JUDGMENT OF THE COURT (SECOND CHAMBER)
30 MAY 1973 [1]

Guiseppe Drescig
v Commission of the European Communities

Case 49/72

1. *Officials — Appointing Authority — Powers — Exercise — Formalities — Division of functions — Deviations therefrom — Sub-delegation of powers — Admissibility — Conditions*
   (Decision of the Commission of 26 February, 1971, Article 5)
2. *Officials — Disciplinary proceedings — Procedure — Documents — Signature by Chairman of the Disciplinary Board — Admissibility*
   (Staff Regulations, Annex IX, Articles 8 and 9)

1. The sub-delegation of powers or deviation from standards laid down by the Commission in the Decision of 26 February, 1971, for the division of functions within the service, cannot render void an act done by the administration, unless it involves the possibility of adversely affecting one of the guarantees given to officials by the Staff Regulations or the principles of good administration in staff management.
2. The signature by the Chairman of the Disciplinary Board of various documents relating to the disciplinary procedure merely constitutes the normal exercise of his prerogatives, which include the power of certifying the regularity of the procedure and of authenticating the Board's documents.

In Case 49/72

GIUSEPPE DRESCIG, a former official of the Commission of the European Communities, residing at Brussels, represented by Maître Marcel Slusny, advocate of the Brussels Court of Appeal with an address for service at Luxembourg at the chambers of Maître Jacques Mersch, 11a boulevard Prince Henri,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by Mr Louis de la Fontaine, its legal adviser, as agent, with an address for service in Luxembourg at the Chambers of its legal adviser Mr Emile Reuter, 4 boulevard Royal,

defendant,

1 — Language of the Case: French.

Application for annulment of the decision of removal of the applicant from his post and of the preliminary disciplinary procedure,

THE COURT (Second Chamber)

composed of: P. Pescatore (Rapporteur), President of Chamber M. Sørensen and A. J. Mackenzie Stuart, Judges,

Advocate-General: A. Trabucchi
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Summary of facts

Mr Giuseppe Drescig, an Italian national, entered the service of the Commission, Directorate of Property and Internal Service, on 16 May 1967 as an usher attached to the telex service.

He was assigned to the position of telex operator on 1 February 1971 and appointed to Grade C 3, step 2.

On 9 December 1971 an official in the Personnel Division addressed a report to the Director of Personnel of the Commission concerning the circumstances surrounding the entry into service of a temporary member of the staff.

It appeared from this report that Mr Drescig, with the complicity of Mr Robert De Greef, another official of the Commission, had extorted a sum of money from this person in order to enable her to enter the service of the Commission.

On 20 December 1971 an official of the Security Department of the Commission prepared for the Director of that department a report on the enquiry which he had made in relation to the activities of Mr De Greef and Mr Drescig.

On 21 December 1971 the Director of the Security Department forwarded this report to the Director-General of Personnel and Administration.

In his accompanying memorandum he underlined that in his opinion Mr Drescig had been guilty of the offence of fraud, forgery and the passing of forged documents under aggravating circumstances, resulting from the fact that he was an official of the Commission.

On 4 January 1972 the head of the Individual Rights Division of the Commission, in execution of an authority conferred upon him on 22 December 1971 by the Director of Personnel, proceeded to a hearing of Mr Drescig pursuant to Article 87 of the Staff Regulations.

On 11 January 1972 the Director of Personnel in his capacity of appointing authority referred the case of Mr Drescig to the Disciplinary Board pursuant to Article 1, Annex IX of the Staff Regulations.

By decision of the Director of Personnel dated 11 January 1972 and communi-

cated to him on the same day, Mr Drescig was suspended from his duties, one half of his basic salary being withheld as from 12 January 1972, pursuant to Article 88 of the Regulations.

The Disciplinary Board met on 28 and 29 February and 6 and 7 March 1972.

In the course of these meetings it particularly heard Mr Drescig, assisted by his lawyer, Mr De Greef and several witnesses.

At its last meeting on 7 March 1972, the Disciplinary Board issued a reasoned opinion in which it stated that the correct way of dealing with the matter would be to apply to Mr Drescig the penalty of removal from his post with withdrawal of entitlement to retirement pension.

This opinion was on 16 March 1972 forwarded to the Director of Personnel.

Mr Drescig was on 5 April 1972 heard by the Commission's Director-General of Personnel and Administration as provided for in the third paragraph of Article 7, Annex IX of the Staff Regulations.

By decision dated 14 April 1972, which was communicated to the party concerned on 15 April 1972, the Director-General of Personnel and Administration found in particular that Mr Drescig had in two instances demanded payment of a sum of BF 12 000 for the purpose of assisting a person outside the Commission to enter its services; that he in fact received this sum, on the first occasion through Mr De Greef, on the second occasion directly from the person concerned; in the first case Mr Drescig had endeavoured by diverse schemes (such as the sending of a letter of appointment for an imaginary competition, written on the Commission's letter-heading and bearing an outline of a signature, which was capable of inducing the belief that it was signed by the competent authority; arranging an imaginary interview with the director of one of the Commission's services) to make the person concerned believe that he was taking effective steps on her behalf to facilitate her engagement by the Commission; he thus abused his status of an official by making two persons outside the Commission believe that on payment of a sum of money, they could be engaged by the Commission; he thus caused great harm to the good name of the Commission; the fact that Mr Drescig had ultimately reimbursed the sums received and that his work in the service of the Commission had been considered satisfactory by his superiors was not sufficient to mitigate the gravity of the facts alleged against him; that taken together the facts found against him constituted grave breaches of the duties of an official, as provided for by the Regulations, in particular Article 11 (1) and 12 (1).

Consequently the Director-General of Personnel and Administration decided to dismiss Drescig with loss of entitlement to retirement pension, with effect from 1 May 1972.

II — Summary of procedure

On 14 July 1972 the applicant brought the present action.

The written procedure followed the normal course.

By Order dated 27 October 1972 the Court (Second Chamber), upon report of the Judge-Rapporteur and having heard the Advocate-General, decided — applying Articles 43 and 95 of the Rules of Procedure — to join for the purposes of the oral proceedings the present action to that lodged under No 46/72 by Mr De Greef.

The Court (Second Chamber), having heard the Advocate-General, decided to open the oral procedure without any preparatory inquiry.

The oral observations of the parties were made at the hearing of 22 March 1973.

The Advocate-General delivered his opinion at the hearing of 5 April 1973.

III — Submission of the parties

The *applicant* submitted that the Court should:

— declare null and void the decision of 14 April 1972 dismissing him, with all its consequences in law, and in particular order the payment to the applicant of his salary and other benefits as from 12 January 1972, the date of his suspension;

— declare null and void the whole disciplinary procedure;

— order the opposing party to pay the costs of the action.

The *Commission* submitted that the Court should:

— dismiss the application as unfounded;

— order the applicant to pay the costs.

IV — Pleas and arguments of the parties

The pleas and arguments of the parties may be summarized as follows:

1. Infringement of Article 5 of the Commission's Decision of 26 February 1971 and of the second paragraph of Article 87 of the Staff Regulations

The *applicant* stresses that under the provisions of the second paragraph of Article 87 of the Staff Regulations disciplinary procedure shall be initiated by the appointing authority, 'after hearing the official concerned'. He argues that the Commission's Decision of 26 February 1971, relating to the exercise of the powers conferred by the Staff Regulations upon the appointing authority, provides by its Article 5 that as regards officials in categories C and D, the powers conferred upon the appointing authority by the second sentence of the second paragraph of Article 87 (prior hearing of the official concerned and initiation of the disciplinary procedure) shall be exercised by the Director of Personnel. However, the Director of Personnel had authorized another official to conduct the prior hearing of the applicant. Such a delegation of powers is illegal in that it is clearly contrary to the express wording of the Commission's Decision itself, by which it is bound. The Decision of 26 February 1971 conferred upon an official of high rank the authority to proceed to the hearing preceding the initiation of disciplinary proceedings, so as to avoid such an important action being taken by junior officials or of admissions or alleged admissions being obtained in doubtful circumstances. In this particular case the infringement of this Decision does not therefore constitute a mere formal defect but a defect in procedure; in a disciplinary matter this amounts to a substantial defect, tainting the whole procedure with illegality.

The *Commission* maintains that from the very terms used by the second paragraph of Article 87 of the Staff Regulations, as well as the relationship between the text of this provision and that of the third paragraph of Article 7 of Annex IX, it follows that the hearing prior to the initiation of the disciplinary proceedings does not have to be undertaken by the appointing authority itself. That the Court has recognized this principle in its judgment of 11 July 1968 (Case 35/67, *Van Eick v Commission,* Rec. 1968, p. 481); this is likewise admitted by the applicant.

As regards the Commission's Decision of 26 February, 1971, this states in its first Article that the object of subsequent Articles is to lay down the method of exercising the powers conferred under the Staff Regulations upon the appointing authority. Certain acts are the preserve of this authority and others can originate with the administration. The prior hearing envisaged by the second paragraph of Article 87 is not the

preserve of the appointing authority; Article 5 of the Decision of 26 February 1971 has no other purpose than to confer upon the Director of Personnel the power to decide whether or not there is a case for proceeding to a prior hearing, but this in no way imposes an obligation upon him to conduct the hearing himself.

This interpretation is in conformity with the Judgment of the Court in Joined Cases 27 and 30/64 *(Fonzi* v *Commission*, Judgment of 8 July 1965, p. 616).

In entrusting the prior hearing of the applicant to a Head of Division, an experienced official who for many years has administered the Individual Rights Division, who by reason of his seniority was called upon to replace him in case he was not available, the Director of Personnel did not disregard either the wording or the spirit of the provisions, the infringement of which is wrongly alleged.

In any event, infringement of the second paragraph of Article 87 does not constitute a substantial defect, affecting the legality of either the opinion of the Disciplinary Board or the decision of dismissal.

2. Description of the facts

The *applicant* states that the official appointed — according to him irregularly — to proceed to the prior hearing of him had used criminal law terms in relation to the facts which had been alleged against him, terms that were contained in the reports prepared by the officials of the Security Department. He thus exceeded his authority and usurped a power which only belongs to a judge in a criminal case. These terms — which besides are inaccurate — were again repeated in the report addressed to the Disciplinary Board by the Director of Personnel; constantly repeated, they were of a nature to have a decisive influence upon both the Disciplinary Board and the official who took the decision of dismissal.

Accordingly the opinion of the Disciplinary Board of 7 March 1972 and the decision to dismiss of 14 April 1972 ought to be annulled, with all consequences that follow from this in law.

The *Commission* points out that the authors of the criticized reports did not intend to apply to the facts a criminal connotation, since in everyday language the terms have a different meaning.

Besides, right through the disciplinary procedure the applicant could have freely contested the exactness of the legal terms.

These terms do not appear either in the opinion of the Disciplinary Board nor in the decision to dismiss; they merely considered the facts and examined whether those facts constituted a breach of duty capable of resulting in a disciplinary measure.

3. Infringement of Articles 8 and 9 of Annex IX of the Staff Regulations

The *applicant* points out that under the provisions of Article 4 of Annex II of the Regulations, the Disciplinary Board is made up of a chairman and four members; according to Article 8 of Annex IX, the chairman shall not take part in the Board's decisions, save on procedural questions or in case of equality of votes; finally, Article 9 of this Annex provides that the reasoned opinion which the Disciplinary Board is called upon to issue by a majority vote, as to the disciplinary measure which it considers appropriate to the facts complained of, shall be signed by all the members of the Board.

It follows from these provisions as a whole that the Regulations draw a distinction between the chairman and the members of the Disciplinary Board in that, in particular, the chairman is not a member of the Board and consequently ought not to sign the reasoned opinion. The chairman's non-participation in the decisions of the Board is a logical one, since the Board is composed in equal

numbers of two officials nominated by the appointing authority and two officials appointed by the Staff Committee.

In the present case not only was the reasoned opinion of the Disciplinary Board signed by its chairman, but it further emerged from the minutes of the Board's deliberations of 6 and 7 March 1972 that the chairman took an active part in these deliberations, when in fact no situation existed in which the Regulations exceptionally allow him to take part.

For this reason there was a violation both of the parity element applying to the Board's proceedings as well as of a specific provision of the Regulations.

The *Commission* states in reply that by signing, the chairman of the Disciplinary Board did no more than authenticate the Disciplinary Board's opinion; this signature obviously could not constitute proof that he had participated in the decision itself.

Articles 8 and 9 of Annex IX of the Regulations in no way prevent the chairman of the Disciplinary Board from participating in the proceedings thereof, since it is his function to preside at all its meetings; he is only forbidden to take part in the decision itself by voting for or against a proposal relating to the substance of the matter, save in case of equality of votes. In the present case, since the members of the Disciplinary Board were unanimous both in regard to the proposed sanction and in regard to the reasoned opinion, the chairman would not have had to vote and did not in fact vote.

The minutes of the Board's meetings establish that the chairman in no way exceeded his powers. The arguments founded upon an alleged infringement of Article 8 of Annex IX of the Regulations are devoid of all basis.

Grounds of judgment

1 The action has as its object the annulment of the decision of removal from his post given on 14 April 1972 by the Director-General of Personnel of the Commission, consequent upon a disciplinary procedure instituted in relation to the applicant, arising out of reprehensible activities involving an abuse of official status and a demand for payment from persons desiring to obtain employment with the Commission.

2 Without denying the facts leading to the disciplinary measure imposed, the applicant argues against the validity of the decision taken by invoking arguments based upon irregularities in the disciplinary procedure and an erroneous description of the facts.

As regards the pleas based upon infringement of Article 87 of the Regulations and of the Commision's Decision of 26 February 1971

3 The applicant argues that under the terms of Article 87 of the Staff Regulations the disciplinary procedure shall be initiated by the appointing authority after hearing the official concerned.

4 Under the terms of the Commission's Decision of 26 February 1971 concerning the exercise of the powers conferred by the Regulations upon the appointing authority, the hearing, as regards officials in his category, was a matter for the Director of Personnel.

5 On the other hand the Director of Personnel in this case appointed another official for this purpose.

6 The disregard of the provisions of the Decision of 26 February 1971 is said to have prejudiced the rights of the defence since the applicant was not able to enjoy all the safeguards to which he is entitled under the Regulations.

7 Under the provisions of the second sentence of the second paragraph of Article 87 of the Regulations, the disciplinary procedure shall be 'initiated by the appointing authority after hearing the official concerned'.

8 The Regulation does not set out more fully the methods and procedures by which this hearing is to take place.

9 The Commission's Decision of 26 February 1971 — made under Article 2 of the Regulations, under the terms of which each institution shall determine who within it shall exercise the powers conferred on the appointing authority — provides by Article 5 thereof that the Director of Personnel shall exercise in regard to officials of categories C and D the powers conferred upon the appointing authority insofar as relating to the prior hearing provided for by the second sentence of the second paragraph of Article 87 of the Regulations.

10 The general system created by this Decision, which contains a detailed enumeration of functions of very varied importance, shows that one is dealing with a distribution of business within the Commission's services, rather than with the conferment of rigid powers, the observance of which could entail the nullity of acts done outside the limits laid down.

11 The fact that this is the nature of the Decision of 26 February 1971 is confirmed by the fact it was published by the Commission not in the Official Journal but in an information bulletin intended for the staff.

12 In these circumstances one cannot interpret this document as excluding in advance all possibility of sub-delegation by the officials appointed or of a deviation in particular cases from the principles of division of functions determined by the Commission.

13 A sub-delegation or deviation from these standards can only involve the nullity of an act done by the administration if it involves the possibility of adversely affecting one of the guarantees given to officials by the Regulations or the principles of good administration in matters of staff administration.

14 In the event this was not the case, the Director-General of Personnel having entrusted the hearing of the applicant to an official particularly qualified in this respect, i.e. the Head of the Individual Rights Division coming under the Directorate-General of Personnel.

15 Examination of the report prepared by this official shows that the applicant has had the benefit of a detailed and impartial enquiry in the course of which the rights of the defence have been fully respected.

16 In these circumstances the fair nature of the hearing cannot be disputed.

17 The plea must therefore be rejected.

On the plea based on erroneous description of the facts

18 The applicant also maintained that during the whole preliminary procedure the officials carrying out the investigation had continually in relation to the facts alleged against him used terms drawn from criminal law, that is to say 'extortion' and 'fraud'.

19 Whilst it is true that these terms were not reproduced by the Disciplinary Board and the Director-General of Personnel in his decision of 14 April 1972, it is nonetheless a fact that the constant use of this terminology was of a kind adversely to influence the opinion both of that Board and of the official who made the decision of removal.

20 For this reason, this constituted a violation of the rights of the defence of such a nature as to render void both the opinion of the Disciplinary Board and the decision of removal itself.

21 Nothing prevents the disciplinary authorities from using approximations to the concepts of criminal law for the purpose of defining and possibly describing the facts submitted for their consideration.

22 In the light of the basic separation between the disciplinary system and criminal procedure, there therefore exists no risk of confusion which might prejudice the official who is the subject of disciplinary procedures.

23 This plea must accordingly be rejected.

As regards the pleas based on the infringement of Articles 8 and 9 of Annex IX of the Regulations

24 The applicant further casts doubt upon the validity of the proceedings of the Disciplinary Board by reason of the fact that not only was the reasoned opinion signed by the chairman but it also emerges from the minutes that the chairman took an active part in the proceedings, when in fact under the terms of Article 8 of Annex IX of the Regulations the chairman of the Disciplinary Board shall not take a part in their decision, save on procedural questions or in case of equality of votes, and Article 9 requires the reasoned opinion to be signed only by the members of the Board.

25 Article 8 of Annex IX has as its object to enable the parity of representation which forms the basis of the constitution of Disciplinary Boards to function to the fullest extent that it is possible for Boards to produce a majority on that basis.

26 Under this system the chairman is called upon to intervene with his vote only in case of equality of votes and, apart from this, on procedural questions.

27 In other respects, the chairman by virtue of his office enjoys all powers necessary for ensuring the normal functioning of the Disciplinary Board.

28 It appears from the minutes attached to the file that the chairman did not have reason to intervene in the decision upon the reasoned opinion since the members of the Board were able to reach unanimity on the subject.

29 The chairman's act in signing the various documents relating to the disciplinary procedure constitutes merely the normal exercise of his prerogatives, which include the power of certifying the regularity of the procedure and of authenticating the Board's documents.

30 The validity of these documents cannot therefore be affected by the fact that they bear the chairman's signature.

31 The plea must therefore be rejected.

Costs

32 Under the terms of Article 69 (2) of the Rules of Procedure the unsuccessful party shall be ordered to pay the costs.

33 The applicant has failed in his action.

34 Nevertheless under the terms of Article 70 of the Rules of Procedure, institutions shall bear their own costs in actions by officials of the Communities.

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the oral observations of the parties;
Upon hearing the opinion of the Advocate-General;
Having regard to the Staff Regulations, especially Article 87 and Articles 7, 8 and 9 of Annex IX;
Having regard to the Protocols on the Statute of the Court of Justice;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities, especially Articles 69 and 70;

THE COURT (Second Chamber)

hereby:

1. **Dismisses the action;**
2. **Orders each party to pay its own costs.**

Pescatore Sørensen Mackenzie Stuart

Delivered in open court in Luxembourg on 30 May 1973.

A. Van Houtte
Registrar

P. Pescatore
President of the Second Chamber

OPINION OF MR ADVOCATE-GENERAL TRABUCCHI

(see Case 46/72, p. 557)