JUDGMENT OF THE COURT (Sixth Chamber)
14 May 1998 *

In Case C-259/96 P,

Council of the European Union, represented by Jean-Paul Jacqué, Director of its Legal Service, Diego Canga Fano and Thérèse Blanchet, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Alessandro Morbilli, Manager of the Legal Affairs Directorate of the European Investment Bank, 100 Boulevard Konrad Adenauer,

appellant,

APPEAL against the judgment of the Court of First Instance of the European Communities (Second Chamber) of 26 June 1996 in Case T-91/95 *De Nil and Impens* v *Council* [1996] ECR-SC II-959, seeking to have that judgment set aside,

the other parties to the proceedings being:

Lieve de Nil, an official of the Council of the European Union, residing in Wolvertem (Belgium),

and

Christiane Impens, an official of the Council of the European Union, residing in Brussels,

* Language of the case: French.

represented by Jean-Noël Louis, Thierry Demaseure, Véronique Leclercq and Ariane Tornel, of the Brussels Bar, with an address for service in Luxembourg at the offices of Fiduciaire Myson SARL, 30 Rue de Cessange,

THE COURT (Sixth Chamber),

composed of: H. Ragnemalm, President of the Chamber, R. Schintgen, G. F. Mancini, J. L. Murray and G. Hirsch (Rapporteur), Judges,

Advocate General: M. B. Elmer,
Registrar: H. von Holstein, Deputy Registrar,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 15 July 1997,

gives the following

Judgment

1 By application lodged at the Court Registry on 23 July 1996, the Council of the European Union 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 26 June 1996 in Case T-91/95 *De Nil and Impens* v *Council* [1996] ECR-SC II-959 ('the judgment under appeal') by which that Court annulled the Council's decisions of 9 and 15 June 1994 rejecting the applicants' requests for compensation dated 9 February and the decision of 4 January 1995 rejecting the applicants' complaint of 6 September 1994 and ordered the Council to pay to each applicant the sum of BFR 500 000 as compensation for combined material and non-material damage suffered.

2 It appears from the judgment under appeal that on 4 December 1990 the applicants were admitted to take part in the tests for Internal Competition B/228 for the purpose of filling 15 administrative assistant posts in Grade B 5 by enabling Grade C 1 officials to obtain 'upgrading' of their posts to that grade. Their names did not appear on the list of successful candidates and the applicants, with seven other persons affected, brought an action before the Court of First Instance, which annulled 'the steps taken following the decisions admitting candidates to the tests in Internal Competition B/228 ...' (Case T-22/91 *Raiola-Denti and Others* v *Council* [1993] ECR II-69).

3 Following that judgment, which acquired the force of *res judicata*, the Council decided, first, to maintain the decisions adopted for the purpose of reclassifying the 15 candidates who had been successful in Competition B/228 with effect from 1 January 1991 and, secondly, to publish a notice of Internal Competition B/228a designed to fill six administrative assistant posts in Grade B 5 by way of the upgrading of Grade C 1 posts. The nature and marking of the tests for Competition B/228a were identical to those for Competition B/228. According to Notice of Competition B/228a, the candidates who had been admitted to take part in the tests for Competition B/228 could be admitted to take part in the tests.

4 After the tests, in which they took part, had taken place, the applicants were placed on the list of successful candidates. Their posts were each reclassified in Grade B 5 with effect from 1 January 1994. The applicants nevertheless considered that despite that reclassification the Council had to be regarded as having not in fact adopted appropriate measures to make good the damage caused by the refusal of the Selection Board in Competition B/228 to place them on the list of successful candidates in that competition, inasmuch as that refusal had deprived them of reclassification with effect from 1 January 1991.

5 On 9 February 1994 they therefore submitted a request on the basis of Article 90(1) of the Staff Regulations of officials and other servants of the European Communities ('the Staff Regulations') for compensation for the damage which they had suffered as a result of the adoption of the irregular decision of the Selection Board in Competition B/228.

6 Since that request and their complaint pursuant to Article 90(2) of the Staff Regulations were rejected by the Council's decisions of 9 and 15 June 1994 and 4 January 1995, on 29 March 1995 the applicants brought an action before the Court of First Instance seeking, first, the annulment of those decisions and, second, an order that the Council pay the sum of BFR 500 000 to each applicant for material damage suffered and ECU 1 to each applicant as symbolic damages for non-material damage suffered.

7 The Court of First Instance held, at paragraph 44, that the refusal by the Council to adopt the specific measures which would have ensured that the applicants were put on an equal footing with their colleagues who had been successful in Competition B/228 with regard to the date on which their reclassification took effect had been adopted in breach of Article 176 of the EC Treaty.

8 It stated in that respect:

'38. In refusing to reclassify the applicants retroactively from 1 January 1991 like the successful candidates in Competition B/228, the Council caused them to lose their chances of earlier promotion, within the periods prescribed in the Staff Regulations, to Grade B 4 and then of earlier promotion to Grade B 3, and of seeing their careers develop in the same conditions as the careers of the candidates who had been successful in Competition B/228. As the applicants point out, without being gainsaid by the Council, 11 of the 15 successful candidates in Competitition B/228, who were reclassified in 1991, had already been promoted to Grade B 3 by 1 January 1996, of whom three were, in 1996, eligible for promotion to Grade B 2, while the four other successful candidates had been promoted by that same date to Grade B 4; three of the latter were, in 1996, eligible for promotion to Grade B 3. In response to a written question from the Court of First Instance, The Council acknowledged that if the applicants had been reclassified in Grade B 5 in January 1991 they could themselves, pursuant to Article 45(2) of the Staff Regulations, have been eligible for promotion to Grade B 4 in July 1991 and to Grade B 3 on 1 July 1993, the date on which their net remuneration would have exceeded the remuneration then actually received by them.

39. The applicants therefore suffered a distortion in the prospects for the development of their careers as compared with those of the successful candidates in Com-

petition B/228, owing to the Council's failure to adopt the appropriate measures to put those candidates who, having first taken part in Competition B/228, were eventually successful candidates in Competition B/228a, on an equal footing with the successful candidates in Competition B/228 with regard, in particular, to the conditions of the reclassification to which they were just as entitled as the successful candidates in Competition B/228. Once Competition B/228a had been organised, the purpose of which, as the defendant institution itself confirmed, was to safeguard the rights that had been infringed by the unlawful nature of Competition B/228, the Council could have provided that reclassification of the successful candidates would take effect on the same date as the reclassification of the successful candidates in Competition B/228. Since it did not provide for that solution in advance, once it had received the applicants' requests to that effect, it should have withdrawn the reclassification decisions as of 1 January 1994 in order to proceed, with a view to equal treatment, to reconstitute the careers of the persons concerned, so as to ensure that their seniority in Category B was equal to the seniority in that category of the successful candidates in Competition B/228 ...'

9 Finding that the candidates who were successful in the tests organised on the basis of Notices B/228 and B/228a had to be regarded as the successful candidates in a single competition, the Court of First Instance concluded, in paragraph 42, that the Council was therefore bound to ensure that the successful candidates in the tests taken on the basis of Notice B/228a should receive the same treatment as the successful candidates in the tests taken on the basis of Notice B/228, by giving the reclassification of the former the same effects as that of the latter.

10 As regards the damage actually suffered following the breach found, the Court of First Instance held:

'46. The applicants have not established the existence of the damage they claim to have suffered, consisting in the difference between the remuneration received by them from 1 January 1991 to 1 January 1994 and the remuneration that they would have received during that period if they had been reclassified in Category B 5 on 1 January 1991. As is made clear by evidence produced by the Council in response to a written question from the Court of First Instance and not disputed by the applicants, the latter did not in fact suffer any net loss of remuneration because of the loss of fixed-rate allowance, the "secretarial allowance", to which they were entitled before their reclassification.

47. The applicants have, however, established the existence of a right to compensation for the damage suffered as a result of the fact that they were not reclassified in Category B at the same time as the candidates who were successful in Competition B/228, inasmuch as, although they would not have had a right to promotion after their reclassification, they have, at all events, lost the opportunity of seeing their careers develop in the future in a manner comparable to the careers of the candidates who were successful in Competition B/228 ...

48. They claim in addition to have suffered non-material damage that they evaluate at 1 symbolic ecu.

49. As regards such damage, the Court of First Instance considers that neither failure in a competition nor preparation for subsequent tests may in principle be regarded as likely to cause non-material damage in respect of which damages are automatically payable, *a fortiori* because in this case the applicants have not established that the fact that their non-inclusion on the list of successful candidates in Competition B/228 was due to the irregularities that led to its annulment. As regards the damage alleged to have been caused by the Council's refusal to accede to their request for compensation and their subsequent complaint, that is part and parcel of the same damage in respect of which the Council refused to pay compensation. It cannot, consequently, constitute separate damage giving rise to separate compensation.

50. The Court of First Instance considers that the non-material damage actually suffered by the applicants is that linked to the state of prolonged uncertainty in which they found themselves as regards the development of their careers. In that respect the specific circumstances of the case were marked by significant irregularities in the way the tests organised on the basis of Notice B/228 were conducted, by a serious impairment of the applicants' entitlement to see the tests conducted properly and by the fact that the Council's refusal to put them on an equal footing with their colleagues who had been reclassified on 1 January 1991 took place at a date when they had already been successful in the tests organised on the basis of Notice B/228a.

51. The Court of First Instance evaluates the combined material and non-material damage suffered by each of the applicants *ex aequo et bono* at BFR 500 000 (see

Cases T-82/91 and T-3/92 *Latham* v *Commission* [1994] ECR-SC II-61 and 83). The Council must therefore be ordered to pay that amount to each applicant.'

11 In the present appeal the Council puts forward six pleas in law:

— infringement of Article 176 of the Treaty;

— infringement of Article 30 of the Staff Regulations;

— breach of the principle of equal treatment;

— infringement of Article 45(2) of the Staff Regulations;

— infringement of Article 48 of the Rules of Procedure of the Court of First Instance; and

— absence of the legal conditions giving rise to liability and breach of the principle of proportionality.

First four pleas in law

12 In its first four pleas in law, which it is appropriate to examine together, the Council essentially complains that the Court of First Instance found fault with it for having misapplied the judgment in *Raiola-Denti and Others* v *Council*, cited above, when it decided to organise a second competition and reclassify the successful candidates in Category B 5 with effect from 1 January 1994.

13 The Council submits, in this connection, that in order to safeguard the rights of candidates that have been infringed by irregularities in a competition, it suffices, according to the case-law of the Court (Case 144/82 *Detti* v *Court of Justice* [1983] ECR 2421; Case C-242/90 P *Commission* v *Albani and Others* [1993] ECR I-3839, and Case C-412/92 P *Parliament* v *Meskens* [1994] ECR I-3757), for the appointing authority of the institution concerned to organise a new competition at a level equivalent to that of the first. The measures taken by the Council to apply *Raiola-Denti and Others* v *Council*, cited above, are in conformity on every point with that case-law.

14 In that context, the Council challenges, in particular, the finding by the Court of First Instance in paragraphs 38 and 39 of the judgment under appeal to the effect that the applicants' reclassification should have taken effect retroactively from the same date as that resulting from Competition B/228, that is to say from 1 January 1991. It considers that that finding impinges on its powers under Article 176 of the Treaty, according to which the institution whose act has been declared void is to be required to take the necessary measures to comply with the judgment, and indicates that in this context it has a margin of discretion.

15 Similarly, the Council claims that retroactive classification as from 1 January 1991 would be contrary to Article 45(2) of the Staff Regulations, according to which '[an] official may be transferred from one service to another or promoted from one category to another only on the basis of a competition', and would also breach the principle of equal treatment, since the six candidates who were successful in Competition B/228a failed the first Competition B/228.

16 It must be pointed out that the Court has held that, by virtue of Article 176 of the Treaty, it is for the competent institution to take, as regards the person concerned, having due regard to the Community rules applicable, such decision as will

provide due compensation for the damage which he has suffered as a result of the decision which has been annulled (see Case 76/79 *Könecke* v *Commission* [1980] ECR 665, paragraph 15).

17 It appears from paragraphs 3 and 4 of the judgment under appeal that, following the judgment in *Raiola-Denti and Others* v *Council*, cited above, which annulled the steps taken following the decisions admitting candidates to the tests in Internal Competition B/228, the Council decided, first, to maintain the decisions classifying the 15 candidates who had been successful in Competition B/228 with effect from January 1991 and, secondly, to organise Internal Competition B/228a for candidates who had failed the tests in Competition B/228. The nature and marking system for the tests in Competition B/228a were identical to those of Competition B/228. In December 1993 the applicants, who had passed the tests, were included on the list of successful candidates. The post of each applicant was reclassified in Category B 5 with effect from 1 January 1994.

18 As regards, first, the date of reclassification, it must be noted that, in accordance with Article 45(2) of the Staff Regulations, an official may be promoted from one category to another only on the basis of a competition. Since success in a competition is thus a *conditio sine qua non* of appointment in a higher category (see Case 28/72 *Tontodonati* v *Commission* [1973] ECR 779, paragraph 8), that condition must be satisfied on the date on which the appointment takes effect. Article 45(2) of the Staff Regulations therefore precludes an appointment taking effect from a date prior to success in a competition.

19 It follows that in this case, since the applicants did not pass a competition until the end of 1993, their reclassification with effect from 1 January 1991 was precluded. The finding to the contrary contained in paragraphs 38 to 44 of the judgment under appeal must therefore be regarded as erroneous. It is not, nevertheless, such as to cause *per se* the judgment under appeal to be set aside.

20 As regards the Council's argument that the organisation of a second competition and the reclassification of the successful candidates in Category B 5 with effect from 1 January 1994 satisfy the requirements of Article 176 of the Treaty, it follows from the Court's case-law (*Parliament* v *Meskens*, cited above, paragraph 24) that Article 176 of the Treaty requires not only that the administration take the necessary measures to comply with the judgment of the Court but that it make good further damage which may be caused by the unlawful measure which has been annulled, subject to the conditions laid down in the second paragraph of Article 215 of the EC Treaty. Thus Article 176 of the Treaty does not make compensation for the damage dependent on the existence of a new fault distinct from the original unlawful measure which has been annulled, but provides for compensation for the damage which results from that measure and which continues after its annulment and compliance by the administration with the judgment whereby it was annulled.

21 Since the applicants' claim is precisely for compensation for the damage resulting from the unlawful act that was annulled, the first four pleas in law must be rejected.

First limb of the sixth plea in law

22 By the first limb of its sixth plea in law, the Council claims that the conditions which might give rise to liability on its part are not satisfied. It did not act unlawfully when implementing the judgment in *Raiola-Denti* v *Council*, cited above, so that two conditions which must be satisfied for liability to be incurred, namely damage and a causal link, are not met. The Council states in that connection that, although the irregularities affected the 71 candidates in Competition B/228 in the same way, it does not however follow that there is an automatic entitlement to compensation for alleged damage in the absence of proof of a causal link between those irregularities and failure in that first competition.

23 It is settled case-law (see Case C-136/92 P *Commission* v *Brazzelli Lualdi and Others* [1994] ECR I-1981, paragraph 42) that for the liability of the Community to be incurred in the case of a claim for damages brought by an official a number of conditions must be satisfied as regards the illegality of the conduct of the institution of which he complains, the actual harm suffered and the existence of a causal link between that conduct and the damage alleged to have been suffered.

24 With regard to the first of those conditions, it follows from paragraph 19 of this judgment that, contrary to the finding of the Court of First Instance at paragraphs 38 to 44 of the judgment under appeal, the unlawful conduct does not consist in the fact that the Council refused to reclassify the applicants with effect from 1 January 1991, but in the original measure that was annulled, that is to say the steps taken following the decisions admitting candidates to the tests in Internal Competition B/228 (see *Raiola-Denti and Others* v *Council*, cited above). It is, moreover, precisely that measure on which, according to the findings of the Court of First Instance in paragraph 6 of the judgment under appeal, the applicants' request, submitted under Article 90(1) of the Staff Regulations, was based.

25 As concerns, next, the damage suffered, it cannot in any event be accepted that there is non-material damage which is linked to the state of prolonged uncertainty in which the applicants found themselves as regards the development of their careers (paragraph 50 of the judgment under appeal). First, the reasons given by the Court of First Instance in support of that conclusion, namely 'significant irregularities in the way the tests organised on the basis of Notice B/228 were conducted ... a serious impairment of the applicants' entitlement to see the tests conducted properly and ... the fact that the Council's refusal to put them on an equal footing with their colleagues who had been reclassified on 1 January 1991 took place at a date when they had already been successful in the tests organised on the basis of Notice B/228a', relate rather to the gravity of the irregularities which had already resulted in the annulment of the acts held invalid by *Raiola-Denti and Others* v *Council*, cited above, and not to a state of prolonged uncertainty with

regard to the development of their careers. Secondly, for the purposes of assessing any non-material damage, the Court of First Instance should have taken into account, besides the length of the state of uncertainty in which the applicants found themselves, other aggravating circumstances which characterised their specific situation.

26 Since that was not the case and since, moreover, the applicants did not plead any such circumstances, the judgment under appeal must be set aside inasmuch as it held that the applicants were entitled to compensation for the non-material damage they claimed to have suffered.

27 Since, on that issue, the state of the proceedings so permits, the proper course for the Court to take, in accordance with the first paragraph of Article 54 of its EC Statute, is to dismiss the applicants' claim concerning compensation for non-material damage.

28 However, it cannot in principle be excluded that the officials who failed in the first Competition B/228 and, like the applicants, were successful in the second Competition B/228a suffered material damage consisting in the fact that they lost the opportunity of seeing their careers develop in the future in a manner comparable to the careers of the candidates who were successful in Competition B/228 (see paragraph 47 of the judgment under appeal), owing to the impossibility of reclassifying them from 1 January 1991.

29 In that connection, as far as the causal link between the unlawful conduct and material damage is concerned, it must be pointed out that it is for the Council to adduce proof that the applicants' failure in the first competition and the damage resulting from that failure were not due to the irregularities found. Since such proof is lacking in this case the first limb of the sixth plea in law must be dismissed on this point.

Fifth plea in law and second limb of the sixth plea

30 Lastly, in its fifth plea in law and the second limb of its sixth plea, the Council complains that the Court of First Instance infringed Article 48(2) of the Rules of Procedure of the Court of First Instance when it determined the amounts awarded, since it took into consideration a new fact consisting in the career development of the 15 successful candidates in Competition B/228 from the date on which the action was lodged up to the date of the hearing, and that it also acted in breach of the principle of proportionality.

31 In that connection, the plea based on infringement of Article 48(2) of the Rules of Procedure of the Court of First Instance, which prohibits the introduction of any new pleas in law in the course of proceedings, must be dismissed from the outset. It is clear from the file on the case that on 26 January 1996 the Court of First Instance requested the applicants to determine the amount of the difference between their remuneration up to their reclassification on 1 January 1994 and the remuneration which they would have obtained if they had been reclassified in Category B 5 on 1 January 1991 with the successful candidates in Competition B/228. Since that request was based on Article 64(3) of the Rules of Procedure of the Court of First Instance, that Court was entitled to base itself on the replies received, without infringing Article 48(2) of those Rules, *a fortiori* since the Council had the opportunity of stating its views on that point at the hearing.

32 As regards the plea in law based on a breach of the principle of proportionality, according to the case-law of the Court (*Commission* v *Brazzelli Lualdi and Others*, cited above, paragraph 81), it is for the Court of First Instance alone to assess, within the confines of the claim, the method and extent of compensation for the damage. However, in order for the Court to be able to review the judgments of the Court of First Instance, those judgments must be sufficiently reasoned.

33 In this case the reasoning of the Court of First Instance at paragraph 51 of the judgment under appeal, according to which the damage suffered by each of the applicants amounted *ex aequo et bono* to BFR 500 000, does not enable the Court to acquaint itself with the criteria taken into account for the purposes of determining that amount. In the absence of such information, the Court is not, however, in a position to decide whether the judgment under appeal is in breach of the principle of proportionality on that point.

34 In the circumstances, the judgment under appeal must be set aside inasmuch as it annulled the Council's decisions of 9 and 15 June 1994 and 4 January 1995 and ordered the Council to pay each of the applicants the sum of BFR 500 000 as compensation for combined material and non-material damage.

Referral back to the Court of First Instance

35 Under the first paragraph of Article 54 of the EC Statute of the Court of Justice, 'If the appeal is well founded, the Court of Justice shall quash the decision of the Court of First Instance. It may itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the Court of First Instance for judgment'.

36 Since the state of the proceedings does not permit final judgment to be given on the applicants' claim for compensation for material damage, that claim must be referred back to the Court of First Instance.

On those grounds,

THE COURT

(Sixth Chamber)

hereby:

1. **Sets aside points 1, 2 and 4 of the operative part of the judgment of the Court of First Instance of the European Communities of 26 June 1996 in Case T-91/95 *De Nil and Impens* v *Council*;**

2. **Dismisses the applicants' claim for compensation for non-material damage;**

3. **Refers the case back to the Court of First Instance for judgment on the applicants' claim for compensation for material damage;**

4. **Reserves the costs.**

Ragnemalm Schintgen Mancini

Murray Hirsch

Delivered in open court in Luxembourg on 14 May 1998.

R. Grass

Registrar

H. Ragnemalm

President of the Sixth Chamber