JUDGMENT OF THE COURT (Third Chamber)
1 June 1995 *

In Case C-119/94 P,

Dimitrios Coussios, a former official of the Commission of the European Communities, residing in Brussels, represented by Georges Sakellaropoulos, of the Athens Bar, with an address for service in Luxembourg at the Chambers of Aloyse May, 32 Grand-rue,

appellant,

APPEAL against the judgment of the Court of First Instance of the European Communities (Fifth Chamber) of 23 February 1994 in Joined Cases T-18/92 and T-68/92 *Coussios* v *Commission* [1994] ECR-SC II-171, seeking to have that judgment set aside,

the other party to the proceedings being:

Commission of the European Communities, represented by Gianluigi Valsesia, Principal Legal Adviser, and Ana Maria Alves Vieira, of the Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Giorgios Kremlis, also of the Commission's Legal Service, Wagner Centre, Kirchberg,

* Language of the case: French.

THE COURT (Third Chamber),

composed of: C. Gulmann (Rapporteur), President of the Chamber, J. C. Moitinho de Almeida and J.-P. Puissochet, Judges,

Advocate General: F. G. Jacobs,
Registrar: D. Louterman-Hubeau, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 2 February 1995,

after hearing the Opinion of the Advocate General at the sitting on 23 March 1995,

gives the following

Judgment

1 By application lodged at the Registry of the Court of Justice on 22 April 1994, Dimitrios Coussios brought an appeal, pursuant to Article 49 of the Statute of the Court of Justice of the EEC and the corresponding provisions of the Statutes of the Court of Justice of the ECSC and the EAEC, against the judgment of the Court of First Instance of 23 February 1994 in Joined Cases T-18/92 and T-68/92 *Coussios* v *Commission* [1994] ECR-SC II-171 in so far as that judgment dismissed his claims for the annulment of the Commission decision of 13 February 1992

— not to fill the post declared vacant by Notice COM/64/91 by way of promotion or transfer;

— not to organize an internal competition; and

— to hold an external competition.

2 According to the contested judgment, the appellant applied for the post of head of a new unit, DG VII. C.3, which was declared vacant on 2 May 1991 by Vacancy Notice COM/64/91.

3 On 5 July 1991 the Commission requested the other institutions to draw this vacancy notice to the attention of their staff. On 8 July 1991 the Commission 'republished' the notice, the text of which had been amended. The appellant applied once again.

4 On 6 March 1992 the appellant brought a first action before the Court of First Instance (Case T-18/92) in which he sought, in particular, the annulment of the decision to 'republish' the notice.

5 The Commission decided on 13 February 1992 not to fill the vacant post, not to organize an internal competition and to hold an external competition instead.

6 The appellant was notified of this decision by a note of 14 April 1992. He lodged a complaint on 22 April 1992, which was implicitly rejected on 22 August 1992. On 18 September 1992 the appellant brought a second action before the Court of First Instance (Case T-68/92) in which he sought the annulment of the Commission decision of 13 February 1992. On 28 September 1992 he received a decision expressly rejecting his complaint of 22 April 1992.

7 The parties presented oral argument before the Court of First Instance at the hearing on 27 April 1993. In the light of the delivery by the Court of Justice of the judgments of 6 July 1993 in Case C-242/90 P *Commission* v *Albani and Others* [1993] ECR I-3839 and of 9 December 1993 in Case C-115/92 P *Parliament* v *Volger* [1993] ECR I-6549, the Court of First Instance decided, on 16 December 1993, to reopen the oral procedure. During the hearing on 12 January 1994, the parties accordingly presented oral argument on the consequences to be drawn from those two judgments.

8 In its contested judgment, the Court of First Instance dismissed in its entirety the action in Case T-18/92.

9 In Case T-68/92, it held that the decision of 13 February 1992 had to be understood as a refusal to fill the post declared vacant by promoting the appellant and that no reasoned decision rejecting his complaint had been received by him before he brought his action. The Court of First Instance accordingly held that the plea in law relied on by the appellant, based on the failure to give reasons for the decision not to accept his application, was well founded and that the decision was accordingly illegal (paragraph 92).

10 The Court of First Instance went on to take the view that the decisions not to hold an internal competition and to hold an external competition were not intrinsically vitiated by any illegality (paragraph 100).

11 However, it decided to examine the question whether the illegality of those decisions arose from 'the illegality, on the ground of failure to give reasons, of the rejection of the applicant's candidature for the post at issue by way of promotion' (paragraph 101) and found that 'the rejection of applications for promotion ... under Article 29(1)(a) of the Staff Regulations is a necessary precondition for proceeding to the subsequent stages of the procedure laid down in Article 29(1)' (paragraph 102). It accordingly concluded that 'the illegality found to have occurred ... entails the illegality of the decision not to organize an internal competition and of the decision to hold an external competition' (paragraph 103).

12 The Court of First Instance referred, however, to the case-law of the Court of Justice, according to which the principle of proportionality requires the interests of applicants who have been the victims of an unlawful act to be reconciled with the interests of third parties and, for that reason, account to be taken not only of the need to restore the rights of applicants but also the legitimate expectations of third parties (paragraph 105). The Court of First Instance accordingly took the view that 'the annulment ... of the decisions not to hold an internal competition and to hold an external competition would constitute an excessive sanction for the unlawful act committed in so far as the adverse effect of such annulment on the rights of third parties might be disproportionate' (paragraph 106).

13 The Court of First Instance went on to explain that this was the reason why, at the reopening of the oral procedure, it had 'heard the parties' arguments on the consequences to be attached to the illegality of the contested decisions and sought with them an equitable solution' (paragraph 107).

14 It explained that the parties had 'agreed on the fact that the award of compensation for the non-material damage caused to the applicant by the Commission's service-related fault, of the same nature as that which had been granted in its judgment in *Oberthür* v *Commission* ..., [constituted] the form of reparation which best met both the applicant's interests and the requirements of the service' (paragraph 107).

15 The Court of First Instance held in conclusion that, in assessing the damage suffered, it was 'necessary to bear in mind that the applicant [had] been obliged to institute judicial proceedings in order to ascertain the reasons for the decision rejecting his application' (paragraph 108). In those circumstances the Court of First Instance, assessing the damage suffered *ex aequo et bono*, formed the view that an award of ECU 2 000 represented appropriate compensation for the appellant.

16 In support of his appeal requesting that the judgment of the Court of First Instance be set aside in its entirety and that the damage suffered be compen-

sated in full, the appellant relies on two pleas in law based on breach of the principle of proportionality and breach of the principle of non-waiver of rights under the Staff Regulations.

Breach of the principle of proportionality

17 The appellant argues in particular that the assessment by the Court of First Instance of the balance between the interests of third parties and his own interests is manifestly wrong. He submits that his interests should have been vindicated by way of full reparation consisting of his assignment to a post similar to that for which he had applied. He notes in this regard that the delay in delivery of the judgment of the Court of First Instance, due to that Court's decision to reopen the oral procedure, provided the Commission with the time to adopt two decisions making it impossible for him to be assigned to the post in question, that is to say, the decision removing him from his post following disciplinary proceedings and the decision appointing a different person to the vacant post. As a result, he claims to have been deprived of effective legal protection, contrary to the general principles of Community law and Article 6 of the European Convention on Human Rights. He claims that the compensation of ECU 2 000 awarded to him is in any event manifestly inadequate.

18 That plea in law cannot be accepted.

19 In the first place, according to the case-law of the Court of Justice, officials do not have a personal right to promotion even if they fulfil the conditions for promotion (judgment in Case 123/75 *Küster* v *Parliament* [1976] ECR 1701, paragraph 10). Furthermore, the appointing authority has a wide discretion in the matter (judgment in *Küster*, cited above, paragraph 12). Consequently, the appellant's claim that, if he could not be assigned to the post in question, he was entitled to be assigned to an equivalent post is groundless.

20 Nor is there any basis to the appellant's argument that there was an irregularity in the procedure before the Court of First Instance which, arising from the Court's decision to reopen the oral procedure and the consequent delay in delivery of the judgment, allegedly prevented the appellant's interests from being taken fully into account.

21 First, the Court of First Instance ordered the reopening of the oral procedure for an objective reason. It took the view that it would be useful to allow the parties to express their views on the significance of two judgments delivered by the Court of Justice after the first hearing, decisions which were without question material to the resolution of the dispute.

22 Second, according to the information provided by the Commission, the procedure for appointment to the post in question had already reached an advanced stage in April 1993, when the first hearing had taken place before the Court of First Instance, with the result that it was appropriate, even at that time, to take account of the interests of third parties.

23 Third, the appellant's argument relating to the disciplinary proceedings brought against him by the Commission is irrelevant to the present appeal.

24 The Court of First Instance was therefore entitled to form the view that the failure to give reasons for rejecting the appellant's application for the post in question did not justify it in invalidating the entire appointment procedure and that the award of compensation represented appropriate reparation for the non-material damage resulting from that failure to give reasons.

25 So far as concerns the amount of compensation granted, suffice it to point out that the documents before the Court do not in any event indicate any factor of such a kind as to cast doubt on the assessment by the Court of First Instance in that regard.

Breach of the principle of non-waiver of rights under the Staff Regulations

26 The appellant submits that the Court of First Instance caused his lawyer to accept the award of compensation instead of the annulment sought when the waiver of his rights under the Staff Regulations is questionable, in view of the public-policy nature of the provisions of the Staff Regulations at issue.

27 That plea in law cannot be accepted.

28 As pointed out in paragraph 24, the Court of First Instance has the power to award compensation instead of annulling the contested measure. In this case, the contested judgment confined itself to recording the agreement reached between the parties in this regard.

29 It follows from the foregoing that the appeal must be dismissed.

Costs

30 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Under Article 70 of the Rules of Procedure, the costs incurred by the institutions in proceedings between them and their servants are to be borne by the institutions. However, under Article 122 of the Rules of Procedure, Article 70 is not applicable to appeals brought by officials or other servants of the institutions. Since the appellant has failed in his appeal, he must be ordered to pay the costs of the present proceedings.

On those grounds,

THE COURT (Third Chamber)

hereby:

1. Dismisses the appeal;

2. Orders the appellant to pay the costs.

Gulmann Moitinho de Almeida Puissochet

Delivered in open court in Luxembourg on 1 June 1995.

R. Grass C. Gulmann

Registrar President of the Third Chamber