JUDGMENT OF THE COURT (Third Chamber)
9 February 1988 *

In Case 1/87

Santo Picciolo, an official of the Commission of the European Communities, represented by Jean-Noël Louis, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Yvette Hamilius, Avocat with the right of audience before the Luxembourg Cour d'appel, 11 boulevard Royal,

applicant,

v

Commission of the European Communities, represented by Peter Kalbe, a member of its Legal Department, acting as Agent, assisted by Aloyse May, of the Luxembourg Bar, 31 Grand-Rue,

defendant,

APPLICATION for the annulment of the decision of Nic Mosar, a Member of the Commission of the European Communities, of 5 March 1986 drawing up the applicant's final periodic report for the period from 1 July 1981 to 30 June 1983, and for damages of one franc,

THE COURT (Third Chamber)

composed of: J. C. Moitinho de Almeida, President of the Chamber, U. Everling and Y. Galmot, Judges,

Advocate General: J. L. da Cruz Vilaça
Registrar: J. A. Pompe, Deputy Registrar

* Language of the Case: French.

having regard to the Report for the Hearing and further to the hearing on 18 November 1987,

after hearing the Opinion of the Advocate General delivered at the sitting on 21 January 1988,

gives the following

Judgment

1 By an application lodged at the Court Registry on 2 January 1987, Santo Picciolo, an official of the Commission, brought an action for the annulment of the decision dated 5 March 1986 establishing his final periodic report for the period from 1 July 1981 to 30 June 1983, and for an order that the Commission should pay him compensation of one franc in respect of non-material damage.

2 Mr Picciolo, who was recruited as an official in Category A on 12 August 1971, was initially assigned to the Publications Office and then, as from 1 January 1983, to Directorate-General XVIII. On 24 June 1982 he was elected to the Luxembourg local staff committee, subsequently becoming its Vice-President.

3 Pursuant to the 'General provisions for implementing Article 43 of the Staff Regulations of officials of the European Communities' (the 'General Provisions') and the guide to staff reports, Mr Picciolo's periodic report for the period from 1 July 1981 to 30 June 1983 was drawn up in December 1983 by the Director of the Publications Office.

4 Mr Picciolo objected to certain parts of the report and the assessor endeavoured — unsuccessfully — to undertake with him the discussions provided for in the General Provisions. On 13 December 1984 the assessor sent him a new, partially amended, report to which was annexed the opinion which had, in the meantime, been obtained from the *ad hoc* group of assessors which, pursuant to the guide to staff reports, participates in the preparation of reports on officials holding office as staff representatives.

5 Having received the new report, on 17 January 1985 Mr Picciolo asked for the matter to be referred to the appeal assessor, Nic Mosar, a Member of the Commission of the European Communities. Initially, the latter confirmed the report; then, following the opinion given on 29 July 1985 by the Joint Committee on Staff Reports which he had consulted at Mr Picciolo's request, he established the final report on 5 March 1986. Mr Picciolo submitted a complaint against that report in accordance with Article 90 of the Staff Regulations, which, by virtue of an implied decision, was rejected.

6 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the legislative background and the submissions and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

The application for annulment

7 In support of his application for annulment of the contested periodic report, Mr Picciolo puts forward the following submissions:

(a) The periodic report contains assessments less favourable than those contained in the previoius report, and no reasons are given therefor. Moreover, the appeal assessor, to whom the matter was referred at the applicant's request, further downgraded those assessments;

(b) There were a number of irregularities in the reporting procedure relating to the information at the disposal of the appeal assessor, the discussions between the assessor and the official concerned, the consultation of superiors and the delay in drawing up the report;

(c) By deliberately infringing the General Provisions and the guide to staff reports, the Commission contravened the principles of protection of legitimate expectations and equality of treatment;

(d) Finally, the internal rules of the Publications Office were also infringed.

The submissions concerning the content of the report

8 Mr Picciolo alleges infringement of the second paragraph of Article 5 of the General Provisions which provides that 'explanations must be provided for any change in the analytical assessment since the previous report'. In his view the contested report contains assessments less favourable than those contained in the previous report without any explanation being given therefor.

9 The applicant also maintains that, following the report issued by the Joint Committee on Staff Reports, the appeal assessor inserted a fresh comment which was even more unfavourable to him. In the applicant's opinion it is clear from the wording of the third and fourth paragraphs of Article 7 of the General Provisions and of point C.2 of the guide to staff reports that the participation of the Joint Committee on Staff Reports at the request of the official concerned may not have the result of placing him in a worse position.

10 As far as those complaints are concerned, it must be pointed out that, on the basis of the documents before the Court, only the analytical assessment relating to the applicant's sense of responsibility is less favourable than that contained in the report for the previous period. The assessment of Mr Picciolo's sense of responsibility was changed from 'excellent' to 'very good'.

11 In the periodic report prepared by the first assessor, that analytical assessment was accompanied by the following comment: 'Mr Picciolo's departure in January 1983 made it necessary to review the commercial book-keeping at the Publications Office and as a result of that review his sense of responsibility can be correctly described as "very good"'. Since the Joint Committee on Staff Reports expressed the view in its opinion of 29 July 1985 that that comment was ambiguous, Mr Mosar replaced it by the following comment which appears in the contested final report: 'Mr Picciolo stopped working at the Publications Office in January 1983. As a result of the Office's accounts being made the responsibility of other officials it was possible to put them in order, something which proved to be long overdue'.

12 On the one hand, it is apparent from the foregoing findings that the downgrading — the modest downgrading — of the assessment of Mr Picciolo's 'sense of responsibility' from one period to the next was properly explained, in accordance with Article 5 of the General Provisions, by the appeal assessor's comment.

13 On the other hand, Article 7 of the General Provisions and point C.2 of the guide to staff reports do not prohibit the appeal assessor from downgrading the assessment of the official concerned. However, those provisions may be interpreted as meaning that they do not allow the appeal assessor to amend a periodic report in an unfavourable manner except in order to take account of the opinion of the Joint Committee. In this case, the appeal assessor did not infringe those provisions. He did no more than associate himself with the view of the Joint Committee by removing such ambiguity as might have existed in the previous version of the comment, which did not explain the downgrading of the assessment by comparison with the previous reference period, and maintained the assessment 'very good' given by the first assessor.

14 It follows that the above submissions cannot be upheld.

The submissions as to irregularities in the reporting procedure

Consultation of superiors

15 Mr Picciolo claims that the requirements concerning such consultation contained in the third paragraph of Article 2 and the second paragraph of Article 3 of the General Provisions and in points B.5.2.1. and B.5.2.2. of the guide to staff reports were infringed when the periodic report was drawn up by the first assessor.

16 It is apparent from the General Provisions and from the guide to staff reports that where an official has moved from one department to another less than six months before the end of the reference period, the report on him is to be prepared by the official empowered to prepare reports in the department to which the official was previously assigned. That assessor must first consult his counterpart in the department to which the official has been re-assigned and also the immediate superior of the official concerned in the previous department. Where necessary, the other superiors of the official in the new department are also to be consulted. Finally, the persons thus consulted must sign the periodic report after it is signed by the assessor and record their observations in the event of their disagreeing with the assessor.

17 In the present case it is apparent from the documents before the Court that Mr Picciolo's periodic report was drawn up by Mr Verheyden, the Director of the Publications Office, and was then signed by Mr Perry, the head of specialized department OP4 in the Publications Office and by Mr Van Goethem, a director in Directorate-General XVIII, and was finally signed by Mr Verheyden.

18 In the first place, whilst the applicant alleges that Mr Perry and Mr Van Goethem were consulted after the periodic report was drawn up by Mr Verheyden, and not before as they should have been under the applicable rules, that fact, even if it were substantiated, cannot in this case be regarded as a substantial irregularity of such a kind as to invalidate the reporting procedure. It is common ground that Mr Perry and Mr Van Goethem signed the report on Mr Picciolo and did not avail themselves of the opportunity to add observations recording any disagreement with the assessments of the first assessor. Thus, by implication, they expressed their agreement with those assessments.

19 In the second place, it should be noted that, contrary to the applicant's assertion, Mr Perry, although a member of the auxiliary staff, was fully entitled to take part in the reporting procedure as the immediate superior of the applicant in the Publications Office since, as he in fact discharged the functions of head of specialized department OP4, he had exercised responsiblity over Mr Picciolo, an employee in that department, as his superior.

20 In the third place, Mr Picciolo has no grounds for his claim that, as a result of his re-assignment, his immediate superior in Directorate-General XVIII should have been consulted. In fact, as is apparent from the applicable rules, consultation of the official's superiors in his new department, other than the superior empowered to prepare the staff report, takes place only where necessary, that is to say if it proves to be appropriate, and is not therefore compulsory.

21 Finally, the fact that Mr Perry and Mr Van Goethem signed the periodic report drawn up by Mr Verheyden before the latter signed it cannot invalidate the procedure since it has not been established, or even alleged, that any amendments were made to it after they signed it and before it was signed by the assessor.

22 In those circumstances, the submission considered above must be rejected.

Discussions between the assessor and the official assessed

23 Mr Picciolo alleges infringement of Article 6 of the General Provisions and point B.8.1 of the guide to staff reports and breach of the general principle of the right to a fair hearing. In his view, the discussions which should have taken place with the first assessor were not proposed to him in the prescribed manner and accordingly could not take place. That defect could not be remedied by the purely formal consultation which he had with the appeal assessor.

24 It should be noted on the one hand that on three occasions the Director of the Publications Office, as assessor, invited Mr Picciolo to enter into discussions on the periodic report drawn up in December 1983. Mr Picciolo refused to do so, claiming that the report was vitiated by certain irregularities. The purpose of such discussions is, in particular, to enable the official concerned to give the assessor his observations and, if necessary, his objections. However well founded his objections might have been, Mr Picciolo was not entitled to rely on them in order to avoid entering into the discussions proposed to him. He cannot therefore rely upon a situation created by him in order to challenge the propriety of the reporting procedure in that respect.

25 Moreover, it must in any event be pointed out that, as the Court held in its judgment of 21 March 1985 in Case 263/83 *Turner* v *Commission* [1985] ECR 893, the absence of consultation between the first assessor and the official assessed cannot lead to the nullity of the periodic report where the dispute relates to the report drawn up by the appeal assessor and the latter had a genuine exchange of views with the official assessed. In the present case it is agreed that Mr Picciolo was heard by the appeal assessor and was thus given an opportunity to express orally all his views on the report.

26 The foregoing submission must therefore be rejected.

The information at the disposal of the appeal assessor

27 According to Mr Picciolo, the second paragraph of Article 7 of the General Provisions and point B.9.3. of the guide to staff reports were infringed in so far as the appeal assessor did not have all the requisite information at his disposal as a result of not hearing the first assessor or receiving the periodic report initially drawn up by the latter.

28 As regards the first point, it must be observed that, although the applicant claims in his application that there is no documentary evidence to show that Mr Mosar heard the views of the first assessor, it is apparent from the statements made by the Commission in its defence and supplemented in its reply to a question put by the Court that the first assessor was consulted orally by Mr Mosar before the latter prepared the contested report.

29 As regards the second point, it should be noted that even if it were established that the appeal assessor did not have at his disposal the first version of the periodic report, drawn up in December 1983, that would not affect the propriety of the procedure. The appeal assessor had to verify the assessments made in respect of Mr Picciolo not as they appeared in that initial report of December 1983 but as they appeared in the second report drawn by the first assessor in December 1984. Moreover, whilst Mr Picciolo maintains that notification of the initial report to the appeal assessor was necessary in order to enable the latter to consider the applicant's criticisms of the procedure and of the content of the report, it must be emphasized that, as indicated earlier, the applicant had a meeting with Mr Mosar and was thus given an opportunity to communicate all his views to him.

30 Accordingly, that submission cannot be upheld.

Delay in drawing up the periodic report

31 Mr Picciolo claims that pursuant to the last paragraph of Article 7 of the General Provisions, the reporting procedure should have been completed no later than 31 December 1984, whereas in fact the final report was not drawn up until 5 March 1986 and was notified at an even later date.

32 It need merely be stated that although delay in completing the reporting procedure is capable, in certain cases, of giving the official concerned a right to a remedy, such delay cannot in any circumstances affect the validity of the periodic report or, in consequence, justify the annulment thereof.

33 That submission must therefore be rejected.

34 In view of all the foregoing considerations, none of the allegations of irregularities invalidating the reporting procedure can be upheld.

Submission based on breach of the principles of the protection of legitimate expectations and of equality of treatment

35 This submission is not supported by any specific arguments and is based solely on the allegation raised in the previous submissions of infringement of the applicable rules. It must therefore be rejected by virtue of the rejection of the latter submissions.

Submission as to the infringement of the internal rules of the Publications Office

36 According to Mr Picciolo, the internal rules of the Publications Office concerning the reporting procedure require the Director of the Publications Office to consult the Management Committee before reporting on officials in category A, but there was no such consultation in the present case.

37 It must be observed that according to Article 48 of the 'management rules' of the Publications Office of the European Communities adopted by its Management Committee, 'the Director of the Office shall notify to the Management Committee the periodic reports made in respect of officials and servants (in category A and categories treated as such), the observations made by the persons concerned and all information which might influence such reports'.

38 It is apparent from those provisions that the Director of the Office is not required to consult the Management Committee before drawing up reports on the employees concerned, but only to notify them to it subsequently.

39 Accordingly, the Director of the Office was entitled to proceed with Mr Picciolo's report without first consulting the Management Committee; and even if he had subsequently failed in his duty to inform that committee — an allegation neither substantiated nor even made by the applicant — that fact would not affect the validity of the contested periodic report.

40 That submission must therefore be rejected, without its being necessary to give a decision on the question raised by the Commission as to whether the internal management rules adopted by the Publications Office can be relied upon against the Commission as appointing authority.

41 It is apparent from all the foregoing considerations that Mr Picciolo's claim concerning annulment of his final periodic report must be rejected.

The claim for compensation

42 Mr Picciolo maintains that the delay in drawing up his periodic report constitutes a wrongful omission by reason of which the Commission has incurred liability. Although he evaluates the damage suffered as LFR 50 000, he has confined his claim to the sum of LFR 1 in respect of non-material damage.

43 It must be pointed out that the delay of which the applicant complains is, at least in part, attributable to his own conduct. Without doubt, Mr Picciolo was entitled to avail himself of the remedies contemplated in the Staff Regulations and the General Provisions. But by asking for the matter to be referred to the appeal assessor and then for the Joint Committee on Staff Reports to be consulted, he himself created the conditions liable to protract the reporting procedure.

44 It must however be emphasized that the administration too contributed to the aggravation of that delay: the first assessor needlessly deferred consultation of the *ad hoc* group of assessors and the appeal assessor let more than seven months elapse between the issue of the opinion of the Joint Committee on Staff Reports and the drawing up of the final periodic report. That conduct on the part of the Commission must be regarded as improper, in view of the administration's obligation to draw up reports on officials within the prescribed time-limits.

45 However, that misconduct on the part of the Commission cannot, in the circumstances of this case, justify even token compensation for Mr Picciolo in view of the fact that he has not shown that the delay in drawing up his periodic report caused him any damage whatsoever. Neither in the documents submitted by him nor in oral argument before the Court did the applicant claim that the progress of his career had been affected, nor did he specify of what the non-material damage he claimed to have suffered consisted.

46 In those circumstances, the applicant's claim for compensation must also be rejected.

47 It follows from all the foregoing considerations that Mr Picciolo's application must be dismissed in its entirety.

Costs

48 Pursuant to Article 69 (2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs.

49 Contrary to Mr Picciolo's assertion, it is inappropriate in this case to apply the second subparagraph of Article 69 (3) of those rules, by virtue of which the Court may order even a successful party to pay the costs which its conduct caused the other party to incur. The only argument put forward by the applicant, namely that the Commission did not answer his complaint, does not provide sufficient reason,

although it was set out in detail, to attribute the costs incurred by him in connection with the present proceedings to unreasonable or vexatious conduct on the part of the defendant.

50 However, under Article 70 of the Rules of Procedure, the costs incurred by the institutions in actions brought by their servants are to be borne by those institutions.

On those grounds,

THE COURT (Third Chamber)

hereby:

(1) Dismisses the application;

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

Moitinho de Almeida Everling Galmot

Delivered in open court in Luxembourg on 9 February 1988.

P. Heim
The Registrar

J. C. Moitinho de Almeida
President of the Third Chamber