ORDER OF THE SECOND CHAMBER OF THE COURT
16 June 1988 *

In Case 371/87

Nicolas Progoulis, an official of the Commission of the European Communities, residing at 5 rue Luther, 1040 Brussels, represented by Pierre H. Delvaux and Dominique Lagasse, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Ernest Arendt, 4 avenue Marie-Thérèse,

applicant,

v

Commission of the European Communities, represented by Joseph Griesmar, Legal Adviser, acting as Agent, assisted by C. Verbraeken, of the Brussels Bar, with an address for service in Luxembourg at the office of G. Kremlis, a member of its Legal Department, Jean Monnet Building, Kirchberg,

defendant,

APPLICATION essentially for the annulment of the Commission's decision of 12 March 1987 rejecting in part the applicant's request of 18 August 1986 and for the annulment of the reply to his complaint of 19 May 1987,

THE COURT (Second Chamber),

composed of: O. Due, President of Chamber, K. Bahlmann and T. F. O'Higgins, Judges,

Advocate General: Sir Gordon Slynn
Registrar: J.-G. Giraud

after hearing the views of the Advocate General,

makes the following

* Language of the Case: French.

Order

1 By application lodged at the Court Registry on 15 December 1987, Nicolas Progoulis, an official of the Commission of the European Communities (hereinafter referred to as 'the applicant'), brought an action under Article 91 of the Staff Regulations of Officials essentially for the annulment of the Commission's decision of 12 March 1987 rejecting in part his request of 18 August 1986 and for the annulment of the reply to his complaint of 19 May 1987.

2 The applicant, a Greek national, is an official of the Commission in Grade B 3. Until 1 December 1985 he performed the duties of a reporting officer for the European Agricultural Guidance and Guarantee Fund (hereinafter referred to as the 'EAGGF'). In the course of those duties the applicant was responsible for carrying out inspection visits concerning the implementation of investment projects. Such inspections are always carried out by two officials under the authority of the head of the Guidance Section of the EAGGF.

In the course of inspection visits to three projects in France (F/74/80, F/43/82 and F/32/82), there were differences of opinion between the applicant and the second official, an administrator in the same division who was the applicant's head of mission, relating chiefly to the reports to be drawn up.

3 As regards project F/74/80, the applicant carried out the inspection visit on 10 July 1984. The report on that mission was not drawn up by the head of mission until 10 December 1985. He was unable to submit it earlier owing to what he described as 'the dispute with' the applicant; that report was signed only by the head of mission since the applicant had left the EAGGF on 1 December 1985 to join another Commission department.

4 As regards projects F/43/82 and F/32/82, the applicant carried out inspection visits on 11 July 1984. In his draft reports, he refused to express an opinion on those projects on the ground that it was the responsibility of his superiors to do so. A meeting between the applicant and his immediate superior failed to change the applicant's mind and, after the applicant had left the division, his immediate superior signed the reports 'on behalf of' the applicant, stating that he had left the EAGGF.

5 In a memorandum dated 21 April 1986 the applicant complained to his former head of division that the applicant's name had been used, without authority, to endorse certain reports. He requested that:

'(1) this memorandum be annexed to all reports transmitted to the EAGGF concerning the projects for which I was sent on mission including the reports communicated to other departments and institutions (the Court of Auditors and Financial Control) and that I be furnished with evidence that that has been done;

I consider that I cannot be made responsible for reports which have never received my approval;

(2) it be made clear to the persons concerned that it is not permissible to use someone's name or signature without his authority and that to do so clearly constitutes a criminal offence;

(3) you inform me in writing of any corrections which you wish to make to the handwritten report annexed to this memorandum'.

In that memorandum he emphasized that he was seeking to warn of impermissible procedures and concluded that it was unacceptable that he be referred to as having been concerned with a decision-making process without being informed thereof.

6 Following that memorandum the competent head of division of the EAGGF changed the conclusions of report F/74/80, stated that he was prepared to withdraw the reports on projects F/32/82 and F/43/82, and requested the applicant to sign the new reports which were to cancel and replace the previous reports. However, the applicant was not satisfied with those concessions and on 18 August 1986 he submitted a request under Article 90 of the Staff Regulations whose object was defined in the following terms:

'(1) I request that the necessary measures be adopted:

investigations should be made to establish all the facts;

disciplinary measures should be taken against those responsible for such facts;

the persons responsible should be brought before the competent criminal courts;

and I should be furnished with evidence that such measures have been adopted;

(2) I request that copies of this request and annexes be attached to all the reports for which I have been sent on mission including the reports communicated to other departments (Court of Auditors and Financial Control) and that I be furnished with evidence that that has been done;

I consider that I cannot incur any responsibility under Article 21 (3) of the Staff Regulations as a result of reports which I have not approved;

(3) I ask that this request be placed in my personal file so that it may be taken into account in any event;

(4) I request that I be awarded BFR 1 for non-material damage for the wrongful use of my name and signature for improper purposes.'

7 When the Commission failed to reply within the period of four months prescribed by the Staff Regulations, the applicant submitted, on 23 February 1987, a complaint under Article 90 (2) of the Staff Regulations against the implied decision rejecting his request. On 12 March 1987 the Commission replied to the request of 18 August 1986 in the following terms:

'I am pleased to be able to reassure you that you could not incur responsibility under Article 21 of the Staff Regulations on the basis of the contents of a report which you have not signed, and it is unnecessary to resort to the disclosure which you request.

Furthermore, as regards your remarks on the conclusions to be drawn from the inspection of the project (F/74/80), it is appropriate to state that in its essentials your different point of view was set out clearly and faithfully in the revised report which was submitted to you for signature by Mr Daleiden on 17 June 1986.

As regards your wish to have your request placed in your personal file, I am able to inform you that instructions have been given to that effect. In addition, this reply may also be placed in your personal file if you so wish.'

Since he considered that that reply was not satisfactory, the applicant submitted a fresh complaint against that Commission decision on 19 May 1987. On 5 June 1987 the Commission notified the applicant of the decision adopted by it on 21 May 1987 in reply to his complaint of 23 February 1987. That decision merely confirmed the letter of 12 March 1987. In a memorandum of 16 September 1987 the Director-General for Personnel and Administration requested the applicant, for purposes of his second complaint, to refer to the replies already given by the Commission concerning the same grievances on 12 March and 5 June 1987.

8 This application was lodged on 15 December 1987. In it the applicant claims that the Court should:

'(1) Annul the Commission's decision of 12 March 1987 which rejects in part the request submitted by the applicant on 18 August 1987;

(2) Annul the Commission's decision of 16 September 1987 which was notified to the applicant on 18 September 1987 and which rejected his complaint of 19 May 1987;

(3) Order the Commission to pay the applicant the provisional sum of BFR 1 as compensation for non-material damage;

(4) Also, order the Commission to annex a copy of this application to all the reports of the missions in which the applicant has taken part and which are with the Court of Auditors;

(5) Order the Commission to pay the costs . . . '.

9 By an application lodged at the Court Registry on 12 February 1988 the Commission raised an objection of inadmissibility under Article 91 (1) of the Rules of Procedure of the Court on the ground in particular that the action had not been brought within the prescribed period and that in any event there was no act adversely affecting the applicant.

10 It must be noted that under Article 92 (2) of the Rules of Procedure the Court may at any time of its own motion consider whether there exists any absolute bar to proceeding with a case, in particular the inadmissibility of the action, and give its decision in accordance with Article 91 (3) and (4) without opening the oral procedure.

11 According to Article 91 (3) of the Staff Regulations, an appeal by an official must be filed within a period of three months beginning on the date of notification of the decision taken in response to the complaint or, where there is no such decision, on the date of expiry of the period prescribed for the reply.

12 The applicant claims that in this case the three-month period did not begin to run until the notification of the Commission's reply to his second complaint, that is to say from 18 September 1987. He refers particular to the judgments of the Court of 15 June 1976 in Case 5/76 *Jaensch* v *Commission* [1976] ECR 1027, and of 28 May 1980 in Joined Cases 33 and 75/79 *Kuhner* v *Commission* [1980] ECR 1677, and claims that it is the express reply of 12 March 1987 which is the starting point for the time-limit for filing an appeal.

13 The Commission contends that this argument cannot be accepted. It argues that the reply of 5 June 1987 expressly referred to the appointing authority's reply of 12 March 1987 and clearly informed the applicant of the Commission's definitive position on the issue.

14 It must be stated first of all that an appeal against the decision which was adopted in reply to the complaint of 23 February 1987 and notified on 5 June 1987 is out of time, since it was not brought within the period of three months prescribed by Article 91 (3) of the Staff Regulations.

15 Furthermore, it is established that the letter from the Director-General for Personnel and Administration of the Commission dated 16 September 1987 is not a decision adopted in reply to the complaint of 19 May 1987.

16 Under those circumstances the question arises whether the complaint of 19 May 1987 could be the starting point for calculating the time-limit for filing an appeal.

17 In that regard, it must be recalled that the Court has consistently held that every decision purely and simply rejecting a complaint, whether it be express or implied, only confirms the act or failure to act to which the complainant takes exception and is not, by itself, a decision which may be challenged (judgment in *Kuhner*, cited above).

18 It must be stated that the complaint of 19 May 1987 was directed against the Commission's decision of 12 March 1987 adopted in response to the applicant's request of 18 August 1986, which had already been rejected by an implied decision.

19 Secondly, it must be pointed out that the Commission's reply of 12 March 1987 is not a measure adversely affecting the applicant separate from the alleged adverse effects stemming from the implied decision rejecting the request of 18 August 1986. Indeed, by its decision of 12 March 1987 the Commission essentially acceded to the applicant's original request.

20 Furthermore, it must be added that, after receiving the Commission's letter of 5 June 1987, the applicant could have been in no doubt as to the date on which the period of three months prescribed for filing an appeal would run.

21 It follows from these considerations that the application is out of time and the action must be dismissed as inadmissible.

Costs

22 Under Article 69 (2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. However, Article 70 of those Rules provides that, in proceedings brought by servants of the Communities, the institutions are to bear their own costs.

On those grounds,

THE COURT (Second Chamber)

hereby:

(1) Dismisses the action as inadmissible;

(2) Orders the parties to bear their own costs.

Luxembourg, 16 June 1988.

J.-G. Giraud
Registrar

O. Due
President of the Second Chamber