

OPINION OF ADVOCATE GENERAL

MENGGOZZI

delivered on 22 November 2007¹

1. In this case, the Court is required to give a ruling in an appeal brought by the Commission of the European Communities against the judgment delivered on 6 June 2006 by the Court of First Instance of the European Communities in Case T-10/02 *Girardot v Commission* [2006] ECR-SC I-A-2-129 and II-A-2-609 ('the judgment under appeal'), by which the latter set the amount of financial compensation payable by the Commission to Ms Girardot following the interim judgment of the Court of First Instance of 31 March 2004 in Case T-10/02 *Girardot v Commission* [2004] ECR-SC I-A-109 and II-483 ('the interim judgment').

3. Article 29(1) of the Staff Regulations of Officials of the European Communities ('the Staff Regulations'), in the version applicable to the facts giving rise to the dispute at first instance, provides that:

'Before filling a vacant post in an institution, the appointing authority shall first consider:

(a) whether the post can be filled by promotion or transfer within the institutions;

I — The legal background

2. Under Article 236 EC, the Court of Justice is to have jurisdiction in any dispute between the Community and its servants within the limits and under the conditions laid down in the Staff Regulations or the Conditions of Employment.

(b) whether to hold competitions internal to the institution;

(c) what applications for transfer have been made by officials of other institutions of the three European Communities;

¹ — Original language: French.

and then follow the procedure for competitions on the basis either of qualifications or of tests, or of both qualifications and tests. Annex III lays down the competition procedure.

6. Article 47 of the Conditions of Employment provides:

‘Apart from cessation on death, the employment of temporary staff shall cease:

The procedure may likewise be followed for the purpose of constituting a reserve for future recruitment.’

...

4. Article 2(d) of the Conditions of Employment of Other Servants of the European Communities (‘the Conditions of Employment’), in the version applicable to the facts giving rise to the dispute at first instance, provides that for the purposes of those Conditions of Employment, ‘temporary staff’ means ‘staff engaged to fill temporarily a permanent post paid from research and investment appropriations and included in the list of posts appended to the budget relating to the institution concerned’.

2. Where the contract is for an indefinite period:

(a) at the end of the period of notice stipulated in the contract... In the case of a servant within the meaning of Article 2 [(d) of the Conditions of Employment] the period of notice shall not be less than one month for each completed year of service, subject to a minimum of three months and a maximum of 10 months ...;

5. The fourth and fifth paragraphs of Article 8 of the Conditions of Employment provide, in particular, that temporary staff in Category A or B to whom Article 2(d) of the Conditions of Employment applies, who are required to perform duties necessitating scientific or technical qualifications, are to be engaged for not more than five years and that their contracts may be renewed only once for a fixed period. Any further renewal is to be for an indefinite period.

(b) at the end of the month in which the servant reaches the age of 65 years.’

7. Cases of termination without notice are defined in Articles 48 to 50 of the Conditions of Employment.

II — The facts giving rise to the dispute

8. According to the account of the facts by the Court of First Instance, Ms Girardot entered the service of the Commission on 1 February 1996 as a seconded national expert. She retained that status until 31 January 1999.

9. By contract of 15 January 1999, concluded for a period of two years and subsequently renewed by means of a supplementary agreement for a period of one year, Ms Girardot was employed as a member of the temporary staff within the meaning of Article 2(d) of the Conditions of Employment. In that capacity, she was transferred successively to the 'Industry' Directorate-General and then to the 'Information Society' Directorate-General of the Commission.

10. On 26 July 2000, the 'Personnel and Administration' Directorate-General of the Commission published a vacancy notice stating that, in the context of its decision on the new policy on research staff, the Commission was organising 'internal reserve competitions', which included 'internal reserve competition' COM/T/R/ST/A/2000 for career brackets A8/A5, A4 and A3 of Category A remunerated on credits of the

scientific and technical service from the research and investment budget.

11. Ms Girardot submitted her application in respect of 'internal reserve competition' COM/T/R/ST/A/2000 but it was rejected on the ground that she failed to satisfy all the required conditions for entry.²

12. On 9 and 12 February 2001, the 'Personnel and Administration' Directorate-General published two vacancy notices for permanent posts remunerated on research credits. By letter of 20 February 2001, Ms Girardot expressed her interest in a Category A post, published in vacancy notice COM/2001/CCR/16/R of 9 February 2001 and also in seven other Category A posts, published in the vacancy notice of 12 February 2001.

13. By letter of 15 March 2001, the Commission informed Ms Girardot that it '[had been] unable to accept her application' for the post published on 9 February 2001.

2 — It should be noted that, in her response to the appeal, Ms Girardot disputes that she took part in that competition. However, that point is of no significance in this case, since it is common ground that the absence of any consideration of comparative merits (or in any event the failure to demonstrate that such an examination had been carried out) which was condemned by the Court of First Instance in its interim judgment was in part based on the fact that Ms Girardot was not a successful candidate in that competition, a fact which is not open to any doubt.

14. With regard to the other seven posts, the Commission informed Ms Girardot, by letter of 13 March 2001, that her application '[could] not be taken into consideration' on the ground that those posts '[were] available only to staff covered by the Staff Regulations in the service of the Commission who were successful candidates in a competition'. For each post the Commission accepted the application of seven other candidates, all of whom were members of the temporary staff and appeared on the list drawn up following 'internal reserve competition' COM/T/R/ST/A/2000, and appointed each of them to the post in which they had expressed an interest.

15. On 8 June 2001, Ms Girardot lodged a complaint against the decisions rejecting her application which were contained in those two letters. That complaint was the subject-matter of an implied decision rejecting it.

rejecting her application and, as a corollary, accepting that of the other candidates.³

17. The Court of First Instance nonetheless dismissed Ms Girardot's claims for annulment of the decisions appointing the successful candidates to the posts in question.⁴ After weighing up the interests of Ms Girardot, the service and the third-parties appointed, 'as required by the principles of proportionality and of protection of legitimate expectations', the Court of First Instance took the view that annulment of the decisions making appointments to the posts in question would constitute an excessive penalty for the unlawful act, committed by the Commission, of failing to establish that it had duly considered the merits of a single candidate for those posts.⁵

III — The interim judgment of the Court of First Instance

16. By its interim judgment, the Court of First Instance annulled the Commission's decisions rejecting Ms Girardot's application, on the ground that it had not been established that the Commission had duly considered the merits of the person concerned before

18. Nevertheless, the Court of First Instance pointed out that the Community judicature may, in order to ensure that the annulling judgment has a practical effect in the appli-

3 — Paragraphs 65 to 71 and 78 to 80 of the interim judgment.

4 — Interim judgment paragraph 88.

5 — Ibid. (paragraphs 85 to 87).

cant's interests, use the unlimited jurisdiction conferred on it in proceedings concerning financial matters and, if need be, of its own motion, order the defendant institution to pay compensation,⁶ or request that institution to provide adequate protection for the applicant's rights.

IV — The judgment under appeal

19. In the present case, the Court of First Instance requested the parties to seek an agreement setting fair financial compensation for the unlawful rejection of Ms Girardot's application, which was to take into account the fact that the person concerned would no longer be able to take part in a future procedure, since she was neither in a position nor entitled to express her interest in vacant posts by responding to specific 'research' vacancy notices. In the absence of such an agreement, the Court of First Instance stated that the parties must present to it their submissions, with figures, within a period of three months of delivery of the interim judgment.

20. Since they were unable to reach an agreement on fair financial compensation, the parties sent the Court of First Instance their submissions on the quantum of damages on 6 September 2004.

21. Ms Girardot proposed that the amount of that compensation be set at EUR 2 687 994 or, in the alternative, at EUR 432 887 and, in the further alternative, at EUR 250 248, with legal interest.

22. The Commission proposed that that amount be set at EUR 23 917.43, taking the view that it was reasonable to award Ms Girardot 'first, three months' net earnings paid in respect of the minimum period of notice provided for by [Article 47(2) (a) of the Conditions of Employment], or EUR 18 917.43, as compensation for the lost opportunity to be recruited to one of the eight posts in question and, second, EUR 5 000 as compensation for the lost opportunity to take part in a new procedure for filling vacant posts'.⁷ That amount should have been increased by the compensatory

6 — Ibid. (paragraph 89). The Court of First Instance refers in that regard to Case 24/79 *Oberthür v Commission* [1980] ECR 1743, paragraph 14. See also Case 44/59 *Fiddelaar v Commission* [1960] ECR 535 and Joined Cases 176/86 and 177/86 *Houyoux and Guery v Commission* [1987] ECR 4333, paragraph 16. It should be noted that, in the present case, Ms Girardot did not in fact claim compensation for the damage caused by the alleged unlawful act committed by the Commission. It should also be pointed out that the interim judgment seems to form part of a minority line of case-law as regards matters relating to the appointment or recruitment procedure, in that it adopts the approach of compensating the applicant rather than annulling both the decision rejecting the latter's application and that appointing or recruiting a third party. See, for examples in which those two decisions are held to be indivisible and annulled, Case 85/82 *Schloh v Council* [1983] ECR 2105, paragraph 40; and Case C-150/03 P *Hectors v Parliament* [2004] ECR I-8691, paragraph 54, and the operative part of the judgments in Case T-273/97 *Richard v Parliament* [1999] ECR-SC I-A-45 and II-235, and Case T-73/01 *Pappas v Committee of the Regions* [2003] ECR-SC I-A-207 and II-1011.

7 — Paragraph 45 of the judgment under appeal.

interest payable between the date of delivery of the interim judgment and the date of actual payment of the sum payable, together with nominal damages of one Euro as compensation for the non-material damage.⁸

23. In the judgment under appeal, the Court of First Instance set the amount of financial compensation payable by the Commission to Ms Girardot at EUR 92 785, together with interest payable from 6 September 2004, at the rate set by the European Central Bank for main refinancing operations, plus two percentage points and ordered the Commission to pay the costs.

24. Before setting out the method used to calculate that amount, the Court of First Instance first recalled that the Commission's decisions, annulled by the interim judgment, deprived, in a certain and irreversible manner, in view of the impossibility of restoration of the situation existing prior to their adoption, the person concerned of the possibility of having her applications examined and of having one of them accepted.⁹ It then ruled that the loss of an opportunity to fill a vacant post within a Community institution and to enjoy the financial benefits attaching thereto constitutes material damage, a

point on which the parties agreed.¹⁰ Finally, the Court of First Instance stated, in paragraphs 57 and 58 of the judgment under appeal, that, for the purposes of assessing the extent of the damage arising from the loss of an opportunity, which is in dispute between the parties to the present case, it was appropriate to 'determine the difference between the earnings which Ms Girardot would have received in the event that her opportunity of having her application accepted had materialised and those which she actually received following the unlawful rejection of her application, and then, if appropriate, to assess, as a percentage, the chance that Ms Girardot had of that eventuality materialising'.

25. Moving on to the specific assessment of financial compensation in the present case, the Court of First Instance first calculated the difference between the earnings under the financial terms of employment which Ms Girardot would have enjoyed if she had been recruited by the Commission and those which she actually enjoyed, on the basis of the net amounts after tax.¹¹ With regard in particular to the period in respect of which that comparison ought to be carried out, the Court of First Instance took the view that, in order to take account of all the possibilities of termination of employment provided for in Articles 47(2), 48, 49 and 50 of the Conditions of Employment, that period could be determined *ex aequo et bono* at five years, including the period of notice, from the date of taking effect of the appointment of the candidates accepted by the Commission

8 — Ibid. (paragraphs 46 and 47).

9 — Ibid. (paragraph 54).

10 — Ibid. (paragraph 56).

11 — Ibid. (paragraphs 60 and 83 to 95).

following the procedure for filling the vacant posts from which Ms Girardot was unlawfully excluded, that is to say the period from 1 April 2001 to 31 March 2006.¹² On the basis of the figures provided by Ms Girardot, the Court of First Instance determined the extent of the loss of earnings for that period at a sum, fixed *ex aequo et bono*, of EUR 185 570.

26. Secondly, with regard to the assessment, as a percentage, of Ms Girardot's chance of having her application accepted, the Court of First Instance first considered whether the applications which she had submitted satisfied the conditions prescribed for being taken into consideration by the vacancy notices to which she had responded, in order to ensure that the opportunity denied to her was to be regarded as genuine.¹³ In that connection, the Court of First Instance pointed out that, according to the interim judgment, this was indeed the case.¹⁴

27. Thirdly, the Court of First Instance examined whether the opportunity denied to Ms Girardot could be regarded as certain, inasmuch as the person concerned would have had, if not every chance of being recruited to one of the posts in question, at least a genuine chance of being recruited to it.¹⁵

28. In that connection, and having regard to the documents in the court file, the Court of First Instance points out that it is not possible to take the view that, at the end of the first stage of the procedure for filling vacant posts provided for by Article 29(1) of the Staff Regulations, the Commission, which indeed may prefer to widen its choice, would definitely have accepted one of the applications of Ms Girardot and, consequently, that the latter had every chance of being awarded a contract as a member of the temporary staff within the meaning of Article 2(d) of the Conditions of Employment and of obtaining the financial advantages attaching to its performance. The Court of First Instance nonetheless considered that Ms Girardot had been deprived of a genuine opportunity as a result of the rejection of her applications, without proof of examination, by the Commission.¹⁶

29. By subsequently weighing up additional factors capable of reducing Ms Girardot's chance of having her application accepted and others capable of increasing that chance,¹⁷ the Court of First Instance concluded that Ms Girardot 'had in the final analysis a genuine chance of acceptance of her application to fill one of the posts in which she had expressed an interest or any

¹⁶ — Ibid. (paragraph 115).

¹⁷ — See, respectively, paragraphs 116 and 117 of the judgment under appeal. As regards the first factors, the Court of First Instance pointed out that the genuine chance identified in paragraph 115 of the judgment under appeal was reduced by the fact that another candidate had expressed his interest in each of the eight posts, in accordance with Article 29(1) (b) of the Staff Regulations, and that the Commission could therefore have accepted one of those candidates or even accepted none of the applications and ended the procedure. As regards the second factors, the Court of First Instance considered that if Ms Girardot had been entitled to take part in a new procedure for filling vacant posts, organised following the annulment of the decisions rejecting her application, she could reasonably have expressed her interest in posts of the same kind and, possibly, been selected.

¹² — Ibid. (paragraphs 78 and 82).

¹³ — Ibid. (paragraph 96).

¹⁴ — Ibid. (paragraph 97).

¹⁵ — Ibid. (paragraph 98).

other post for which she might reasonably have applied subsequently',¹⁸ and adjusted *ex aequo et bono* the difference in earnings of EUR 185 570 by a multiplying factor of 0.5 intended to reflect the existence of a genuine chance (50%) of taking up one of those posts. The amount of fair financial compensation was accordingly set at EUR 92 785.¹⁹

found to exist, the Court of First Instance points out that Ms Girardot adduced no evidence attesting to the existence of such damage.²²

30. With regard to the compensation for supplementary material damage, non-material damage and physical injury claimed by Ms Girardot, the Court of First Instance considered, in paragraph 123 of the judgment under appeal, that the purpose of the fair financial compensation was to give effect to the interim judgment and to provide adequate protection for Ms Girardot's rights by compensating *ex aequo et bono* for the impossibility of restoration of the situation existing prior to the unlawful act committed by the Commission. The Court of First Instance therefore took the view that, in the absence of a prior claim for damages, the purpose of the compensation could not have been to make good any other damage which that unlawful act might have caused the person concerned and that, accordingly, the arguments concerning other damage alleged by Ms Girardot were irrelevant.²⁰ The Court of First Instance ruled that, in any event, none of the other alleged damage could be taken into consideration for the purpose of setting the amount of fair financial compensation.²¹ As regards, in particular, the aspects of non-material damage relating to the deterioration in Ms Girardot's mental health and her depressive state, and the alleged physical damage resulting from the unlawful act

V — The forms of order sought by the parties

31. In its appeal, the Commission claims that the Court should:

- set aside the judgment under appeal;
- order the Commission to pay Ms Girardot the sum of EUR 23 917.40, and
- order that the parties should bear their own costs.

18 — Judgment under appeal (paragraph 118).

19 — Ibid. (paragraphs 119 and 121).

20 — Ibid. (paragraph 124 and first sentence of paragraph 125).

21 — Ibid. (second sentence of paragraph 125).

22 — Respectively paragraphs 133 and 137 of the judgment under appeal.

32. Ms Girardot contends that the Court should:

- declare the appeal brought by the Commission inadmissible and, in any event, unfounded;

- declare her cross-appeal admissible and uphold the submitted claims for annulment and damages;

- order the Commission to pay the costs.

loss of an opportunity to be recruited by the Commission where the latter has adopted an unlawful decision, thus depriving the person concerned of having her application accepted. It added, both in its pleadings and at the hearing, that the aim of its appeal is that the Court should identify a consistent legal argument and method for the purpose of calculating the loss of an opportunity to obtain a post.

34. The Commission states that it is not seeking to argue that the unlawfulness of the decisions by which it rejected Ms Girardot's various applications has not caused damage for which compensation can be paid. Indeed, it states that it accepts the idea that the loss of an opportunity to fill a post constitutes material damage.

VI — The main appeal

A — *Arguments of the parties*

33. The Commission bases its claim for annulment on a single plea, alleging that the method used by the Court of First Instance in the judgment under appeal to calculate the loss of opportunity constitutes an infringement of Article 236 EC and of the conditions governing the liability of the Commission, while requesting in its appeal that the Court rule on the method for calculating the

35. However, the Commission points out that the actual and certain damage suffered by the person concerned is that resulting from the failure to examine her applications, and not that resulting from a hypothetical loss of earnings during a period determined in an equally hypothetical manner.

36. The Commission considers that the finding, contained in paragraph 58 of the

judgement under appeal, that in order to assess the extent of the damage arising from the loss of an opportunity it is appropriate to determine the difference between the earnings which Ms Girardot would have received in the event that the opportunity of having her application accepted had materialised and that which she actually received following the unlawful rejection of her application amounts to quantifying material damage which is no longer that of loss of an opportunity to be recruited and wrongly interprets the notion of loss of an opportunity as that of loss of a guarantee of obtaining a post. The Commission takes the view that it cannot be disputed that it is accorded a wide margin of discretion in matters of recruitment.

in paragraph 58 of the judgment under appeal, that the amount of material damage, quantified by calculating the difference in earnings received, could, 'if appropriate', be assessed as a percentage representing the chance which the person concerned had of being recruited. The Commission takes the view that that premiss in the reasoning put forward in the judgment under appeal shows that the Court of First Instance is seeking to quantify the damage resulting from a hypothetical loss of earnings, since it is not automatically the case ('if appropriate') that the person concerned lost only an opportunity of being recruited. Thirdly, the Court of First Instance quantified the likelihood of being recruited of the person concerned on the basis of uncertain conjectures. However, as stated in paragraph 57 of the interim judgment, the person concerned had no right to be recruited. Nevertheless, by first calculating the material damage as if the person concerned enjoyed such a right, the judgment under appeal is inconsistent with the interim judgment.

37. The Commission takes the view that the existence of such an error of law is confirmed, first, by the fact that, in order to calculate the loss of earnings, the Court of First Instance takes into consideration the earnings received in the intervening period by the person concerned. However, in the event that the person concerned had, during that intervening period, taken up a post that was better paid than that which she could have obtained at the Commission during the same period, no loss of earnings would be suffered, although the person concerned would, nonetheless, have indeed suffered a loss of opportunity. The method of calculation used by the Court of First Instance is therefore illogical and liable to cause discrimination. Secondly, the Commission argues that the existence of the error of law which it identifies is also confirmed by the assessment, again contained

38. According to the Commission, all those considerations must lead to the conclusion that the calculation of the damage resulting from the loss of opportunity to be recruited must be founded on a basis other than that used by the Court of First Instance and cannot in any event be applied to a loss of earnings, which presupposes the existence of a guarantee (hypothetical and not certain) of being recruited. At the hearing, the Commission added that the damage resulting from the unlawful act of failing to examine an application cannot be a loss of earnings.

39. Consequently, the Commission asks the Court, in accordance with the second sentence of the first paragraph of Article 61 of the Statute of the Court of Justice, to declare that the damage suffered by Ms Girardot on account of the Commission's wrongful act of failing to examine her application for one of the posts in question, and which entailed the loss of an opportunity of being recruited, may be fairly compensated for by the award of a lump sum equal to three months' net pay and corresponding to the sum which the Commission must pay during the period of notice of a contract for an indefinite period — that is, in the present case, EUR 18 917.43 — increased by the sum, also fixed, of EUR 5 000 as compensation for the fact that the person concerned may no longer take part in a subsequent recruitment procedure.

40. Ms Girardot proposes that the Court should dismiss the main appeal as inadmissible or, in any event, as unfounded.

41. As regards admissibility, she claims, first, that, according to the case-law, the Court of First Instance has exclusive jurisdiction to assess the damage resulting from the loss of an opportunity. She considers that, unless the Commission takes issue with the Court of First Instance for having failed to specify the criteria used to assess the damage suffered by her, *quod non*, the

Commission is not justified in criticising the assessment of the Court of First Instance or, *a fortiori*, in expecting the Court of Justice to deliver a decision of principle on the method which must be used to calculate compensation for the material damage resulting from the loss of an opportunity. Moreover, she submits that there exists, in that regard, a large number of different situations which can be dealt with only on a case-by-case basis. Secondly, Ms Girardot claims that the plea alleging that the Court of First Instance is making good the loss of a guarantee and not the loss of an opportunity is inadmissible since that plea was not raised at first instance before the Court of First Instance.

42. On the substance of the case, and as a preliminary point, Ms Girardot points out that, although the way in which the Court of First Instance assessed the extent of the damage in the judgment under appeal is not consistent with the way in which it has acted in other cases, this was because the situations were not similar.

43. With regard, first of all, to the actual and certain nature of the damage, Ms Girardot points out that, as regards the damage resulting from the loss of an opportunity, the Court of First Instance has ruled that the requirement as to actual damage is satisfied where an applicant establishes that it is the institution's allegedly unlawful act which

deprived him of that opportunity (Case T-230/94 *Farrugia v Commission* [1996] ECR II-195, paragraph 43). In this case, it is no longer disputed that the Commission's unlawful refusal to examine Ms Girardot's applications deprived her of the opportunity, first, of having one or more of the applications accepted and, second, of usefully expressing an interest in any other post subsequently, if she had been entitled to do so.

44. With regard, secondly, to the alleged misinterpretation of the notion of loss of an opportunity as loss of a guarantee, Ms Girardot notes that the approach used in the judgment under appeal, consisting in listing the advantages which she would have enjoyed if she had been recruited and of subsequently determining the percentage chance which she had of being recruited, is a traditional approach which has already been used by the Court of First Instance in its judgment of 5 October 2004 in *Eagle and Others v Commission*²³ and which is referred to in Belgian legal literature. That method does not misinterpret the notion of loss of chance, but is suited to the reparation of damage resulting from the loss of an opportunity which is not, by definition, certain to materialise.

45. With regard, thirdly, to the discrimination brought about by the method employed by the Court of First Instance, Ms Girardot considers that the criticisms expressed by the Commission fail totally to take into account the second part of the Court of First

Instance's line of reasoning, the very purpose of which, she submits, is to determine the factor which must be applied to the loss of earnings that would have resulted if the opportunity had been realised and which represents the probability of the opportunity materialising. Furthermore, it would seem fair that, where there is an equal probability of being recruited, a candidate who has suffered a greater loss of income should be awarded higher compensation than a candidate who has suffered a smaller loss of earnings. Since such candidates are not in a comparable situation, there can be no infringement of the principle of equal treatment.

B — Analysis

1. Preliminary remarks

46. According to the case-law, a dispute between an official or a temporary servant and the institution to which he is or was answerable concerning compensation for damage is pursued, where it originates in the relationship of employment between the person concerned and the institution, under Article 236 EC and the Staff Regulations and

²³ — Case T-144/02 [2004] ECR II-3381; ECR-SC I-A-275 and II-1231, paragraphs 149 and 163.

lies outside the sphere of application of Articles 235 EC and 288 EC.²⁴

47. It also follows from the case-law concerning proceedings for compensation in the context of the Community public service that for the Community to incur non-contractual liability three cumulative conditions must be satisfied, namely the illegality of the allegedly wrongful act committed by the institutions, the existence of damage and the existence of a causal link between the act and the damage alleged to have been suffered.²⁵ In that context, the Court ruled that the Court of First Instance did not depart from that case-law, pointing out that in order to claim compensatory interest, officials had to demonstrate fault on the part of the institution, *the existence of certain and quantifiable damage* and a causal link between the fault and the alleged damage.²⁶

48. Those conditions — which were found to have been satisfied in the interim judg-

ment and in the judgment under appeal, although this is challenged in part by the Commission in this case — are therefore, in essence, analogous to those which govern the Community's non-contractual liability, pursuant to Article 288 EC.

49. In that regard, it is to be noted that neither Article 236 EC nor the Staff Regulations, unlike the second paragraph of Article 288 EC, make reference to the rule that the Community must make good any damage caused by its institutions, 'in accordance with the general principles common to the laws of the Member States'.

50. However, since the non-contractual liability of the Community is governed both in the case of Article 288 EC and in that of Article 236 EC and the Staff Regulations by similar unwritten principles, I take the view that there is nothing to preclude the carrying out of an examination of the legal systems of the Member States in order to ascertain, if not whether there exist any general principles common to the laws of the Member States, at least whether some of them recognise any legal constructions from which the Community judiciary may draw inspiration. Moreover, a brief survey of national laws may be of interest in the present case from the point of view of how they define the loss of an opportunity, whether or not they classify such a loss as capable of compensation and the method which some of those laws use to evaluate the extent of the damage resulting from that type of loss. This survey also allows

24 — See Case 9/75 *Meyer-Burckhardt* [1975] ECR 1171, paragraph 7; Case 48/76 *Reinartz v Council and Commission* [1977] ECR 291, paragraph 10; Case 176/83 *Allo v Commission* [1985] ECR 2155, paragraph 18; and Case 401/85 *Schina v Commission* [1987] ECR 3911, paragraph 9.

25 — Case 111/86 *Delauche v Commission* [1987] ECR 5345, paragraph 30; Case C-136/92 P *Commission v Brazzelli Lualdi and Others* [1994] ECR I-1981, paragraph 42; and Case C-259/96 P *Council v De Nil and Impens* [1998] ECR I-2915, paragraph 23.

26 — *Commission v Brazzelli Lualdi and Others*, paragraph 42. See, also, Case T-99/95 *Stott v Commission* [1996] ECR II-2227, paragraph 72.

a better understanding of the approach of the Court of First Instance in this case — which certainly took into consideration some national legal systems — an approach which, in the light of the latter, does not seem as ‘illogical’ as the Commission claims in the main appeal.

51. It is not possible from an examination of the laws of the Member States at the time of the application initiating proceedings before the Court of First Instance, that is to say in 2003, to identify a common general principle underlying such rights under which the loss of an opportunity to be recruited constitutes damage capable of compensation, which, moreover is made good in accordance with common or comparable rules.

52. Indeed, several national laws (the German, Austrian, Finnish, Danish, Portuguese and Swedish laws) do not, in principle, allow compensation to be awarded for the loss of an opportunity to be recruited, even though some of them (in particular, the Finnish, Danish and Portuguese laws) provide for different forms of compensation which may, where appropriate, be more favourable to an unlawfully rejected candidate.²⁷

27 — Thus, under Portuguese law, according to the administrative case-law and the new Code of Administrative Court Procedure, reparation of damage to the career of an official takes the form of a retroactive reconstruction of that career as it ought to have progressed in the absence of the act which has been declared void. Under Danish law, which does not contain the notion of loss of opportunity, the decisions of public authorities which are unlawful on account of procedural or substantive errors may form the basis of an application for damages, in the context of which demonstration of a causal link between the unlawful act and the damage is established where there exists a certain probability that the person in question would have been employed if the decision had not been unlawful on account of that error.

53. By contrast, the notion of loss of opportunity and the possibility of compensating for it as such, in particular in disputes in the field of employment law and/or the national public service, are recognised in Belgian, Spanish, French, Greek, Irish, Italian, Luxembourg, Netherlands and United Kingdom laws.

54. Essentially, according to those laws, the notion of loss of opportunity is defined as the unrealised expectation of obtaining an advantage and/or of avoiding the occurrence of a risk. With regard at least to the loss of an opportunity to obtain an anticipated advantage — which is the situation in this case (the loss of an opportunity to be recruited) — a feature common to the national laws which recognise it is that it applies where an uncertain event occurs and thereby renders the expected result forever unknown. Moreover, in general, those laws require that the lost opportunity should be genuine inasmuch as the probability that it will materialise must be high. The genuine nature of a lost opportunity therefore constitutes an instrument for measuring the certainty of the damage suffered.

55. As regards evaluating the damage caused by the loss of an opportunity, regardless of whether the damage is regarded as non-material or material,²⁸ the national courts carry out an assessment on equitable principles. In Belgium, the economic value of

28 — In Spain, in the field of civil liability, the loss of an opportunity is regarded as non-material damage for which compensation may be awarded, whereas under other national laws it may also be regarded as material damage.

the lost opportunity is the subject-matter of an assessment *ex aequo et bono*, in that a court, having found that there is no specific evidence for the purposes of evaluating the damage, takes into account, according to conscience, all the evidence capable of having an influence on its calculation.²⁹ Some decisions evaluate the damage by multiplying the value of the lost benefit by a percentage corresponding to the lost opportunity. For example, in matters relating to the public service, the damage suffered by a person who has lost a genuine chance of promotion has been evaluated at 50% of the difference between the salary that the official would have obtained following that promotion and that which he received in the absence of that promotion.³⁰ In France, where the conditions for compensation have been satisfied, in particular the condition as to the loss of a genuine opportunity, which is the only type of loss which constitutes certain damage, the administrative court determines the amount of compensation having regard to the criterion that compensation for the damage must be measured at the value of the lost opportunity and cannot be equal to the advantage that that opportunity would have provided if it had materialised.³¹ With regard to setting the amount of compensation awarded to the victim, the administrative court may make, in the context of an action for damages, an overall assessment of the amount of damage, whilst observing the principle of full compen-

sation for the damage³² or, in the specific case in which the victim's right is restored (for example, reinstatement or reclassification), an assessment of the damage on the basis of the difference between the salary that the official would have received if he had remained in active employment and his actual earnings.³³ In Italy, the Corte suprema di cassazione (Supreme Court of Cassation) approved a method which took into account the difference between the salary which a worker would have received if the opportunity to be promoted had materialised and that which he actually received and ruled that it was permissible to award a worker a percentage of that amount equal to the possibility of obtaining the promotion.³⁴ In the United Kingdom, in the context of employment law, quantification of the loss of an opportunity to fill a post was carried out by evaluating the percentage chance of filling the post and multiplying that percentage by the amount of wages hypothetically lost.³⁵

56. Those methods seem to have inspired the Court of First Instance in this case. The

29 — See Durand, I, 'À propos de ce lien qui doit unir la faute au dommage' in *Droit de la responsabilité — Morceaux choisis*, Formation permanente C.U.P., vol. 68, Liège, Larcier, 2004, p. 43.

30 — Cour d'Appel de Bruxelles, 28 November 1994, published in the journal *Jurisprudence de Liège, Mons et Bruxelles*, 1995, p. 1108.

31 — See, Conseil d'État, 6 November 2000, *Grégory*, No 189398, published on the website www.legifrance.gouv.fr. In that case, the Conseil d'État held that the applicant could not claim the benefit of payments that he would have received as a student of the École Normale Supérieure, on account of his loss of the opportunity to pass the competition for entry to that school.

32 — See, in that regard, Conseil d'État, 8 February 1984, *Mlle Gueninchauly*, No 44690/044777 and, 8 November 2002, *M. Guisset*, No 227147, published on the website www.legifrance.gouv.fr. In the *M^{lle} Liuzzi* judgment (2 February 1996, No 146769, published on the website www.legifrance.gouv.fr), the Conseil d'État held that no provision or general principle of law prevented the administrative court, after it had assessed the merits of the claims for compensation of specific forms of damage, from carrying out an overall evaluation of the amount of that damage.

33 — See, Conseil d'État, 27 May 1987, *Legoff*, No 59158 published on the website www.legifrance.gouv.fr and, Conseil d'État, 24 January 1996, *Collins*, Recueil Lebon, No 103987.

34 — Corte di Cassazione, sez. lav., 14 December 2001, No 15810.

35 — Court of Appeal, 22 July 1998, *Doyle v Wallace* [1998] PIQR Q 146.

Commission suggests in the main appeal that the case-law of the Court of First Instance shows some inconsistency, first, as regards recognition of the loss of an opportunity as damage capable of compensation in its own right and, second, as regards the method of calculating the damage resulting from the loss of an opportunity in different cases.

57. It is certainly true that in disputes *other than those concerning the Community public service*, the Court of First Instance has taken the view that it is not possible to compensate for damage resulting from the loss of an opportunity, since it is neither actual nor certain. Thus, in disputes concerning public contracts, the Court of First Instance tends to take the view that the damage which results from a loss of profit due to an infringement of Community law by the Commission in the conduct of a tendering procedure, presupposes that the applicant is entitled to be awarded the contract.³⁶ In such a situation, the Court of First Instance has ruled that the damage resulting from the loss of profit alleged by the rejected tenderer was neither actual nor certain insofar as it is not possible to infer that the contract would have

been awarded to it with certainty.³⁷ A similar approach, albeit less categorical, was adopted in *Farrugia v Commission*,³⁸ which rejected, on similar grounds, the applicant's claim that he suffered substantial damage as a result of having lost a unique opportunity to pursue his studies and research on account of the unlawful rejection of his application for a research training fellowship which, under the applicable Community legislation, was to be awarded by the Commission.

58. However, *in disputes concerning the Staff Regulations*, it seems that the Court of First Instance has not demonstrated the same rigour in finding, on an issue characterised to say the least by predominant judicial opinion, that the loss of an opportunity of being recruited or promoted is capable of

36 — Case T-13/96 *TEAM v Commission* [1998] ECR II-4073, paragraph 76, and Case T-231/97 *New Europe Consulting and Brown v Commission* [1999] ECR II-2403, paragraph 51.

37 — Case T-365/00 *AICS v Parliament* [2002] ECR II-2719, paragraph 79, and Case T-160/03 *AFCon Management Consultants and Others v Commission* [2005] ECR II-981, paragraphs 112 to 114. That approach was justified by Advocate General Poiares Maduro in his Opinion delivered on 7 September 2006 in Case C-243/05 *P Agraz* [2006] ECR I-10833, in which he pointed out, in point 20 and in reference to the judgments cited above, that the fact that the Commission has been granted discretion may justify the hypothetical nature of any damage, in strictly limited cases of lost opportunities. Accordingly, in his view, where an applicant for a post or a tenderer for a contract is excluded from entitlement to compete because of an error on the part of the Community, a court refuses to compensate for the loss of opportunity which results from this for the person concerned because the person concerned cannot count on any right or legitimate expectation that he will obtain the post or contract in question. The material damage resulting from loss of the profits which would have resulted from obtaining the post or contract appears too uncertain to be deemed to be damage for which reparation may be granted. Although the Court set aside the judgment of the Court of First Instance in that case, it nonetheless did not have to rule on the issue of the loss of an opportunity.

38 — Case T-230/94 *Farrugia v Commission* [1996] ECR II-195, paragraphs 44 and 46.

compensation.³⁹ In those cases, the Court of First Instance took the view, sometimes in an ambiguous way, that the damage suffered was non-material⁴⁰ and/or material in nature,⁴¹ by using, in respect of the method for calculating the damage, either a method based on the earnings differential,⁴² or a method of reparation *ex aequo et bono*.⁴³

59. The material nature of damage suffered because of the loss of an opportunity for career development seems to have been

39 — Case T-13/92 *Moat v Commission* [1993] ECR II-287, paragraph 44; Case T-47/93 *C v Commission* [1994] ECR-SC I-A-233 and II-743, paragraph 54; Case T-91/96 *Council v Hankart* [1998] ECR-SC I-A-597 and II-1809, paragraph 27; Joined Cases T-331/00 and T-115/01 *Bories and Others v Commission* [2003] ECR-SC I-A-309 and II-1479, paragraphs 194 to 204; Case T-144/02 *Eagle and Others v Commission* [2004] ECR II-3381; ECR-SC I-A-275 and II-1231, paragraph 150; Case T-45/01 *Sanders and Others v Commission* [2004] ECR II-3315, ECR-SC I-A-267 and II-1183, paragraphs 151 and 152, and Case T-166/04 *C v Commission*, not yet published in the ECR-SC, paragraph 70.

40 — *Moat v Commission*, paragraphs 44 to 48, and Case T-166/04 *C v Commission*, paragraph 70. Case T-47/93 *C v Commission*, which seems to fall within this category since the Court of First Instance upheld the claim for compensation of the non-material damage suffered by the applicant, nevertheless is somewhat ambiguous insofar as, on the one hand, the Court of First Instance did not expressly indicate the nature of the damage for which it was awarding compensation and, on the other hand, it awarded an amount in respect of non-material damage higher than that claimed by the applicant, while dismissing the claim for compensation in respect of the material damage of loss of opportunity to be recruited based on the difference between the anticipated earnings and those actually received, with the result that it is possible to infer from this that the Court of First Instance carried out an overall assessment of the two forms of damage.

41 — *Bories and Others v Commission*, paragraphs 195, 197, 200 and 202; *Eagle and Others v Commission*, paragraph 150; *Sanders and Others v Commission*, paragraph 150. See, also, Case T-386/94 *Allo v Commission* [1996] ECR-SC I-A-393 and II-1161, paragraph 73, which the judgment under appeal classes among the cases which have acknowledged that the damage suffered on account of the loss of an opportunity is material in nature, the Court of First Instance having, in that case and in contrast to the other judgments cited above, found that the alleged damage had not been established.

42 — See, *Eagle and Others v Commission*, paragraph 163, and *Sanders and Others v Commission*, paragraph 166.

43 — See *Moat v Commission*, paragraph 49; Case T-47/93 *C v Commission*, paragraph 55; *Bories and Others v Commission*, paragraphs 194 to 204; and Case T-166/04 *C v Commission*, paragraph 79.

confirmed, on appeal, by the Court in its judgment in *Council v De Nil and Impens*.

60. At first instance, the Court of First Instance took the view, in paragraph 47 of *De Nil and Impens v Council*,⁴⁴ that the applicants had established the existence of a right to compensation for the damage resulting from the fact that they had not been reclassified in Category B at the same time as the other successful candidates in an internal competition organised by the Council of the European Union, insofar as, even though they were not entitled to promotion after their reclassification, they had, in any event, lost an opportunity of seeing their careers develop in the future in a manner comparable to the careers of the candidates who were successful in that competition. In addition to that material damage, the Court of First Instance upheld the applicants' claim for compensation of the non-material damage suffered by the applicants linked to the state of prolonged uncertainty in which they found themselves as regards the development of their careers. It therefore evaluated, *ex aequo et bono*, the combined material and non-material damage at BEF 500 000.

61. On an appeal brought by the Council, the Court set aside the judgment of the Court of First Instance inasmuch as it held that the

44 — Case T-91/95. ECR-SC I-A-327 and II-959.

applicants were entitled to compensation for the non-material damage they claimed to have suffered. Finding that, on that issue, the state of the proceedings so permitted, the Court dismissed the applicants' claim concerning compensation for the non-material damage. However, the Court rejected the Council's criticisms of the Court of First Instance's acknowledgment of the existence of material damage. Accordingly, it ruled, in paragraph 28 of the judgment and with express reference to the above-mentioned paragraph 47 of the judgment of the Court of First Instance, that 'it cannot in principle be excluded that the officials who failed in the ... Competition [in question] and, like the applicants, were successful in the second Competition ... 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 [the] Competition [in question], owing to the impossibility of reclassifying them from 1 January 1991'.

62. I cannot think of any objection to carrying out a similar assessment concerning the loss of an opportunity to be recruited, such as that at issue in this case.⁴⁵ Moreover, it should be pointed out that, in the main appeal, the Commission does not dispute that the loss of an opportunity of being recruited may be compensated for and

'accepts the idea', in spite of some critical remarks regarding the case-law of the Court of First Instance, that the damage resulting from such a loss is of a material nature, as stated in paragraph 56 of the judgment under appeal.

63. However, in its appeal, the Commission states that it cannot accept the method used by the Court of First Instance to quantify such damage. It points out that, by quantifying the loss of opportunity as the difference between the earnings which the person concerned would have received if she had been recruited and those that she actually obtained, the Court of First Instance distorted the notion of loss of opportunity. The method used by the Court of First Instance, which is based on the earnings differential, amounts, in effect, in the Commission's view, to assessing hypothetical damage and to making good the loss of a guarantee and not an opportunity of obtaining a post. At the hearing, the Commission also stated that the required causal link between the unlawful act and the damage suffered failed to satisfy one of the conditions laid down in the case-law, namely that there should be a direct causal link between the unlawful act committed and the damage.

⁴⁵ — I would point out, in that regard, that in Case 11/72 *Giordano v Commission* [1973] ECR 417, paragraphs 8 and 9, the Court dismissed the applicant's claim for compensation for the alleged material damage suffered as a result of the loss of a real chance of being appointed not because such damage is not relevant in disputes concerning non-contractual liability, but simply because the applicant had failed to adduce proof as to the reality of his chance of recruitment.

64. Before assessing the merits of that view, the line of argument put forward by the Commission raises, as was made apparent by Ms Girardot (see point 41 above), the

preliminary issue of its admissibility, a question which it is now appropriate to consider.

2. Admissibility

65. As a preliminary point, it should be recalled that, according to the case-law, once the Court of First Instance has found the existence of damage, it alone has jurisdiction to assess, within the confines of the claim, the method and extent of compensation *for that* damage.⁴⁶ The Court has nonetheless stated that in order for it to be able to review the judgments of the Court of First Instance, those judgments must state sufficient reasons and, in particular, set out the criteria taken into account for the purposes of determining the amount selected.⁴⁷

66. In the present case, the main appeal certainly contains some ambiguities as to the criticisms it contains of the judgment under appeal.

67. Indeed, on the one hand, the Commission explains therein that it requests the Court to rule on the method of calculation used in the judgment under appeal to make good the damage caused by the loss of an opportunity. However, in the light of the case-law cited, those pleas in the main appeal should either be declared inadmissible or, as the Court has already had occasion to do,⁴⁸ be reclassified as alleging the absence or inadequacy of the statement of reasons in the judgment under appeal as regards the criteria taken into account in determining the compensation for the damage, in order to render those grounds of appeal meaningful.

68. Nonetheless, and on the other hand, the Commission does not confine itself to challenging the extent of the compensation for the damage, but identifies, in my view, in its single plea in support of its claims, a genuine error of law which allegedly renders the judgment under appeal unlawful.

69. Indeed, although it does not — and cannot — call into question the finding, made in the interim judgment, as to the existence of damage caused by the unlawful act committed, the Commission argues, in essence, that the compensation awarded by the Court of First Instance in the judgment under appeal is not concerned with the damage found to exist in the interim judgment, but, on the contrary, other damage, that is to say the loss of a guarantee of obtaining a post and the loss of earnings relating thereto. In that regard,

46 — *Commission v Brazzelli Lualdi and Others*, paragraph 81; *Council v De Nil and Impens*, paragraph 32; Case C-257/98 P *Lucaccioni v Commission* [1999] ECR I-5251, paragraph 34; Case C-62/01 P *Campogrande v Commission* [2002] ECR I-3793, paragraph 44; and the order of 14 December 2006 in Case C-12/05 P *Meister v OHIM*, not published in the ECR, paragraph 82 (emphasis added).

47 — See, in particular, *Council v De Nil and Impens*, paragraphs 32 and 33, and the order in *Meister v OHIM*, paragraph 82.

48 — *Lucaccioni v Commission*, paragraph 36.

the Commission therefore claims that, by adopting the criticised method, the Court of First Instance wrongly interpreted the conditions governing the non-contractual liability of the Community, either by making good damage which was not actual and certain or by misinterpreting the extent of the causal link between the unlawful act committed and the damage suffered. In other words, although the Court of First Instance has indeed found the existence of damage, it has nevertheless made good not *that* damage, but *other* damage, of a type which does not satisfy the conditions laid down by the case-law in order to be reparable. Such an issue, clearly legal in nature, must, in my view, be subject to review by the Court in the context of the appeal.

71. I therefore propose that the main appeal should be declared admissible, provided that the claims in that appeal criticising the extent of the compensation for the damage are interpreted so as to relate to the absence or inadequacy of the statement of reasons in the judgment under appeal.

3. Substance

70. Nor is it possible to claim, contrary to Ms Girardot's submission in her objection of inadmissibility, that, insofar as the Commission's line of argument disputes the actual and certain nature of the damage, it is inadmissible since it was not submitted at first instance. It is indeed clear that the findings criticised by the Commission appear for the first time in the judgment under appeal, which must lead to the dismissal of the claim put forward by Ms Girardot that the plea is a new one.⁴⁹

72. In essence, the Commission argues, with reference to paragraph 58 of the judgment under appeal, that the material damage was calculated on the basis of the criterion of the difference in earnings, thus wrongly interpreting the loss of an opportunity as being the loss of a guarantee of obtaining a post. In its view, the existence of an error of law on the part of the Court of First Instance is confirmed by other evidence, as stated in point 37 above.

73. Those criticisms are the result, in my view, of a partial misreading of the judgment under appeal.

74. Indeed, it should be acknowledged that the assessment in paragraph 58 of the judgment under appeal is vitiated by an error of law.

49 — See, in that regard, Case C-229/05 P *PKK and KNK v Council* [2007] ECR I-439, paragraph 33.

75. It should be pointed out that, in that paragraph of the grounds of the judgment under appeal, the Court of First Instance presented the approach it was going to adopt for the purposes of assessing the extent of the damage suffered by Ms Girardot. To that end, it therefore stated that it was appropriate ‘to determine the difference between the earnings which Ms Girardot would have received in the event that her opportunity of having her application accepted had materialised and those which she actually received following the unlawful rejection of her application, and then, *if appropriate*, to assess, as a percentage, the chance that Ms Girardot had of that eventuality materialising’.⁵⁰

76. However, by introducing the second stage of the reasoning it was to adopt with the words ‘if appropriate’, the Court of First Instance seems to take the view that that stage is merely optional, whereas, legally, in the case of the loss of an opportunity to be recruited, such a stage is mandatory.

77. Indeed, it should be borne in mind that the loss of an opportunity constitutes damage in itself, as the Commission also acknowledges. With regard to the loss of an opportunity of being recruited, it is not the anticipated amounts which constitute the damage, but the expectation of earning them. When awarding damages, a court must take into account the level of the expectation, which must, as required by the case-law, be real. The chance has to have been a genuine

one. In that respect, this is an application of the principle of compensation for certain damage, since what is certain is not the anticipated future event or development, but rather the loss of the chance that they may materialise. Accordingly, the assessment of the chance that Ms Girardot had of having her application accepted cannot be optional, since it forms part of the very definition of the notion of loss of opportunity.

78. However, I take the view that the error of law on the part of the Court of First Instance cannot result in the annulment of the judgment under appeal. Indeed, it is common ground that, in paragraphs 96 to 122 of the latter, the Court of First Instance actually assessed *in concreto* the chance — described, incidentally, as genuine — that Ms Girardot had of filling the posts for which she had submitted her application, with the result that it is not possible to take the view, as the Commission wrongly claims, that the material damage found to exist in the judgment under appeal is equal only to the difference between the earnings which Ms Girardot would have received if one of her applications had been accepted by the Commission and those which she actually received.

79. In that regard, the Commission’s criticisms concerning the taking into account, in the judgment under appeal, of the loss of earnings as a criterion for assessing the loss of an opportunity to be recruited are also untenable.

⁵⁰ — Emphasis added.

80. It is true, as the Commission states, that Ms Girardot had no right to be recruited. That assertion is not contradicted by the judgment under appeal. The Court of First Instance even expressly confirmed it in paragraph 72 of the judgment under appeal, which, therefore, excludes the existence of any contradiction between the judgment under appeal and paragraph 57 of the interim judgment, contrary to the claims of the Commission.

81. Nevertheless, the absence of a right to be recruited does not mean that the criterion of earnings cannot be taken into consideration in assessing the material damage arising from the loss of an opportunity to be recruited, provided that that assessment also takes into account the likelihood of being recruited and that it is carried out in the light of the parties' claims, as the Court of First Instance did in the judgment under appeal.

82. Indeed, the unlawful act found to exist, that is the failure to demonstrate that a consideration of comparative merits had been carried out, certainly deprived Ms Girardot of the opportunity of filling the coveted posts and, therefore, of the opportunity of receiving the earnings relating thereto. However, by using a method based on anticipated earnings, weighted to reflect the genuine chance that Ms Girardot had of obtaining such earnings, the Court of

First Instance merely applied the criteria governing the non-contractual liability of the Community, in the specific context of the loss of an opportunity to be recruited.

83. Moreover, it is interesting to note that the alternative method proposed by the Commission is also based on the criterion of earnings, in that it proposes to compensate Ms Girardot by awarding financial compensation the amount of which would be set at three months' net earnings paid in respect of the minimum notice period provided for by Article 47(2)(a) of the Conditions of Employment.

84. However, even if such a method of compensation — which is based on the assumption that the Commission would have been entitled unilaterally to terminate the employment of Ms Girardot without reason and immediately after it had taken effect —⁵¹, were possible, the fact remains

51 — In Case 25/68 *Schertzer v Parliament* [1977] ECR 1729, paragraphs 38 to 40, and Case C-18/91 *P V v Parliament* [1992] ECR I-3997, paragraph 39, the Court, with regard to the unilateral termination of the contract of a member of the temporary staff considered that the justification for such termination, which is expressly provided for by Article 47 of the Conditions of Employment, lies in the contract of employment and there is no need therefore for a statement of reasons. With regard in particular to the importance, regularly reiterated in the case-law, of the principle of the obligation to state reasons in Community law (from which derogations are possible only where there are overriding considerations) and of the protection of workers against dismissal and the abuse of indefinite contracts, that approach ought, in my view, to be reviewed: see, in that regard, the judgment of the Civil Service Tribunal in Case F-1/05 *Landgren v European Training Foundation* [2006] ECR-SC I-A-1-123 and II-A-1-459, paragraphs 63 to 70, under appeal before the Court of First Instance (Case T-404/06 P).

that it is based on the same criterion as that used by the Court of First Instance. The Commission departs therefrom, in the final analysis, only as regards determining the extent of the damage which, as has already been stated in this Opinion, is within the exclusive jurisdiction of the court hearing the substance of the case. In other words, since the Commission acknowledges the relevance of the criterion of earnings for the purposes of compensating for the loss of an opportunity to be recruited, including as the starting point for its own method of calculation, it cannot, in the context of the appeal, criticise the method and extent of compensation for the damage suffered.

85. Moreover, as the Commission has pointed out, the purpose of the method which it proposes is to compensate in a uniform way for the loss of an opportunity to be recruited. However, on the one hand, that approach tends to disregard the necessarily individual nature of damage caused by an unlawful act committed by a Community institution and, on the other hand, it entails the risk of undermining the overall deterrent nature of financial compensation and encouraging the administration to strike a balance between complying with the rules applicable to it and engaging in unlawful conduct which it knows the price of in advance.

86. To require the court hearing the substance of the case to apply a uniform method, as the Commission suggests, would almost certainly prevent it from exercising a large part of the unlimited jurisdiction which allows it to rule *ex aequo et bono* by seeking

the most suitable compensation for the damage suffered. If the approach proposed by the Commission were to be accepted, it would, in the final analysis, be liable to lead the court hearing the substance of the case to fail to observe the principle of full compensation for the damage.⁵²

87. Those considerations also lead me to dismiss the Commission's claim concerning the unequal treatment which would be caused by the method used by the Court of First Instance. Indeed, not only are such criticisms concerned with the extent of the damage, they also disregard the necessary discretion which must be enjoyed by the court hearing the substance of the case when carrying out the most appropriate assessment of compensation for the damage suffered.

88. Finally, it is also necessary to dismiss the Commission's complaints relating to the extent of the compensation as set out in the judgment under appeal, which it is appropriate, as stated in points 67 and 71 above, to interpret as relating to the absence and/or inadequacy of the statement of reasons, complaints which are concerned, in essence, with the period of 5 years taken into account in the judgment under appeal for the purposes of calculating the difference between the earnings expected by

52 — See, concerning that principle, Joined Cases 169/83 and 136/84 *Leussink-Brummelhuis v Commission* [1986] ECR 2801, paragraph 13, and *Lucaccioni v Commission*, paragraph 22, and also point 4 of the Opinion of Advocate General Darmon in Case 131/81 *Berti v Commission* [1985] ECR 645.

Ms Girardot if her applications had been accepted and those which she actually received. Indeed, it is sufficient to note that, by determining, on the one hand, in paragraph 62 of the judgment under appeal, the starting point of the comparison period as being the date on which the appointment of the successful candidates took effect and, on the other hand, in paragraphs 63 to 78 of that judgment, the term of that period by taking into account all the facts and points of law which would have governed the relationship between the person concerned and the Commission if the latter had recruited her, the Court of First Instance adequately explained the reasons which led it to use that period.

89. In the light of all those considerations, I propose that the Court should dismiss the main appeal.

VII — The cross-appeal

A — *Arguments of the parties*

90. In her cross-appeal, Ms Girardot contends that the Court of First Instance infringed Community law by committing several manifest errors of assessment. The first relates to the determination of the period to be taken into consideration when calculating the difference in earnings insofar as, in paragraph 80 of the judgment under

appeal, the Court of First Instance refused to take into account the loss of opportunity of a career at the Commission. According to Ms Girardot, the prospect of appointment as an established official after recruitment was not uncertain. The period to take into account should therefore necessarily have been greater than the period of five years used by the Court of First Instance. The second manifest error of assessment committed by the Court of First Instance relates to the determination of the difference in earnings. By using the net monthly earnings corresponding, on average, to the most recent remuneration paid by the Commission, the Court of First Instance disregarded, in paragraph 85 of the judgment under appeal, the fact that she had more chance of being recruited to a post at Grade A4 than a post at Grade A5, since five of the eight posts for which Ms Girardot had applied were at Grade A4. The third error of assessment relates to the probability of the opportunity to be recruited materialising, since the Court of First Instance, by determining at 50% the chance that Ms Girardot had of filling a post at the Commission, disregarded the fact, on the one hand, that applying for eight posts is more a factor likely to increase the opportunities of being recruited and, on the other hand, that a genuine chance is not the same as an even chance. Finally, the fourth manifest error of assessment lies in the absence of consideration, in paragraphs 133 to 138 of the judgment under appeal, of all the elements constituting non-material damage and physical injury, although the medical certificates annexed to the cross-appeal refer to the depressive syndrome from which she has suffered since the unlawful rejection of her applications by the Commission.

91. At the hearing, the Commission contended that the cross-appeal was inadmissible.

B — *Analysis*

92. It is clear from Article 225 EC and the first paragraph of Article 58 of the Statute of the Court of Justice that the Court of First Instance has exclusive jurisdiction, first, to find the facts except where the substantive inaccuracy of its findings is apparent from the documents submitted to it and, second, to assess those facts. When the Court of First Instance has found or assessed the facts, the Court of Justice has jurisdiction under Article 225 EC to review the legal characterisation of those facts by the Court of First Instance and the legal conclusions it has drawn from them.⁵³

93. In the present case, as was reiterated at the hearing by Ms Girardot, the cross-appeal, in relation to the first three pleas on which it is based, simply challenges the assessment of certain facts carried out by the Court of First Instance in the context of applying the method of calculation which the latter used to determine the damage suffered by Ms Girardot on account of the loss of an opportunity to be recruited to a post as a member of the temporary staff at the Commission, although no distortion of those facts has been alleged or can be identified. Moreover, as has already been stated, the Court of First Instance has exclusive jurisdiction to assess the method and extent of compensation

for the damage suffered.⁵⁴ On those two grounds, such pleas should be dismissed as inadmissible.

94. With regard to the fourth plea, by which Ms Girardot alleges that the Court of First Instance failed to take into account the medical certificates that she submitted, that, to me, appears to be admissible, since it seems to be directed not against the incorrect assessment of evidence, but against the alleged infringement of the obligation to examine the evidence allegedly adduced, which purports to establish the existence of heads of damage other than the material damage caused by the unlawful act committed by the Commission. Accordingly, just as the Court has, in the context of an appeal, ruled that a plea alleging an incomplete examination of the facts was well founded,⁵⁵ a plea alleging the absence of an examination of evidence by the Court of First Instance should, in my view, also be subject to review on the part of the Court.

95. However, for the reasons set out below, I take the view that that plea should be dismissed as irrelevant or, in any event, as unfounded.

54 — See the case-law cited in footnote 47 above.

55 — Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others v Commission* [2002] ECR I-8375, paragraphs 392 to 406.

53 — See Case C-167/04 P *JCB Service v Commission* [2006] ECR I-8935, paragraph 106, and the case-law cited.

96. As regards the irrelevance of that plea, it is apparent from a combined reading of paragraphs 123 to 125, 133 and 138 of the judgment under appeal that the rejection of the existence of physical harm and of the claim relating to the deterioration in Ms Girardot's physical health and her depressive state, because she failed to produce evidence attesting to the existence of that damage, is based on a ground included merely for the sake of completeness, as confirmed in the second sentence of paragraph 125 of the judgment under appeal, introduced by the words '[i]n any event'.⁵⁶ The principal ground set out in paragraphs 123 to 125 of the judgment under appeal and in respect of which Ms Girardot alleges no error of law, is based, for its part, on the consideration that the purpose of financial compensation is solely to make good the material damage resulting from the loss of an opportunity to be recruited caused by the unlawful act on the part of the Commission and not, in the absence of a prior claim for damages, to make good any other damage which that unlawful act might also have caused to Ms Girardot, with the result that the Court of First Instance was able to rule, in the first sentence of paragraph 125 of the judgment under appeal, that the arguments concerning that other alleged damage were irrelevant.

97. In any event, as regards whether that plea is unfounded, it should be noted that the medical certificates, which are annexed to the cross-appeal and on which Ms Girardot supports her claim, are all subsequent to the delivery of the judgment under appeal

and that, accordingly, Ms Girardot fails to establish that the Court of First Instance, by finding, in paragraphs 133 and 138 of the judgment under appeal, that she had failed to demonstrate the existence of the damage that she was alleging on the basis, *inter alia*, of medical certificates, committed an error of law in applying rules on the burden of proof and the production of evidence or infringed Community law by failing to examine evidence, since that evidence had not been presented to it.⁵⁷

98. For all those reasons, I take the view that the cross-appeal should be dismissed as partly inadmissible and partly irrelevant or unfounded.

99. In those circumstances, it is appropriate to dismiss both the main appeal and the cross-appeal.

VIII — Costs

100. Under the first paragraph of Article 122 of the Rules of Procedure, where the appeal is unfounded, the Court is to make a decision

⁵⁶ — It is settled case-law that complaints directed against grounds given in a decision of the Court of First Instance merely for the sake of completeness cannot provide any basis for annulment of that decision and are therefore irrelevant: see order of the Court of 9 March 2007 in Case C-188/06 P *Schneider Electric v Commission*, not published in the ECR, paragraph 64, and the case-law cited.

⁵⁷ — See, in that regard, order of the Court of 4 October 2007 in Case C-100/07 P *É.R. and Others v Council and Commission*, not published in the ECR, paragraph 29.

as to costs. According to Article 69(2) of those rules, which applies to the appeal procedure pursuant to Article 118 thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since Ms Girardot applied in her pleadings for the Commission to be ordered to pay the costs and the latter must, in my view, be unsuccessful in its single plea, it should be ordered to pay the costs of the main appeal. Since the

Commission applied in its pleadings for each of the parties to be ordered to bear its own costs in these proceedings and Ms Girardot must, in my view, be unsuccessful in her pleas put forward in support of the cross-appeal, each of the parties should be ordered to bear their own costs in respect of the cross-appeal, in accordance with the Commission's claims and Article 69(3) of the Rules of Procedure, which applies to the appeal procedure pursuant to Article 118 of those rules.

IX — Conclusion

101. Having regard to the foregoing considerations, I propose that the Court should:

- (1) Dismiss the main appeal and the cross-appeal;
- (2) Order the Commission of the European Communities to pay the costs of the main appeal;
- (3) Order Ms Girardot and the Commission of the European Communities to bear their own costs in respect of the cross-appeal.