OPINION OF ADVOCATE GENERAL MISCHO

delivered on 10 June 1999 *

1. The appeal before us has been brought by the Economic and Social Committee against the judgment of 17 February 1998 of the Court of First Instance in Case *E* v *Economic and Social Committee of the European Communities*, [1] annulling a disciplinary measure of 18 January 1996 consisting of a relegation by three steps, imposed on E, at that time an official in Grade C 3, Step 5, by a decision of the Economic and Social Committee appointing authority ('the appointing authority').

2. The contested judgment sets out as follows the facts which that decision sought to penalise:

'4 On 30 November 1994, in the context of the procedure for preparing her staff report for the period 1 September 1992 to 31 August 1994, the applicant's former director in the "Communication" Directorate sent her a "draft staff report".

5 By letter of 7 December 1994, the applicant raised objections to the draft staff report. By letter of 16 December 1994, she returned the staff report to the reporting officer with the following comments:

"I would like to do proper secretary's work, which I have never been able to do at the ESC, since I started work in 1986.

I believe that I am equipped to do that job, since, in addition to my qualifications as a short-hand typist, I have two university qualifications as a primary Spanish teacher, which I enclose with this memorandum, which show that I speak that language. I have an excellent knowledge of French, which [the reporting officer] is not in a position to judge, since his own knowledge of

* Original language: French.

1 — Case T-183/96 *E* v *ESC* [1998] ECR I-A-67 and II-159.

that language is insufficient. His memoranda were full of spelling mistakes and he had to rewrite them several times because of his uncertainties in drafting. ...

Since I was first assigned to the Communication Directorate, [the reporting officer] marginalised me and never allocated me any secretarial work.

On the rare occasions when he assigned me a task to perform, it was to make photocopies, send a fax or go to the documentation section to ask for a document. Only very sporadically would he dictate to me a text to type in French or Spanish. ...

Given the above considerations, [the reporting officer] has no grounds to substantiate his assessment. How and according to what criteria can he judge work which he never gave me, which he himself is not familiar with and which does not exist at the Communication Directorate, since it is an artificial directorate, devoid of substance or role?

During the period when I was assigned to the Directorate I was the victim of insults on the part of [the reporting officer]; unbeknown to me he sent a defamatory note to Mr [X] on 28 March 1994 demanding that I be dismissed and leading to my post being removed from the list of posts.

The staff report drawn up by [the reporting officer] constitutes an abusive and defamatory personal attack full of false allegations ...".

6 On 9 January 1995, the applicant acknowledged receipt of the definitive staff report, adopted by the reporting officer on 20 December 1994. A memorandum accompanied the report, in which the reporting officer deplored the views which the applicant expressed in her letter of 16 December 1994. The following notes appeared at the foot of that memorandum: "sent 21. 12. 1994: on leave; sent 4. 1. 1995: on leave; sent 5. 1. 1995: on leave; sent 6. 1. 1995: on leave". The applicant replied to this memorandum by a memorandum of 10 January 1995 to the reporting officer, with a copy for the appellate reporting officer, in which she set out again her above-cited comments and, for the rest, stated as follows:

"I would be grateful if you would refrain from taking note of my leave, since it does not concern you and is not within your competence.

Similarly, I ask you to respect me and to confine yourself strictly to the provisions laid down in the Staff Regulations and the rules in force. Stop defaming me and subjecting me to abuse and insults.

Article 57 of the Staff Regulations entitles an official to annual leave authorised by that official's superior. In my case, that immediate superior is certainly not you. Do not exceed your powers.

The fact that you refer, in your memorandum of 20 December 1994 (paragraph 4.a.3), to regular work is absurd, since you have never assigned to me either duties or any regular task. I was marginalised from the start of my assignment to the Directorate and unreasonably replaced by a typist from the Spanish pool who, on your instructions, took over my work and my job ...'"

3. The judgment sets out the course of the disciplinary proceedings as follows:

'7 By a memorandum of 21 February 1995, the applicant was informed that disciplinary proceedings had been commenced against her, as the result of the contents of her memorandum of 10 January 1995. The applicant was heard on 6 March 1995. At the hearing, she submitted a document in which she stated in reply that there had been a failure to observe the Staff Regulations of Officials of the European Communities ("the Staff Regulations"), and contended that Article 87 of the Staff Regulations had been infringed and that the memorandum of 21 February 1995 gave inadequate reasons.

8 On 29 March 1995, the appointing authority resolved that the matter should be heard by the Disciplinary Board.

9 On 9 November 1995, the Disciplinary Board issued an opinion in which it recommended that deferment of advancement to a higher step should be imposed on the applicant. This opinion was communicated to the applicant on 30 November 1995, and on 18 December 1995 the applicant was heard again.

10 On 18 January 1996, the appointing authority decided to impose on the applicant, for infringement of Articles 12 and 21 of the Staff Regulations, the penalty of relegation in step, reducing her grade from Grade C 3, Step 5 to Grade C 3, Step 2, and to record this disciplinary measure on the applicant's personal file. The decision also lists a series of instances of alleged behaviour by the applicant in the course of 1991, 1992 and 1994 which it regarded as lacking in respect, to illustrate the repeated nature of the conduct complained of in the case before it.

11 The decision stated that it would take effect in law from the time it was communicated to the applicant, but that the financial consequences of the decision would be deferred until 29 February 1996.

12 On 22 April 1996, the applicant submitted a complaint against the penalty. That complaint was rejected by a letter of 14 August 1996.'

4. E relied on four pleas in law before the Court of First Instance, alleging, first, procedural irregularity, secondly, manifest errors of law and misuse of powers, thirdly, manifest errors of fact, and fourthly, failure to observe the principle of proportionality.

5. The Court of First Instance dismissed the first three pleas, but upheld the fourth, basing its decision on the following considerations:

'58 It should be pointed out, next, that it is for the disciplinary authority to choose the appropriate penalty, and that that authority must base its election on a comprehensive appraisal of all the particular facts and the aggravating or mitigating circumstances peculiar to the case. This Court is not entitled to substitute its judgment for that of the disciplinary authority. It is, however, incumbent on this Court to review whether the measure chosen is manifestly disproportionate to the conduct which the decision held to have occurred (judgments of the Court of First Instance in [Case T-146/89] *Williams* v *Court of Auditors*, cited above, paragraph 83, and Case T-26/89 *De Compte* v *Parliament* [1991] ECR II-781, paragraphs 220 to 222).

59 In the present case, as the Court has found, ... the conduct attributable to the applicant is that when she used her right to communicate her observations on the staff report, she employed a tone and expressions which cannot be reconciled with the obligations relating to the dignity of the post and respect for the authorities of the institution. It was not, however, a serious breach of those obligations. In the contested memorandum, the applicant did not use grossly insulting language and she gave reasons for her criticism of the reporting officer, setting out her own view of the working relationship she had with him and expressing her profound dissatisfaction with it. The breach of Articles 12 and 21 of the Staff Regulations therefore lies solely in the applicant's extreme and aggressive choice of words and in what she herself acknowledged in her application to be her unseemly conduct.

60 The Court finds that, in those circumstances, it was manifestly disproportionate to impose on her the penalty of relegation by several steps. That is a

serious measure which is rarely imposed on officials and which, in order to be proportionate, must correspond to facts much more serious than those of the present case.

61 It follows from the foregoing that this alternative plea is well founded.'

6. The Court of First Instance therefore annulled the decision imposing a penalty and ordered the Economic and Social Committee to pay the costs of the proceedings.

7. On 17 April 1998, the Economic and Social Committee lodged an appeal against that judgment, in which it requests the Court of Justice to set aside the judgment of the Court of First Instance, definitively to determine the dispute by upholding the ESC's contention at first instance that E's application should be dismissed, to order the parties to bear their own costs and to give E's full name in its judgment.

8. The appeal is based on three pleas in law, which the Economic and Social Committee itself sums up as follows:

— erroneous finding as to the legal classification to be attributed to the facts, and misinterpretation of Article 12 and Article 21 of the Staff Regulations applicable to officials and other servants of the European Communities ('the Staff Regulations');

— defects of reasoning in the contested judgment and misinterpretation of Article 86 and Article 87 of the Staff Regulations;

— erroneous application of the principle of proportionality and misinterpretation of Article 12 and Article 21 of the Staff Regulations.

The first plea

9. I shall start by examining the first plea, by which the Economic and Social Committee criticises the Court of First Instance for finding, at paragraph 59 of its judgment, that the infringement of Article 12 and Article 21 of the Staff Regulations 'lies solely in the applicant's extreme and aggressive choice of words and [that she, therefore, demonstrated] unseemly conduct', whereas the Economic and Social Committee had found the infringement to consist of a lack of deference.

10. In the submission of the ESC, that finding constitutes an assessment of the

legal nature of the facts and must be subject to review by the Court of Justice ruling on appeal.

11. I am able to agree with it on this point, but cannot otherwise accept its ground of challenge since it appears that the Court of First Instance, also in paragraph 59, found that E used 'a tone and expressions which cannot be reconciled with the obligations relating to the dignity of the post and respect for the authorities of the institution'.

12. Can one, moreover, seriously maintain that classifying E's conduct as unseemly rather than lacking in deference was an erroneous assessment of the legal nature of the facts, when consultation of the *Le Petit Robert* dictionary reveals that 'bienséance' ('seemly conduct') and 'respect' ('deference') have a common synonym, 'politesse' ('courtesy')?

13. I could understand the ESC's insistence on this point if the Staff Regulations attached a specific penalty to lack of deference or, at least, furnished guidelines for assessing, and therefore penalising, conduct which indicates a lack of deference.

14. That is not, however, so, since, as will be seen below and as, moreover, the Economic and Social Committee acknowledges, the Staff Regulations do not associate a particular penalty with any particular conduct. What is significant in E's case is the fact that, in her relations with her immediate superior, she engaged in a certain form of conduct, whose occurrence the Court of First Instance never questioned, whether that conduct is classified as a lack of deference, a lack of courtesy or unseemly conduct.

15. Nor can I share the view expressed by the Economic and Social Committee that the tone and expressions which E employed in the memorandum for which she is criticised and the context of the radical deterioration in relations between E and her superiors are irreconcilable with a classification as unseemly conduct.

16. That context, admittedly, is not a matter of indifference, and must even be taken into account when it comes to choosing the disciplinary measure, but it is not relevant in terms of classifying the infringement. The words and expressions used were unacceptable in themselves, regardless of whether E's behaviour in relation to her superiors was already susceptible to criticism before she sent the memorandum in question.

17. I am therefore of the view that the ESC's first plea cannot be upheld.

The second and third pleas

18. It seems to me appropriate to address the two other pleas in law on which the Economic and Social Committee relies together, since they are, in my view, linked in all respects. The ESC's second complaint alleges that the judgment gives an inadequate statement of reasons and misinterprets Article 86 and Article 87 of the Staff Regulations. The Economic and Social Committee complains that the Court of First Instance erred in taking into consideration only the specific conduct found against E, without stating its reasons for not taking account of all the circumstances of the case, including the aggravating circumstances set out in the appointing authority's decision, thus overlooking the fact that Articles 86 to 89 of the Staff Regulations require the disciplinary measure to be determined by a comprehensive appraisal of all the particular facts and circumstances peculiar to the case. Nor, in so determining the appropriate penalty, was the Court of First Instance entitled, in the submission of the ESC, to substitute its judgment for that of the appointing authority.

19. The Economic and Social Committee points out that, in the present case, the lack of reasons given as to why the Court of First Instance did not take the background of aggravating circumstances into account is all the more serious in that the contested decision of the Economic and Social Committee was based explicitly on those aggravating circumstances, and because they have particular significance. This gives rise, in its submission, to defects of reasoning and misinterpretation of Article 86 and Article 87 of the Staff Regulations.

20. By way of its third plea, the Economic and Social Committee alleges erroneous application, by the Court of First Instance, of the principle of proportionality, and misinterpretation of Article 12 and Article 21 of the Staff Regulations. It argues that applying the principle of proportionality in the exercise of disciplinary action requires the penalty chosen to be strictly necessary, in the sense that there must be a close correlation between the penalty and the gravity of the infringement. The administration responsible for imposing a disciplinary measure must, therefore, choose that measure which is least restrictive and which corresponds most closely to the infringement committed.

21. According to the ESC, the Court of First Instance's finding that the disciplinary measure imposed on E by the Economic and Social Committee was disproportionate is erroneous and stems from, on the one hand, the fact that the Court of First Instance classified E's conduct as 'unseemly' and, on the other, from the lack of reasons given as regards the grounds on which it was necessary to take into consideration all the circumstances of the case.

22. Furthermore, according to the ESC, its contested decision contained all the particulars necessary to justify the disciplinary measure chosen. The aggravating circumstances taken as a whole dictated the imposition of relegation by three steps, and all the more so because no mitigating circumstances could be established in E's favour.

23. According to the ESC, the contents of the memorandum written by E, in conjunction with all the aggravating circumstances of the case, justify the choice of a penalty

with an immediate economic impact on the party concerned. None the less, in so far as it chose the least severe of the penalties with direct economic effect, the Economic and Social Committee did act in accordance with the principle of proportionality.

24. It should be noted, first of all, that this is not an instance where no reasons at all were given. Examination of paragraphs 58 to 61 of the judgment reveals that the Court of First Instance, having pointed out that it must confine its review to analysing whether the disciplinary measure was manifestly disproportionate to the facts, placed those facts once again in context, that is, the framework of the staff report procedure, and found them on analysis to constitute an infringement of Article 12 and Article 21 of the Staff Regulations but not serious infringement of the obligations which those provisions impose on officials. It concluded from this that, since those facts were not serious, the Economic and Social Committee appointing authority did not have authority to impose on E the penalty of relegation by several steps, 'a serious measure which is rarely imposed on officials and which, in order to be proportionate, must correspond to facts much more serious than those of the present case'. The Court of First Instance therefore founded the annulment of the disciplinary measure, which it stressed was a serious measure, on the fact that it was highly disproportionate in relation to its finding as to the severity of the infringement.

25. One should note, next, the case-law of the Court of Justice on the scope of the review which it considers it should exercise over disciplinary measures, as expressed, in particular, in the judgment in Case 403/85 *F* v *Commission*.[2] In that judgment the Court of Justice held:

'18 In its judgment of 29 January 1985, the Court has already referred to its consistent decisions to the effect that, once the truth of the allegations against the official has been established, it is for the appointing authority to choose the appropriate penalty. The Court cannot substitute its own judgment for that of the appointing authority except in the case of a manifest error or misuse of powers.

...

26 In that regard, it must be stressed that the provisions of the Staff Regulations on disciplinary measures (Articles 86 to 89) do not specify any fixed relationship between the measures provided for and the various sorts of failure by officials to comply with their obligations; nor do they state the extent to which the existence of aggravating or mitigating circumstances should affect the choice of penalty. The determination of the penalty to be imposed in each individual case is therefore based on a comprehensive appraisal of all the

2 — Case 403/85 *F* v *Commission* [1987] ECR 645.

particular facts and circumstances peculiar to the case.'

26. The Court of First Instance has always sought to follow that case-law, to which it refers, moreover, at paragraph 58 of its judgment. Did it, in the present case, apply it correctly?

27. In order to be able to determine whether it did indeed do so, the reasoning of the judgment must contain the grounds on which the Court of First Instance, which could not, without explanation, substitute its judgment for that of the appointing authority, rejected as unfounded the reasoning of the contested disciplinary decision as regards whether the penalty was appropriate to the infringement. The judgment must also set out in what respect the inappropriate nature of the penalty to the infringement was so manifest that, despite the discretion allowed to the appointing authority, the Court was bound to set aside the contested decision.

28. It seems to me, therefore, on these two points, that the Court of First Instance's reasoning is open to criticism.

29. The Economic and Social Committee appointing authority, in fact, took pains in its decision to explain in abundant detail in what respect the infringement arising from E's memorandum was in its view a serious infringement, to carry out an equally detailed examination of all the factors which it held to be aggravating circumstances, having been unable to find any mitigating circumstances, and finally to show in what respect the measure imposed, which it did not at all deny was a serious measure, corresponded absolutely to the serious nature of the charges which could be levelled against E.

30. These detailed explanations are rehearsed in full in the notice of appeal. Whether or not they accurately reflect the true situation is one thing, and was a matter for the Court of First Instance to verify; to disregard them is another. That is, none the less, what the Court of First Instance seems to have done, since it justifies its annulment of the measure solely by the finding that a serious measure was imposed in relation to an infringement which was, from its point of view at least, not in itself serious.

31. The judgment reveals no trace of any examination of the validity of the evaluations by the Economic and Social Committee appointing authority as regards the choice of penalty, the Court of First Instance confining itself to the observation that the infringement was not serious. The Court of First Instance may therefore be criticised for adopting a mistaken approach.

32. It was not entitled, on the basis merely of the view that the infringement was not serious, to reach the conclusion that there could be no justification for a serious

measure without, as the case-law I have cited invited it to do, refuting the ESC's arguments based on E's past conduct, in order to justify the serious nature of the measure imposed.

33. It is not my intention here in any way to take a position on the question whether the penalty fitted the infringement in the present case, or to signify my full agreement with the ESC's argument intended to prove to this Court that the measure chosen, that is, relegation by three steps, was precisely the penalty which compliance with that principle dictated. In order to adduce that proof, it relies in fact on an interpretation of the principle of proportionality which is open to question, being based apparently on a confusion between a requirement that the penalty be absolutely fitting, leaving no room whatsoever for any discretion, and a requirement merely that it correspond sufficiently to the infringement.

34. All I would observe here is that the Court of First Instance did not, in the present case, set out in what respect the fact that the infringement was not serious, in itself, notwithstanding the case-law referred to above and the grounds accompanying the disciplinary decision, necessarily implied that the Economic and Social Committee had breached the principle of proportionality.

35. Perhaps the Court of First Instance did, none the less, examine in depth whether the penalty fitted the infringement. The fact is, however, that no trace of any such examination can be found in its judgment.

36. That judgment does, admittedly, give reasons, yet those reasons cannot but seem inadequate in the light of the principles expounded by the case-law on the exercise of disciplinary power and its review by the courts.

37. Given that it thus failed to show clearly, through sufficiently argued reasoning, in what respect the disciplinary measure was, taking into consideration all the factors which may have influenced its choice, disproportionate to the infringement, the Court of First Instance, evidently, was equally unable to demonstrate in what respect this lack of proportionality was manifest, which is, however, a precondition for an order to annul a decision pursuant to review by the courts.

38. I consider that, in those circumstances, the Court of Justice cannot but uphold this plea and set aside the judgment of the Court of First Instance.

Should the Court of Justice rule on the merits of the case?

39. There remains to examine the request submitted by the Economic and Social

Committee that, in the event of the judgment of the Court of First Instance being set aside, the Court of Justice should rule on the merits of the case.

40. For my part, I am not in favour of the request being granted, for various reasons.

41. The first is that, in order to dismiss E's action, one would have to be certain that the disciplinary measure imposed on her was not manifestly disproportionate.

42. However, one could only achieve this certainty, in my view, after a meticulous examination of the context in which the infringement was committed.

43. As, moreover, the Court of First Instance stated, in succinct terms, in paragraph 2 of its judgment, 'administrative and personal relationship problems built up between the applicant and the defendant institution'.

44. The ESC, both in its decision imposing the disciplinary measure and in its notice of appeal, is unstinting in setting out all the negative factors which it was able to point up in E's conduct, and paints a picture of her such as to dissuade any superior from having the applicant amongst the staff of his department.

45. Re-examination of the case by the Court of First Instance observing the *audi alteram partem* principle would indeed shed some light and provide the opportunity, perhaps, for certain rectifications. For example, the disciplinary decision challenged by E notes, amongst the aggravating circumstances, two previous reprimands. However, one of these was annulled by the judgment of the Court of First Instance in Case T-293/94. [3]

46. Further, without there being any question here of excusing E's conduct, one can point out that, besides this case, E and the Economic and Social Committee have been adversaries in various other proceedings before the Court of First Instance. Although E has not, in general, obtained satisfaction, it should be noted, none the

3 — Case T-293/94 *Vela Palacios* v *ESC* [1996] ECR I-A-305 and II-893.

less, that in Case T-25/92,[4] costs were awarded in full against the ESC, even though E's action was dismissed, since it was only in the course of the proceedings that E was able to ascertain the full reasons for the decision which she was challenging. In Case T-150/94,[5] E was awarded damages of BEF 50 000 for late preparation of her staff report.

47. The question arises, therefore, whether or not these factors could be found to be mitigating circumstances, taking the view that the conduct of the Economic and Social Committee authorities may have given rise to frustration on the part of E, which could explain, in part, the subsequent shortcomings in her conduct.

48. It seems to me that in any event the ESC's mere statement of its complaint against the applicant is insufficient to enable the Court of Justice to give a ruling on the merits of the action brought by E against the penalty of relegation by three steps imposed on her.

49. The second reason, inseparable from the first, is that since E, for reasons unknown to me, is not represented in these appeal proceedings, reference of the case back to the Court of First Instance will give her an opportunity to state her case. Furthermore, before the Court of First Instance, the Economic and Social Committee may be prompted to clarify its position on a number of points where there is doubt, which is not possible in these proceedings since they are taking place without a hearing.

50. The third is that the type of examination and assessment of the facts which must be carried out in order to give judgment in the action clearly falls within the task of the Court of First Instance.

51. For these various reasons, which all concern the dispassionate and impartial exercise of judicial review, I consider it necessary to refer the case back to the Court of First Instance for it to carry out a fresh examination of the contested decision by the Economic and Social Committee in the context of 'a comprehensive appraisal of all the particular facts and circumstances peculiar to the case'.

52. Addressing, finally, the ESC's request that the Court of Justice should give E's full name in its judgment, I do not think this should be granted as regards the judgment to be delivered by the Court of Justice, since the fact that the appeal may be upheld (should that be the decision of the Court) is without prejudice to how the Court of First Instance will dispose of the matter after it has been referred back to it.

4 — Case T-25/92 *Vela Palacios* v *ESC* [1993] ECR II-201.

5 — Case T-150/94 *Vela Palacios* v *ESC* [1996] ECR I-A-297 and II-877.

Conclusion

53. I propose, therefore, in conclusion, that

— the judgment of the Court of First Instance of 17 February 1998 in Case T-183/96 *E* v *Economic and Social Committee of the European Communities* be set aside, in so far as it found the disciplinary measure of relegation by three steps, imposed by the Economic and Social Committee on E, to be manifestly disproportionate;

— the case be referred back to the Court of First Instance for it to rule afresh on the fourth plea raised by E;

— costs be reserved.