OPINION OF ADVOCATE GENERAL JACOBS
delivered on 23 March 1995 *

1. In this case Mr Dimitrios Coussios appeals from a judgment given by the Court of First Instance in Joined Cases T-18/92 and T-68/92 *Dimitrios Coussios* v *Commission*. [1] The facts can be restated briefly as follows. On 10 April 1991 the Commission decided to create a new unit in Directorate General VII dealing with air safety, air traffic control and industrial policy, a unit which would carry the denomination 'C.3'. The Commission published vacancy notice COM/64/91 on 2 May 1991 concerning the post of head of this new unit and Mr Coussios applied for it on 5 May 1991, as did four other candidates. No one was appointed to the published post. On 16 June 1991 Mr Coussios was appointed deputy head of that unit. On 5 July 1991 the Commission invited the other institutions to inform their personnel of the vacancy notice COM/64/91. No candidate from another institution came forward. On 8 July 1991, the vacancy notice was republished and the qualifications required were different from those required according to the first publication of the notice. Mr Coussios reapplied for the published vacancy and three new candidates applied. On 8 October 1991 Mr Coussios lodged a complaint against the republication of the vacancy, which the Commission rejected on 28 January 1992. On 13 December 1991 the Advisory Committee on Appointments examined the eight applications received as a result of both the original publication of the vacancy notice of 2 May 1991 and the republication of 8 July 1991 and decided that none of the candidates could be considered for the post. On 10 January 1992, the Commission informed Mr Coussios that his application could not be considered. The Commission decided, on 13 February 1992, not to fill the vacant post by way of promotion or transfer and not to organize an internal competition but to hold an open competition. By note dated 14 April 1992 the Chairman of the Advisory Committee on Appointments notified Mr Coussios of the Commission's decision of 13 February. Mr Coussios lodged a complaint on 22 April 1992 against the decision of 13 February 1992. Since the Commission failed to reply to the complaint within four months, the complaint was deemed to have been rejected implicitly on 22 August 1992, in accordance with the second subparagraph of Article 90(2) of the Staff Regulations. On 28 September 1992 Mr Coussios received an express rejection of his complaint.

2. Mr Coussios lodged two applications before the Court of First Instance: by the first, in Case T-18/92, he sought the annulment of the decision of the Commission to republish vacancy notice COM/64/91; by

* Original language: English.

1 — [1994] ECR-SC I-A -47; reported in full at [1994] ECR-SC II-171.

the second, in Case T-68/92, he sought the annulment of the decision of 13 February 1992 not to fill the vacant post by way of promotion or transfer and not to organize an internal competition but to hold an open competition. In the second application, he also requested an award of ECU 100 000 in damages for the failure of the Commission to produce his staff report for 1987/89 in a timely fashion.

3. In its judgment, the Court of First Instance dismissed the first application in its entirety. In particular, the Court held that the decision to republish the post contained a sufficient statement of reasons. It stated that the context of the decision to republish the vacancy was such as to enable Mr Coussios to comprehend why the vacancy had been republished with a change in the qualifications required for the post in question. It also held that in seeking to challenge the way in which the Commission examined the applications both of the candidates who had applied for the post the first time and of those who had applied after the republication Mr Coussios in reality sought to challenge the decision of the Commission to reject his application, which decision was subsequent to the one whose annulment he was seeking.

4. As for the second application, the Court of First Instance rejected a number of complaints but held that Mr Coussios was entitled to be given reasons for the rejection of his complaint against the decision not to promote him to the vacant post. He had been given no such reasons by the date his application to the Court was lodged (i. e. 18 September 1992, 10 days before the Commission's express decision to reject his complaint). [2] The Court went on to hold that the decision not to organize an internal competition but to organize an open one was illegal because it was tainted by the illegality of the decision rejecting the application of Mr Coussios: the Court stated at paragraphs 102 and 103 of its judgment, relying on paragraph 10 of the judgment in *Küster* v *Parliament*, [3] that the rejection of applications for promotion or transfer under Article 29(1)(a) of the Staff Regulations is a necessary precondition for passing on to the subsequent stages of the procedure laid down in Article 29(1) since that provision establishes an order of priority as between the different stages for which it provides. However, instead of annulling the decision not to organize an internal competition but to hold an open competition, the Court of First Instance ordered the Commission to pay the applicant damages in the amount of ECU 2 000. The remainder of the application in Case T-68/92 was dismissed. In particular, the submission according to which the decision to reject the application of Mr Coussios was illegal because his staff reports were not prepared punctually enough for them to be considered by the Selection Board was rejected because the Court of First Instance found that their absence did not have a decisive effect on the outcome of the selection process. In conse-

2 — See paragraphs 69 to 77 of the judgment appealed against, II-187 to II-190.

3 — Case 123/75 [1976] ECR 1701.

quence, the Court of First Instance rejected the claim for damages under that head.

First submission: breach of the principle of proportionality

5. By his first submission, Mr Coussios alleges a breach of the principle of proportionality.

6. As already mentioned, although the Court of First Instance reached the conclusion that the illegality of the rejection of the applicant's candidature entailed, by way of consequence, the illegality of the decision not to organize an internal competition and the decision to hold an open competition, it refrained from annulling those decisions. It held that, by virtue of the principle of proportionality, it was necessary to reconcile the interests of the applicant, who had been the victim of an unlawful act, and the interests of third parties (including those of the candidate who was appointed to the post) and, for that reason, to take into account not only the need to restore the rights of the applicant but also the legitimate expectations of third parties. Accordingly, instead of annulling the decisions in question, it awarded Mr Coussios ECU 2 000 by way of 'compensation for the non-material damage caused to the applicant by the service-related fault [*faute de service*] of the Commission'. It referred in support of that result to the principles established by the case-law of this Court, in particular *Oberthür* [4] and *Albani*. [5]

7. Mr Coussios submits that the balancing of the respective interests carried out in that way by the Court of First Instance was manifestly erroneous. It gave full satisfaction to third parties in respect of their rights and legitimate expectations, while he received inadequate compensation for the illegality of which he was the victim. Full reparation, in his submission, would have consisted at the least in appointment to an equivalent post.

8. Before examining that submission, I should mention that I am not convinced that, as a matter of law, the illegality of the rejection of the candidature of Mr Coussios did entail the illegality of the subsequent decisions. If a person is unlawfully denied a reasoned decision, that can in some instances be remedied by giving him a reasoned decision. It does not necessarily entail invalidating all the procedures consequent upon the initial illegality. But it is unnecessary to pursue the

4 — Case 24/79 *Oberthür* v *Commission* [1980] ECR 1743.

5 — Case C-242/90 P *Commission* v *Albani* [1993] ECR I-3839.

point in the present case, since the Court of First Instance did not in fact annul the consequent decisions.

9. The submission of Mr Coussios that the balancing of interests carried out by the Court of First Instance was manifestly erroneous must, in my view, be rejected. The reasons can be stated very shortly. First, the Court of First Instance was plainly entitled to take the view that, in all the circumstances, it should not invalidate the entire appointment procedure because of the formal irregularity affecting Mr Coussios. That could well have been an excessive and disproportionate remedy. Secondly, the suggestion that Mr Coussios, if he could not be appointed to the post in question, had a right to be appointed to an equivalent post is manifestly unsupportable. As this Court held in the *Küster* case, already cited, the provisions of the Staff Regulations in question do not give officials, even if they fulfil the conditions for promotion, a personal right to promotion; moreover, as the Court also emphasized, the appointing authority has a wide discretion in the matter. [6] Thirdly, in so far as Mr Coussios can be taken to contest the amount of damages awarded to him, it must be recalled that the jurisdiction of this Court, in appeals from the Court of First Instance, is limited to points of law. An award of damages in a case of this kind necessarily reflects an assessment of the facts. In any event, this Court cannot in my view revise such an award or remit it to the Court of First Instance for reconsideration in the absence of any suggestion that the Court of First Instance has committed an error of law, and no specific error of such a kind is alleged in this case.

10. Mr Coussios has also made certain complaints about the timing of the proceedings before the Court of First Instance. In essence, he claims that judgment was delayed as a consequence of the reopening of the oral procedure and that that delay allowed the Commission to begin disciplinary proceedings against him and to appoint another person to the post in question on the day that the disciplinary measure taken against him took effect. He also states that the second hearing before the Court of First Instance was set down for a date after the expiry of the time for him to lodge a complaint against the disciplinary proceedings. I cannot see how the reopening of the oral phase of the procedure before the Court of First Instance in the present case has any bearing on disciplinary proceedings which may have been commenced against Mr Coussios for other

6 — See paragraphs 10 to 12 of the judgment.

matters or vice versa. The two procedures are quite separate. Nor are the disciplinary measures connected or related to the appointment of another person to the post for which Mr Coussios was a candidate: such an appointment could have been made whatever had been the outcome of the disciplinary proceedings.

Second submission: breach of the principle of non-waiver of statutory rights

11. By his second submission, Mr Coussios invokes a principle according to which he could not legally waive or renounce his rights under the Staff Regulations. Consequently the Court of First Instance acted unlawfully in awarding him damages rather than annulling the contested decisions. He states that, although his counsel agreed, at the second hearing, to the principle of an award of damages, he himself did not, and protested verbally to that effect at the hearing.

12. Mr Coussios considers that it was wrong for the Court of First Instance to 'instigate' an agreement between the parties according to which he waived his statutory rights, in particular those he held by virtue of Articles 7, 25, 26, 29, 43, 45 and Annex I of the Staff Regulations as well as his rights to full compensation.

13. The Commission has raised doubts as to the admissibility of this submission. The Commission submits that this is a matter for Mr Coussios to settle with his counsel.

14. I do not agree that the appellant's second submission is inadmissible. The tenor of his submission on this point is not that his counsel failed to follow his instructions and that therefore the Court of First Instance could not make such an award but that that Court erred in seeking an agreement between the parties on such an award. What he submits in effect is that the Court of First Instance could not ask the parties to agree to a remedy which resulted in him waiving his statutory rights.

15. It is clear from the judgment of the Court of First Instance [7] that the parties had in fact agreed that an award of damages was the most appropriate remedy. Whether the agreement was entered into by Mr Coussios

7 — Paragraph 107.

himself or his counsel is, in my opinion, irrelevant. If his counsel did not follow his instructions, then that is a matter which Mr Coussios should raise with him: it is in any case a matter of fact which this Court cannot review on appeal.

16. In any event, I do not think that the course followed by the Court of First Instance can be criticized. What it did was to invite the views of the parties on the solution to be found for the illegality; and it recorded the agreement of the parties that an award of damages was the appropriate remedy. Mr Coussios contends that his rights were of so fundamental a character that they could not be waived and that financial compensation could not be an appropriate remedy. But no argument has been advanced to support the view that Mr Coussios' rights (of which the only one truly in issue, in my view, was the right to receive a reasoned decision for the rejection of his candidature) could not be waived and that compensation could not be an appropriate remedy. Indeed it is clear that the Court of First Instance could have proceeded to make an award of damages of its own motion, without inviting the parties' comments. Since the Court has unlimited jurisdiction in staff cases, [8] it can award damages in lieu of annulment even if the applicant has not sought damages in respect of the illegality in issue.

17. In my view therefore the second submission must also be rejected.

Conclusion

18. I am accordingly of the opinion that the Court should:

(1) dismiss the appeal;

(2) order the appellant to pay the costs.

8 — See *Oberthür*, cited above, note, paragraph 14 of the judgment.