JUDGMENT OF THE COURT (Second Chamber)

9 November 2006 *

In Case C-344/05 P,

APPEAL under Article 56 of the Statute of the Court of Justice, lodged on 21 September 2005,

Commission of the European Communities, represented by L. Lozano Palacios and H. Kraemer, acting as Agents, with an address for service in Luxembourg,

applicant,

the other party to the proceedings being:

Joël De Bry, official of the Commission of the European Communities, residing in Woluwe-St-Lambert (Belgium), represented by S. Orlandi, avocat, with an address for service in Luxembourg,

applicant at first instance,

* Language of the case: French.

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, R. Schintgen, J. Klučka, R. Silva de Lapuerta and L. Bay Larsen (Rapporteur), Judges,

Advocate General: M. Poiares Maduro,
Registrar: R. Grass,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 13 July 2006,

gives the following

Judgment

1 By its appeal, the Commission of the European Communities seeks the annulment of the judgment delivered by the Court of First Instance of the European Communities on 12 July 2005 in Case T-157/04 *De Bry* v *Commission*, ECR-SC I-A-199 and II-901 ('the judgment under appeal'), by which the Court of First Instance set aside the Commission decision of 26 May 2003 ('the contested decision') making definitive the career development report ('CDR') of Mr De Bry, an official, in respect of the period from 1 July 2001 to 31 December 2002.

Legal context

2 The first and second paragraphs of Article 26 of the Staff Regulations of Officials of the European Communities, in the version applicable to the facts of these proceedings ('the Staff Regulations') provide:

'The personal file of an official shall contain:

(a) all documents concerning his administrative status and all reports relating to his ability, efficiency and conduct;

(b) any comments by the official on such documents.

Documents shall be registered, numbered and filed in serial order; the documents referred to in subparagraph (a) may not be used or cited by the institution against an official unless they were communicated to him before they were filed.'

3 Article 43 of the Staff Regulations provides:

'The ability, efficiency and conduct in the service of each official, with the exception of those in Grades A1 and A2, shall be the subject of a periodical report made at least once every two years as provided for by each institution in accordance with Article 110.

The report shall be communicated to the official. He shall be entitled to make any comments thereon which he considers relevant.'

4 The first and second paragraphs of Article 110 of the Staff Regulations provide that the general provisions for giving effect to those regulations are to be adopted by each institution after consulting its Staff Committee and the Staff Regulations Committee and are then to be brought to the attention of the staff.

5 On 26 April 2002, the Commission adopted a decision on general provisions for implementing Article 43 of the Staff Regulations ('the GIP 43 decision'), by which it introduced a new system of appraisal.

6 Article 1 of the GIP 43 decision provides for the drawing-up, on an annual basis, of a CDR.

7 Articles 7 and 8 govern the appraisal procedure. Following a self-assessment drawn up by the official under appraisal and a dialogue between that official and the reporting officer, his head of unit, the CDR is compiled by the reporting officer and the countersigning officer, the reporting officer's hierarchical superior, who transmit it to the individual concerned. The official under appraisal then has the right to request a dialogue with the countersigning officer, who can either amend or confirm the CDR. That report is then sent again to the individual concerned. The official under appraisal can then ask the countersigning officer to refer the matter to the Joint Evaluation Committee ('the JEC'). The JEC checks that the CDR has been drawn up fairly, objectively and in accordance with normal reporting standards. It also verifies that the procedures have been correctly followed, in particular as regards dialogues and time-limits. It produces a reasoned opinion. That opinion, which is notified to the official under appraisal, the reporting officer and the

countersigning officer, is transmitted to the appeal assessor, the hierarchical superior of the countersigning officer, who either confirms or amends the CDR before sending it to the individual concerned. If the appeal assessor departs from the recommendations contained in the JEC's opinion, he is required to justify his decision.

8 In July 2002, the Commission published a document entitled 'Career Development Review System — Guide' ('the Appraisal Guide'). According to that guide, the CDR is based on each official's ability, efficiency and conduct in the service. The three headings of appraisal thus set out are divided into separate levels including a maximum of six, ten and four points respectively.

The factual background to the dispute

9 Mr De Bry, a Grade A5 official assigned to the Commission's Secretariat General, was the subject of a CDR dated 18 February 2003 in respect of the period from 1 July 2001 to 31 December 2002.

10 In accordance with the GIP 43 decision, he requested a review of his appraisal. On 19 March 2003 the countersigning officer made some amendments to the descriptive comments, but the marks awarded remained unchanged.

11 Under the heading 'Conduct in the service', the following comment was added:

'Mr De Bry is always available to finish his work by working overtime during the week, and even at weekends. However this availability outside normal working hours is frequently accompanied by failure to comply with the normal hours of work.'

12 On 26 March 2003, Mr De Bry requested that the matter be referred to the JEC. His action was dismissed by the contested decision, adopted by the appeal assessor.

13 On 26 August 2003, Mr De Bry submitted a complaint under Article 90(2) of the Staff Regulations. That complaint was rejected by the Appointing Authority on 6 January 2004.

The action before the Court of First Instance and the judgment under appeal

14 By application lodged at the Registry of the Court of First Instance of the European Communities on 22 April 2004, Mr De Bry, brought an action for annulment of the contested decision.

15 He essentially relied on four pleas, alleging, respectively:

— infringement of Article 14 of the Staff Regulations, under which any official who, in the performance of his duties, is called upon to decide on a matter in the handling or outcome of which he has a personal interest such as to impair his independence must inform the Appointing Authority of this;

— breach of the obligation to state reasons;

— inconsistency between some descriptive comments and the corresponding numerical marking;

— breach of the rights of the defence.

16 In connection with the fourth plea, he submits that the criticism that he failed to comply with the normal hours of work could only be taken into account in a CDR if the official had had the opportunity beforehand to submit his comments on that criticism, which had not happened in the present case. The alleged lack of punctuality should have given rise, when it occurred, to warnings enabling him to express his views.

17 The Court of First Instance called on the Commission to set out its views on whether Article 26 of the Staff Regulations and the case-law which states that the purpose of that provision is to ensure that the rights of the defence of the official are observed were relevant to the appraisal procedure at issue.

18 The Commission responded that Article 26 of the Staff Regulations presupposes that there are 'documents' and does not require that documents be created, in particular in the form of written warnings addressed to the official.

19 At paragraph 94 of the judgment, the Court of First Instance upheld the fourth plea, ruling, so far as the criticism relating to working hours is concerned, that the Commission had infringed the rights of the defence guaranteed by Article 26 of the Staff Regulations.

20 Consequently, in paragraphs 95 and 96 of that judgment, it upheld the third plea in so far as, since the finding of a lack of punctuality was unlawful, the corresponding criticism should be deemed not to be included in the CDR, with the result that significant doubt arose as to the consistency between the mark 'satisfactory' and the comments included under the heading 'Conduct in the service'.

21 The Court of First Instance rejected the remainder of the pleas raised by the applicant.

22 Finally, it annulled the contested decision and ordered the Commission to pay the costs.

23 In paragraph 83 of the judgment under appeal, the Court of First Instance ruled that observance of the rights of the defence of the official under appraisal implies that, in order for it to be capable of being relied upon against him, the factual information, such as that at issue in the present case, must have been recorded in 'documents' within the meaning of the first and second paragraphs of Article 26 of the Staff Regulations, which have been previously placed on his personal file or at least previously brought to his notice.

24 In paragraph 86 of its judgment, the Court of First Instance held that, for there to have been no breach of the rights of the defence to which he is entitled under Article 26 of the Staff Regulations, the official should have been given a written warning about the finding of his lack of punctuality within an appropriate period, that is to say, within a reasonable period following the matter for which he was criticised, which would have enabled him, inter alia, to effectively defend his interests either by challenging that criticism or by taking note of it in order to improve his conduct in the service, if only in order to obtain a good mark.

25 The Court of First Instance also found, in addition, in paragraph 91 of the judgment under appeal, that section 3.1 of the Appraisal Guide, which the Commission has imposed on itself as a rule of conduct, requests reporting officers to be careful, throughout the appraisal period, to collect examples of work, to keep copies of them or write notes. In the same paragraph of the judgment under appeal, the Court of First Instance observed that, in accordance with section 3.2 of the Appraisal Guide, feedback should be related to specific areas of behaviour and be provided as quickly as possible after the work has been done.

Forms of order sought by the parties before the Court of Justice

26 The Commission claims that the Court of Justice should:

— annul the judgment under appeal;

— pass final judgment itself on the dispute, allowing the claims which it submitted at first instance and, consequently, dismiss the application;

— in the alternative, refer the case back to the Court of First Instance;

— order Mr De Bry to pay the costs of the proceedings, including his own costs in the proceedings before the Court of First Instance.

27 Mr De Bry contends that the Court of Justice should:

— dismiss the appeal as being manifestly unfounded;

— order the Commission to pay the costs.

The appeal

28 The appellant raises a single plea for annulment, subdivided into two branches, alleging that the Court of First Instance erred in law in the application, first, of the principle of the observance of the rights of the defence and, secondly, of the second paragraph of Article 26 of the Staff Regulations.

Arguments of the parties

29 In the first branch of its plea, the Commission claims that the Court of First Instance misinterpreted the scope of the general principle that the rights of the defence must be observed.

30 Those rights, it submits, can be exercised solely within the actual procedure which is liable to culminate in the adoption of a measure having an adverse effect.

31 They do not imply an obligation on the originator of the measure having an adverse effect to warn the person concerned before initiating such a procedure.

32 In the second branch of its plea, the Commission states that the obligation, upheld by the Court of First Instance, to record in writing any information on the basis of which an official may be criticised does not follow from the second paragraph of Article 26 of the Staff Regulations.

33 That latter provision presupposes that there are 'documents', within the meaning of section (a) of the first paragraph of that article. It does not lay down an obligation to create such documents.

34 Mr De Bry submits that Article 26 of the Staff Regulations is designed to ensure that the official's rights of defence are observed. The purpose of that article is to prevent decisions of the Appointing Authority affecting the administrative status and career of the official under appraisal from being based on matters concerning his conduct which are not placed on his personal file or communicated to the individual concerned.

35 The Court of First Instance was thus fully entitled to annul the contested decision, in accordance with settled case-law.

36 Mr De Bry adds that the Court of First Instance was in fact required to ascertain whether the Commission had applied, at the time the CDR was drawn up, the new internal directives stemming in particular from section 3.1 of the Appraisal Guide, with which it was required to comply.

Findings of the Court

37 According to settled case-law, observance of the rights of the defence is, in all procedures initiated against a person which are liable to culminate in a measure adversely affecting that person, a fundamental principle of Community law which must be guaranteed even in the absence of any rules governing the procedure in question (see, inter alia, Case 234/84 *Belgium* v *Commission* [1986] ECR 2263, paragraph 27, and Case C-288/96 *Germany* v *Commission* [2000] ECR I-8237, paragraph 99).

38 That principle requires that the person concerned must have been afforded the opportunity to effectively make known his views on any incriminating information which might be taken into account in the document to be drawn up (see, to that effect, *Belgium* v *Commission*, paragraph 27, *in fine*, and Case C-458/98 P *Industrie des poudres sphériques* v *Council* [2000] ECR I-8147, paragraph 99).

39 However, as a procedural guarantee, the fundamental principle that the rights of the defence must be observed cannot be interpreted, in the field of the appraisal of European Communities staff, as imposing, before the procedure leading to such an appraisal, any obligation to give prior warning.

40 That finding is not affected by the first and second paragraphs of Article 26 of the Staff Regulations in so far as they make the reliance, as against an official, of all reports on his ability, efficiency and conduct subject to the requirement of being communicated to the individual concerned before being placed on his personal file.

41 In fact, the corresponding provisions, the purpose of which is to guarantee the official's right of defence (see, inter alia, Case 88/71 *Brasseur* v *Parliament* [1972] ECR 499, paragraph 11, and Case 233/85 *Bonino* v *Commission* [1987] ECR 739, paragraph 11), relate to documents which already exist. They preclude, during the appraisal procedure, such documents from being taken into account to the detriment of the official under appraisal without having been communicated to him before being placed on his personal file. They do not require documents formalising any criticism of the conduct of the individual concerned to be prepared beforehand.

42 Article 26 of the Staff Regulations therefore no more imposes an obligation to give prior warning than does the fundamental principle itself.

43 The fundamental principle of observance of the rights of the defence must allow the individual concerned, during the appraisal procedure, to defend himself against any criticism of his conduct which might be taken into account. That purpose is given effect to, in particular, by the first and second paragraphs of Article 26 of the Staff Regulations and by the GIP 43 decision, the provisions of which guarantee that the principle that both parties must be heard will be observed throughout that procedure, as is apparent from paragraph 7 of this judgment.

44 It is not the role of the fundamental principle of observance of the rights of the defence to allow the official to adapt his behaviour in the future in order to avoid the conduct proven being actually taken into account against him. As the Advocate General noted in points 53 and 54 of his Opinion, improving one's conduct in the

service is an objective which goes beyond the scope of observance of the rights of the defence. That objective is in fact served by the staff report.

45 Therefore, by accepting, in paragraphs 83 and 86 of the judgment under appeal, that there was a breach of the rights of the defence guaranteed by Article 26 of the Staff Regulations by reason of the lack of a prior written warning, the Court of First Instance misinterpreted both the fundamental principle of observance of the rights of the defence and Article 26 of the Staff Regulations.

46 That finding is not affected by the reasoning contained in paragraph 91 of the judgment under appeal, relating to the Appraisal Guide, which, according to the Court of First Instance, the Commission has adopted as a rule of conduct binding on it.

47 Although Chapter 3 of the Appraisal Guide suggests that 'timely and constructive feedback be given on a regular basis', by reference to 'specific areas of behaviour', 'as quickly as possible after the work has been done', and although it requests the reporting officers 'to collect examples of work ..., to keep copies of them or write notes', it also states that the feedback is given through 'formal and informal reviews and one-to-one discussion'. It does not therefore require in any way that a written warning should be systematically drawn up for each act for which an official may be criticised.

48 Finally, it must be held that, because of errors in law committed in the interpretation of the fundamental principal of observance of the rights of the defence and of Article 26 of the Staff Regulations, the Court of First Instance, in paragraphs 95 and 96 of the judgment under appeal, went on incorrectly to infer that the CDR's content was inconsistent before accepting the third plea raised before it (see paragraph 20 of this judgment).

49 It follows that the judgment under appeal must be set aside in part, in so far as it annulled the contested decision on the ground of breach of the rights of the defence guaranteed by Article 26 of the Staff Regulations and, consequently, on the ground of inconsistency between some descriptive comments and the corresponding numerical mark, as regards the criticism of failure to comply with working hours.

The consequences of quashing the judgment under appeal

50 Pursuant to the first paragraph of Article 61 of the Statute of the Court of Justice, if the Court quashes 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.

51 That provision must be applied in the present case, since the case is indeed under deliberation.

The plea alleging a breach of the rights of the defence

52 On the grounds set out in paragraphs 37 to 44 of this judgment, neither the fundamental principle of observance of the rights of the defence nor the first and second paragraphs of Article 26 of the Staff Regulations make the fact that a matter may be held against an official in his appraisal report subject to the drawing-up, prior to the procedure leading to the adoption of that report, of a written warning and the communication of that warning to the individual concerned.

53 The applicant at first instance therefore has no basis on which to complain that the Commission took into account, in the contested CDR, the criticism that he did not comply with working hours without having addressed warnings to him prior to the appraisal procedure.

54 The plea alleging a breach of the rights of the defence must therefore be rejected.

The plea alleging inconsistency between certain descriptive comments and the corresponding numerical mark, as regards the criticism of a failure to comply with working hours

55 Since the finding of a lack of punctuality was not held to be unlawful, the criticism based on that finding must be considered to have been properly included in the text of the CDR at issue.

56 In those circumstances, no doubt is cast on the consistency between the mark 'satisfactory' and the comments included under the heading 'Conduct in the service'.

57 The plea alleging inconsistency between certain descriptive comments and the corresponding numerical mark must therefore also be rejected as regards the criticism of a failure to comply with working hours.

58 It follows that the action must be dismissed.

Costs

59 The first paragraph of Article 122 of the Rules of Procedure provides that, where the appeal is well founded and the Court itself gives final judgment in the case, the Court is required to make a decision as to costs. Under the first subparagraph of Article 69(2) of the Rules of Procedure, applicable to appeal proceedings by virtue of 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. However, in accordance with Article 70 of the Rules of Procedure, which is also applicable, under the second paragraph of Article 122 thereof, to appeals brought by the institutions in proceedings between the Communities and their servants, the institutions are to bear their own costs.

60 In the present case, Mr De Bry has been unsuccessful and the Commission has applied for costs. In accordance with the abovementioned provisions of the Rules of Procedure, each party must be ordered to bear its own costs in connection with the present proceedings and those incurred in the proceedings at first instance.

On those grounds, the Court (Second Chamber) hereby:

1. Annuls in part the judgment of the Court of First Instance in Case T-157/04 *De Bry* v *Commission*, in so far as it set aside the Commission decision of 26 May 2003 making definitive the career development report

of Mr De Bry in respect of the period from 1 July 2001 to 31 December 2002 on the ground of a breach of the rights of the defence guaranteed by Article 26 of the Staff Regulations of Officials of the European Communities, on the ground of inconsistency between some descriptive comments and the corresponding numerical mark, as regards the criticism of failure to comply with working hours;

2. **Dismisses the action;**

3. **Orders each party to bear its own costs in connection with the present proceedings and those incurred in the proceedings at first instance.**

[Signatures]