ORDER OF THE COURT (Fourth Chamber)
15 January 1998 *

In Case C-403/95 P,

Dieter Obst, an official of the Commission of the European Communities, residing at Everberg, Belgium, represented by Lothar Mahlberg, Rechtsanwalt, Bonn, with an address for service c/o Marianne Moritz, 25a Rue de Schönfels, Bridel, Luxembourg,

appellant,

APPEAL against the judgment of the Court of First Instance of the European Communities (Second Chamber) of 19 October 1995 in Case T-562/93 *Obst* v *Commission* [1995] ECR-SC II-737 seeking to have that judgment set aside,

the other party to the proceedings being:

Commission of the European Communities, represented by Julian Currall, of its Legal Service, acting as Agent, and Bertrand Wägenbaur, Rechtsanwalt, Hamburg, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

THE COURT (Fourth Chamber),

composed of: H. Ragnemalm, President of the Chamber, J. L. Murray and K. M. Ioannou (Rapporteur), Judges,

* Language of the case: German.

Advocate General: M. B. Elmer,
Registrar: R. Grass,

after hearing the Advocate General,

makes the following

Order

1 By application lodged at the Court Registry on 27 December 1995, Dieter Obst brought an appeal pursuant to Article 49 of the EC Statute and the corresponding provisions of the ECSC and EAEC Statutes of the Court of Justice against the judgment of the Court of First Instance of 19 October 1995 in Case T-562/93 *Obst* v *Commission* ([1995] ECR-SC II-737, 'the contested judgment'), in so far as, after ordering the Commission to compensate him for the non-material damage which he had suffered, it rejected the remainder of his application for, first, annulment of Opinion No 45/93 of the Advisory Committee on Appointments of 18 February 1993, informing him that his candidature should not be taken into consideration and annulment of the Commission's decision of 22 March 1993 not to accept his candidature and, second, for compensation for the material loss allegedly suffered.

2 Paragraphs 1 to 11 of the contested judgment state as follows:

'1. The applicant, an official in Grade A 4, is Deputy Head of the "Legislation relating to crop products and animal nutrition" Unit in Directorate-General VI — Agriculture (DG VI).

2. On 18 December 1991, the Commission decided to create a new unit within DG VI, with responsibility for carrying out the inspections and controls provided

for under Community legislation applicable to the veterinary and plant health sectors. On 30 June 1992, in accordance with Article 29(1)(a) of the Staff Regulations of Officials of the European Communities ("the Staff Regulations"), the Commission published Vacancy Notice COM/056/92, concerning the post of Head of the "Plant Health Inspection and Control Unit", which it intended to fill at Grade A 3, A 4 or A 5. The applicant submitted his candidature on 14 July 1992.

3. The vacancy notice was worded as follows:

"Head of Unit, responsible for directing and coordinating the work of the 'Plant Health Inspection and Control Unit' within the Commission's Office for Veterinary and Plant-Health Inspections and Control".

4. In addition to the applicant, five other candidates submitted applications for that post, including Mr G, a Grade A 5 official, who entered the Commission's employment in June 1990 in the same unit as the applicant and who was subsequently appointed to the post in issue.

5. After examining the applications, the appointing authority initially decided not to fill the post in question. On 7 June 1993 it made a second publication of the vacancy notice, adding "republication" ("the second publication"), that second publication being in all respects identical to that of 30 June 1992.

6. Following the second publication, the applicant once more submitted his candidature on 20 January 1993. One candidate, who had not applied on first publication of the vacancy notice, submitted his candidature following the second publication.

7. On 12 February 1993 the applicant submitted a complaint under Article 90 of the Staff Regulations against the "implied rejection" of his candidature presented

on 14 July 1992, since he had never received the Commission's decision prior to the second publication for the post.

8. By application lodged at the the Registry of the Court of First Instance on 14 September 1993, the applicant brought an action seeking annulment of the "implied decision rejecting" his candidature presented on 14 July 1992. By order of 20 May 1994, the Court of First Instance dismissed his action as inadmissible on the grounds that the second publication could not be classified as an implied decision rejecting his candidature and was not therefore an act adversely affecting him within the meaning of Article 90(2) of the Staff Regulations (Case T-510/93 *Obst* v *Commission* [1994] ECR-SC II-461).

9. In the meantime, by note of 26 February 1993 the secretary of the Advisory Committee on Appointments ("the ACA") informed the applicant of the conclusion in its Opinion No 45/93 of 18 February 1993 ("the opinion of the ACA") that his candidature should not be taken into consideration for the post in issue. Subsequently, after examining the seven candidatures lodged following the second publication of the notice and the opinion of the ACA, the appointing authority appointed Mr G, who had earlier presented his candidature on first publication of the notice, to the post at issue. It then informed the applicant by note of 22 March 1993 of its decision not to accept his application.

10. On 6 April 1993, the applicant submitted a complaint under Article 90 of the Staff Regulations against, *inter alia*, the ACA's note of 26 February 1993 and the decision contained in the appointing authority's note of 22 March 1993.

11. On 6 August 1993, the applicant's complaint was rejected by implied decision.'

3 Those were the circumstances in which the appellant brought an action against the Commission for (following the withdrawal of some of his original heads of claim) annulment of the opinion of the ACA and the Commission's decision communi-

cated by note of 22 March 1993. The appellant also requested the Court of First Instance to order the Commission to compensate him for the material and non-material damage allegedly suffered.

The contested judgment

4 In its contested judgment the Court of First Instance dismissed as inadmissible, at paragraph 24, the appellant's claims relating to the annulment of the opinion of the ACA, on the ground that its opinion was a preparatory measure not capable of affecting his position under the Staff Regulations or, consequently, of affecting him adversely.

5 In essence, the appellant's claim for annulment of the Commission's decision of 22 March 1993 rejecting his candidature was based on six pleas in law alleging, respectively, procedural errors, breach of Article 45 of the Staff Regulations, misuse of powers or abuse of process, breach of the administration's duty to have regard for his welfare, breach of the principle of equal treatment and breach of the duty to give reasons for the decision of 22 March 1993.

6 The Court of First Instance rejected those pleas in support of the claim for annulment. Nevertheless, with regard to the plea alleging failure to state reasons, after finding at paragraph 78 that the Commission's note of 22 March 1993 informing the appellant that his candidature was rejected gave no indication of any reason for the rejection and that he had been given no reasoned decision for the rejection of his candidature before he brought his action before it, the Court of First Instance held at paragraph 79 that the appellant's candidature was not rejected in circumstances of which he was aware, and the mere fact that he knew of the preparatory work for the creation of the new unit was not in itself capable of supplying him with sufficiently precise information as to the reasons which had actually led the appointing authority to reject his candidature.

7 None the less, at paragraph 81 of the contested judgment, the Court of First Instance went further and held that the object of the appellant's action was in substance to obtain compensation for the damage allegedly suffered when his candidature was rejected. In the circumstances, it considered that annulment of the decision rejecting his candidature, on the ground of failure to state reasons, would constitute an excessive penalty and that an award of compensation constituted the form of reparation which best met both his interests and the requirements of the service.

8 The Court of First Instance also rejected, at paragraph 84, Mr Obst's claim for a declaration that his candidature for the post had been unlawfully rejected and, at paragraph 87, his claim for compensation for alleged material damage.

9 As regards non-material damage, after recalling that it had found at paragraph 79 of its judgment that the appointing authority had given no reasons for its decision, the Court of First Instance held at paragraph 90 that total absence of any statement of reasons for a decision refusing to appoint a candidate constitutes a breach of administrative duty, as a result of which Mr Obst was entitled to compensation for the non-material damage suffered.

10 In assessing the damage suffered, the Court of First Instance considered at paragraph 91 that Mr Obst had been compelled to bring legal proceedings in order to learn the reasons for the decision rejecting his candidature. Accordingly, assessing the damage suffered *ex æquo et bono*, it considered that an award of ECU 2 000 represented appropriate compensation for the appellant.

Forms of order sought and pleas in law put forward by the parties

11 The appellant claims that the Court should:

'— set aside the contested judgment in so far as it dismisses the application and orders the appellant to bear his own costs;

— annul the respondent's decision, communicated by note of 22 March 1993, rejecting his candidature for the post in question;

— declare that the rejection of the appellant's application for that post was unlawful;

— declare that the respondent is liable to compensate the appellant for all consequential material damage which he may suffer in the future;

— award the appellant fair compensation of more than ECU 2 000 for his non-material damage;

— in the alternative: refer the case back to the Court of First Instance for re-hearing, fresh measures of inquiry and another decision;

— order the respondent to pay all the costs of the proceedings, including those incurred in the prior proceedings and those of the appeal;

— if necessary: in the alternative, reserve a decision on costs.'

12 In his appeal, the appellant states both that he does not take issue with the judgment of the Court of First Instance in so far as it dismissed his claim for annulment of the opinion of the ACA and that all he seeks is annulment of the rejection of his second candidature of 20 January 1993.

13 Furthermore, as regards the grounds of appeal, the appellant states that he maintains all the heads of claim and pleas in law considered by the Court of First Instance and that he relies on them in support of his appeal. The grounds of appeal fall under four headings:

(a) dismissal of the claim for annulment of the Commission's decision of 22 March 1993 rejecting the appellant's candidature;

(b) unlawfulness of the rejection of the appellant's candidature for the post in issue;

(c) compensation for material and non-material damage;

(d) costs.

14 The Commission claims that the appeal should be dismissed as clearly inadmissible or as clearly unfounded.

Findings of the Court

15 In accordance with Article 119 of the Rules of Procedure of the Court of Justice, where the appeal is clearly inadmissible or clearly unfounded, the Court may at any time, by reasoned order, dismiss the appeal without opening the oral procedure.

16 Furthermore, the first paragraph of Article 51 of the EC Statute of the Court of Justice provides that an appeal is limited to points of law and must be based on grounds of the lack of competence of the Court of First Instance, breach of procedure before it which adversely affects the interests of the appellant or infringement of Community law by the Court of First Instance. Article 112(1)(c) of the Rules of Procedure provides that an appeal must specify the pleas in law and legal arguments relied on.

17 It follows from those last two provisions that an appeal must indicate precisely the contested elements of the judgment and also the legal arguments supporting the claim for the judgment to be set aside.

18 This Court has consistently held that an appeal which simply repeats or reproduces verbatim the pleas in law and arguments already submitted to the Court of First Instance, including those based on factual allegations expressly dismissed by that Court, does not meet that requirement; such an appeal merely seeks, in reality, reconsideration of the application submitted before the Court of First Instance, which, under Article 49 of the EC Statute of the Court of Justice, falls outside the jurisdiction of the Court of Justice (see the orders in Case C-244/92 P *Kupka-Floridi* v *Economic and Social Committee* [1993] ECR I-2041, paragraph 10; Case C-338/93 P *De Hoe* v *Commission* [1994] ECR I-819, paragraph 19; Case C-26/94 P *X* v *Commission* [1994] ECR I-4379, paragraph 13, and Case C-62/94 P *Turner* v *Commission* [1995] ECR I-3177, paragraph 17).

19 In the present case, the pleas in law relied on by the appellant do not satisfy those requirements.

Dismissal of the claim for annulment of the Commission's decision of 22 March 1993 rejecting the appellant's candidature

20 As regards the dismissal of the claim for annulment of the Commission's decision of 22 March 1993, the appellant puts forward four pleas in law alleging procedural errors, breach of Article 45 of the Staff Regulations, breach by the administration of its duty to have regard for his welfare and breach of the principle of equal treatment respectively.

The first plea, alleging procedural errors

21 The first plea falls into two parts.

22 In the first part, the appellant states that, by the wording used in its note of 22 March 1993 ('the appointing authority is unable to accept your candidature for the post to be filled'), the appointing authority informed him that for legal or other reasons it could not appoint him to the post in question. Accordingly, he alleges that the Court of First Instance did not give sufficient consideration to the facts of the case, even though he had expressly offered to adduce evidence for his assertions. He adds that there was in fact no reason preventing his appointment, so that the decision of 22 March 1993 is inaccurate and the statement of reasons incorrect.

23 In that regard, the appellant, while not specifying the paragraphs of the contested judgment, is challenging the findings of fact made by the Court of First Instance, so that the sole purpose of the first part of this plea is to have his application re-examined. This part of the plea cannot therefore be accepted.

24 In the second part of the first plea, the appellant challenges paragraph 36 of the contested judgment in which the Court of First Instance dismissed as inadmissible in accordance with Article 48(2) of its Rules of Procedure the part of the plea alleging irregularity in the procedure followed within the ACA on the ground that the appellant had not raised it until the oral procedure.

25 The appellant considers that the Court of First Instance erred in holding that that head of claim was inadmissible, since, in contrast to what that Court stated, the plea was not raised during the oral procedure but at the earlier stage of the reply. He adds that that head of claim was well founded, since the appointing authority had acted unlawfully in that it had not stated in the vacancy notice that 'specialist training' was required. Finally, he maintains, the ACA did not express an opinion as to the level of the post at issue until after considering the candidatures.

26 In so far as the second part of this plea seeks to challenge the fact found by the Court of First Instance, that the appellant had raised that plea for the first time during the oral procedure, it is to be noted that the Court of First Instance alone is competent to decide at what point in the proceedings a plea was raised before it. It follows that this part of the plea cannot be accepted, so there is no need to consider the other arguments.

27 It follows that the first ground of the appeal must be dismissed as clearly inadmissible.

The second plea, alleging breach of Article 45 of the Staff Regulations

28 The appellant alleges that the Court of First Instance infringed Article 45 of the Staff Regulations, which provides for consideration of the comparative merits of the officials eligible for promotion and of the reports on them.

29 According to this plea, the Court of First Instance was wrong to consider that the Commission had exercised its discretion properly, since factors not mentioned in the vacancy notice had been taken into consideration by the appointing authority. The appellant claims that the Court of First Instance confirmed that 'specialist training' for the post to be filled was necessary, when that condition, which did not appear in the vacancy notice, was a subsequent requirement. He adds that, since the appointing authority's rejection of his candidature was based on a manifest error of assessment, the Court of First Instance should either have examined the case in greater depth or rejected the Commission's assertions.

30 In paragraphs 44 to 55 of the contested judgment, the Court of First Instance studied, *inter alia*, the contents of the vacancy notice, the Commission's decision of 18 December 1991 on the creation of the new unit and its communication of 5 June 1991 entitled 'Steps to be taken immediately in order to ensure that the single market in the veterinary and plant health sectors is actually established', and considered, at paragraph 50, that the Commission had kept within the proper bounds of its discretion.

31 Similarly, after considering, in paragraphs 51 to 54, the appellant's qualifications and those of Mr G, the minutes of the ACA of 18 February 1993 and its opinion, and also the appellant's assertion that the Commission had paid scant regard to his staff report, the Court of First Instance considered at paragraph 55 that consideration of the file disclosed no evidence to support the conclusion that the assessment of the candidates' merits was vitiated by any error of fact or law.

32 Also in that paragraph the Court of First Instance, considering that the documents in the case provided sufficient information for guidance, held that there was no need to ask the Commission, as a measure of organisation of procedure, to give further particulars of the conditions and qualifications required by the vacancy notice which were not satisfied by the appellant or to hear witnesses as to the appellant's qualifications, as he had suggested.

33 In those circumstances, the second plea must be rejected as clearly unfounded.

The third plea, alleging breach by the administration of its duty to have regard for the welfare of officials and of its duty of loyalty

34 In this third plea, the appellant claims that, having regard to the two pleas set out above, the appointing authority committed an error of assessment, so that there was no interest of the service to justify Mr G's appointment. On the contrary, the duty to have regard for the welfare of officials required the appointing authority to appoint the appellant.

35 The appellant does not state precisely either which parts of the judgment he challenges or his legal arguments in support of this plea. It follows that the plea is clearly inadmissible.

The fourth plea, alleging breach of the principle of equal treatment

36 By this fourth plea the appellant objects that the Court of First Instance failed to give reasons for paragraph 74 of the contested judgment.

37 In his action the appellant had claimed that the decision to appoint Mr G had been adopted in breach of the principle of equal treatment, since the Commission had not required other officials with similar duties to have specialist training.

38 In paragraph 74 of the contested judgment, the Court of First Instance answered that plea as follows:

'This Court has already ruled, at paragraph 50 above, that the Commission kept within the proper bounds of its discretion in considering that it must appoint to the post of Head of Unit an official possessed of both specialist training and experience in carrying out on-site controls in the relevant sectors. Accordingly, the Court considers that, even if the Commission should have imposed similar conditions in respect of certain other officials with responsibility for similar tasks, the applicant may not rely upon the principle of equal treatment by pleading in his own cause an unlawful act committed in favour of another (see, for example, Case T-30/90 *Zoder* v *Parliament* [1991] ECR II-207, paragraph 26). It must, moreover, be stressed that the plea is not supported by any independent argument and is based on the arguments put forward in connection with the preceding pleas which have not been upheld.'

39 According to the appellant, the Court of First Instance should rather have considered the reasons for which the Commission had not found it necessary in the veterinary sector to appoint to a similar post a head of unit with specialist professional training. In his view, the Court of First Instance ought then to have held that the restriction imposed after the event by requiring specialist professional training in the applicant's case actually constituted breach of the principle of equal treatment and was therefore for that reason unlawful.

40 This plea, which merely repeats what was pleaded before the Court of First Instance and challenges findings of fact made by that Court, seeks in fact to have the application reconsidered, and is accordingly clearly inadmissible.

The unlawfulness of the rejection of the appellant's candidature for the post in issue

41 With regard to the unlawfulness of the rejection of his candidature for the post in issue, the appellant states that this head of claim relates to his second candidature only. He considers that he has an interest in such a finding on the ground that it would enable him to obtain compensation in the future. For justification of his continuing the claim, the appellant refers to the summary of pleas mentioned in connection with the first head of claim.

42 In this connection it is sufficient to find that the appeal does not specify the pleas in law and legal arguments relied on in support of the claim, since a mere reference to the summary of the pleas previously considered, which relate to annulment of the Commission's decision of 22 March 1993, does not amount to a precise indication of the elements of the judgment which the appeal seeks to have set aside (see, *inter alia*, Case C-153/96 P *De Rijk* v *Commission* [1997] ECR I-2901, paragraph 15). It follows that this plea is clearly inadmissible.

Compensation for material and non-material damage

43 The head of claim seeking compensation for material and non-material damage is divided into two separate pleas.

44 With regard, first, to the plea concerning material damage, the appellant alleges that the Court of First Instance misinterpreted his claims. In his view, it was wrong to hold that he was claiming payment of damages, when he had simply requested a declaration that the Commission was bound to make good all material damage which might follow in the future. According to the appellant, such a claim is admissible, since he has a legitimate interest in the determination of the appointing authority's future obligations to pay compensation. The claim is also well founded inasmuch as, if his candidature had not been unlawfully rejected, he would have been appointed to the post in question.

45 It should at this point be noted that in paragraphs 86 and 87 of the contested judgment, the Court of First Instance held:

'86. As regards the alleged material damage, it is settled case-law that the Community can only be held liable to pay damages if a number of conditions are satisfied as regards the illegality of the conduct of the institutions complained of, the actual harm suffered and the existence of a causal link between the act and the alleged damage (see, for example, Case T-27/90 *Latham* v *Commission*, cited above, paragraph 63).

87. In this instance, there is no need to give a decision on the admissibility of this claim, since it is not disputed that the applicant has not until now suffered any material loss, because the post in issue was filled at Grade A 4, which is the applicant's present grade. It is thus clear from the case-law that the applicant cannot plead any material loss (see Case T-27/90 *Latham* v *Commission*, cited above, paragraph 43).'

46 The Court of First Instance rightly, after considering that one of the conditions for the incurring of liability by the Community is that actual harm should have been suffered, rejected the applicant's claim without ruling on the admissibility of that head of claim. Even if, as the appellant asserts, what he claimed before the Court of First Instance was not payment of damages and interest but a declaration that the Community was bound to pay compensation, for such an obligation to be established the damage must be real, that is to say it must exist at the time the action is brought. Since the Court of First Instance found at paragraph 87 that the appellant had not as yet suffered any material damage, his pleas as to damage had to be rejected.

47 In consequence, this plea is clearly unfounded.

48 With regard, second, to the plea relating to non-material damage, the appellant considers that it is much greater than the sum of ECU 2 000 which the Commission was ordered to pay him, since the cause of that damage was not only the failure to give reasons for not appointing him, but also in essence the unlawful rejection of his candidature, which deeply hurt and wounded him.

49 This plea is based on the assumption that the rejection by the appointing authority of the appellant's candidature is unlawful.

50 As stated above, the ground of appeal regarding the unlawful rejection of that candidature has been dismissed. In consequence, this plea is clearly unfounded.

51 In those circumstances, the pleas put forward by the appellant must be dismissed as clearly inadmissible or unfounded, pursuant to Article 119 of the Rules of Procedure.

Costs before the Court of First Instance

52 Finally, the appellant takes the view that, having regard to the attitude adopted by the Commission, the Court of First Instance should have ordered it to pay the costs.

53 On this point, it suffices to note that where all the other pleas advanced in an appeal against a judgment of the Court of First Instance have been rejected, the plea concerning the order for costs must, pursuant to the second paragraph of Article 51 of the Statute of the Court of Justice, be declared inadmissible (Case C-396/93 P *Henrichs* v *Commission* [1995] ECR I-2611, paragraphs 65 and 66).

54 In the light of all the preceding considerations, the appeal must be dismissed in its entirety.

Costs

55 Under Article 69(2) of the Rules of Procedure, applicable to appeals by virtue of Article 118 of those Rules, the unsuccessful party is to be ordered to pay the costs. Under Article 70 of those Rules, institutions are to bear their own costs in proceedings brought by their servants. However, by virtue of the second paragraph of Article 122 of those Rules, Article 70 does not apply to appeals brought by an official or other servant of an institution against that institution. Since Mr Obst's appeal has been unsuccessful, he must be ordered to pay the costs of these proceedings.

On those grounds,

THE COURT (Fourth Chamber)

hereby orders:

1. The appeal is dismissed.

2. The appellant shall pay the costs.

Luxembourg, 15 January 1998.

R. Grass — Registrar

H. Ragnemalm — President of the Fourth Chamber