Decides that the Council of Europe shall reimburse the costs of the appellant up to the sum of 5,000 FF.

Delivered in Strasbourg on 25 March 1994, the French text of the decision being authentic.

The acting Secretary of the
Appeals Board

The Substitute Chairman of the
Appeals Board

Christos GIAKOUMOPOULOS

Nicolas VALTICOS