JUDGMENT OF THE COURT OF FIRST INSTANCE (Second Chamber)
26 June 1996

Case T-91/95

Lieve de Nil and Christiane Impens
v
Council of the European Union

(Officials – Internal 'upgrading' competition – Measures implementing a judgment annulling a decision – Article 176 of the EC Treaty – Fresh tests – Reclassification – Not retroactive – Material and non-material damage – Compensation)

Full text in French . . . . . II - 959

Application for: (both applicants) first, annulment of the Council's decision of 15 June 1994 and, if necessary, the Council's decision of 9 June 1994, explicitly rejecting in the first case and rejecting by implication in the second, the request for compensation for the damage suffered as a result of the Council's failure to implement adequately the judgment of the Court of First Instance of 11 February 1993 in Case T-22/91 *Raiola-Denti and Others* v *Council* [1993] ECR II-69, and of the Council's decision of 4 January 1995 expressly rejecting the subsequent complaint, and secondly, an order that the Council pay BFR 500 000 for material damage and ECU 1 as symbolic damages for non-material damage.

Decision: Annulment and Council ordered to pay compensation for the material and non-material damage suffered. Remainder of the application dismissed.

Abstract of the Judgment

On 26 October 1990 the Council published Notice of Internal Competition B/228 for the purpose of filling 15 administrative assistant posts in Grade B 5 by enabling Grade C officials to obtain 'upgrading' of their posts to that grade.

The applicants, who were at the time Council officials in Grade C 1, were admitted to take part in the tests by individual notification dated 4 December 1990.

Their names did not appear on the list of successful candidates and on 13 April 1991 they brought, with other persons concerned, an action for the annulment *inter alia* of decisions of the selection board 'taken following the decisions on admission to the tests in the competition'. By judgment of 11 February 1993 in Case T-22/91 *Raiola-Denti and Others* v *Council* [1993] ECR II-69, the Court held that the tests were not conducted in accordance with Competition Notice B/228 because the selection board failed to comply with the notice and rendered nugatory the language test specified. The Court consequently annulled 'the steps taken following the decisions admitting candidates to the tests in Internal Competition B/228 [...]'.

Following that judgment, the Council decided, first, to maintain the decisions reclassifying the candidates who had been successful in Competition B/228 with effect from 1 January 1991 and, secondly, to publish on 1 September 1993 a notice of Internal Competition B/228a open to candidates who had been admitted to take part in the tests for Competition B/228 by individual notification dated 4 December 1990 for the purpose of filling six administrative assistant posts in Grade B 5 by way of the upgrading of C 1 posts. The nature and marking of the tests for Competition B/228a were identical to those for Competition B/228.

After the tests had taken place, the applicants, who were candidates in Competition B/228a, were placed on the list of successful candidates and obtained reclassification of their posts to Grade B 5 with effect from 1 January 1994.

The applicants considered that despite that reclassification the Council had not in fact made good the damage caused by the refusal of the selection board in Competition B/228 to place them on the list of successful candidates, inasmuch as that refusal had deprived them of reclassification with effect from 1 January 1991. 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 for compensation for material and non-material damage suffered as a result of the irregular decision of the selection board in Competition B/228, which they evaluate at BFR 500 000. In addition they ask for reimbursement of all the costs incurred in the fresh pre-litigation procedure.

That request was rejected by implication and then by express decision notified to the applicants on 15 June 1994.

On 6 September 1994 the applicants submitted a complaint pursuant to Article 90(2) of the Staff Regulations against that rejection decision.

On 4 January 1995 the appointing authority took an express decision to reject the complaint.

Substance

In order to comply with the obligation laid down in Article 176 of the Treaty, it is for the institution which adopted the act annulled by the Community judicature to determine the measures required to implement the judgment annulling the act in the exercise of its discretion, complying with both the operative part and the grounds of the judgment and with the provisions of Community law. Where compliance with a judgment annulling a measure presents particular difficulties, the institution concerned may satisfy the obligation arising from Article 176 of the Treaty by taking such decision as will provide due compensation for the damage which the persons concerned have suffered. In a case such as this, the institution concerned must ensure that the principles of equal treatment of officials and that officials are entitled to reasonable career prospects are complied with (paragraphs 34 and 35).

See: 15/63 *Lassalle* v *Parliament* [1964] ECR 31; 17/68 *Reinarz* v *Commission* [1969] ECR 61; Case 48/70 *Bernardi* v *Parliament* [1971] ECR 175, para. 27; 97/86, 193/86, 99/86 and 215/86 *Asteris and Others* v *Commission* [1988] ECR 2181; C-412/92 P *Parliament* v *Meskens* [1994] ECR I-3757, para. 28; T-84/91 *Meskens* v *Parliament* [1992] ECR II-2335, para. 80; T-43/91 *Hoyer* v *Commission* [1994] ECR-SC II-297, para. 64; T-508/93 *Mancini* v *Commission* [1994] ECR-SC II-761; T-506/93 *Moat* v *Commission* [1995] ECR-SC II-147, para. 37

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; this is evidenced by the development of the careers of the latter, who have all been promoted: three are now eligible for promotion to Grade B 2 and another three for promotion to Grade B 3. If the applicants had been reclassified in Grade B 5 in January 1991 they would themselves 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 (paragraph 38).

The applicants therefore suffered a distortion in the prospects for the development of their careers as compared with those of the successful candidates in Competition B/228. Once Competition B/228a had been organized, the Council could have provided that the 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 until 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 (paragraph 39).

See: 9/81 *Williams* v *Court of Auditors* [1982] ECR 3301; 190/82 *Blomefield* v *Commission* [1983] ECR 3981

That solution did not imply that the applicants were entitled to be included on the list of successful candidates in Competition B/228 (paragraph 40).

First, the retroactivity requested did not relate to hypothetical success on the part of the applicants in Competition B/228 and their consequent inclusion on the list of successful candidates relating to that competition, but to the effects that would attach to their actual success in Competition B/228a (paragraph 41).

Secondly, the two competitions were not separate entities. Far from being closed, Competition B/228 remained open and the applications admitted by notification of 4 December 1990 remained in abeyance before the appointing authority, so that, when it organized Competition B/228a, the Council in reality merely re-opened the procedures in Competition B/228 solely as regards those candidates who had not been included on the list of successful candidates drawn up following the previous tests. The candidates who were successful in the tests organized on the basis of Notices B/228 and B/228a must therefore be regarded as the successful candidates

in a single competition and accordingly receive the same treatment as regards the effects of reclassification (paragraph 42).

Since the refusal by the Council to adopt the measures which would have ensured such equal treatment constituted a breach of Article 176 of the Treaty, the Council is liable to pay compensation for the damage actually suffered following that breach (paragraphs 44 and 45).

The applicants have 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, since 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 (paragraph 47).

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 organized 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 organized on the basis of Notice B/228a (paragraphs 48 to 50).

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

See: T-82/91 *Latham* v *Commission* [1994] ECR-SC II-61; T-3/92 *Latham* v *Commission* [1994] ECR-SC II-83

Operative part:

The Council decisions of 9 and 15 June 1994 rejecting the claims for compensation submitted by the applicants on 9 February 1994 and the decision of 4 January 1995 rejecting the applicants' complaint of 6 September 1994 are annulled.

The Council is ordered to pay each of the applicants the sum of BFR 500 000 as compensation for combined material and non-material damage.

The remainder of the application is dismissed.