JUDGMENT OF THE COURT (Second Chamber)
29 January 1985 *

In Case 228/83

F., a former official of the Commission of the European Communities, represented and assisted by Georges Vandersanden and Lucette Defalque, of the Brussels Bar, and Lucien Felli, Avocat at the Cour d'Appel, Paris, with an address for service in Luxembourg at the Chambers of Janine Biver, 2 rue Goethe,

applicant,

v

Commission of the European Communities, represented by Hendrik van Lier, a member of its Legal Department, acting as Agent, assisted by Robert Andersen, of the Brussels Bar, with an address for service in Luxembourg at the office of Manfred Beschel, a member of its Legal Department, Jean Monnet Building, Kirchberg,

defendant,

APPLICATION for:

Primarily,

Annulment of the Commission Decision of 11 July 1983 rejecting the applicant's complaint against the disciplinary decision of 7 April 1983 taken by the Member of the Commission responsible for Personnel and Administration removing the applicant from his post; and,

if necessary, annulment of the Disciplinary Board's Opinion of 8 March 1983;

In the alternative,

Damages equivalent to three years' remuneration and all other allowances payable to an offical in the applicant's position,

* Language of the Case: French.

THE COURT (Second Chamber)

composed of: O. Due, President of Chamber, P. Pescatore and K. Bahlmann, Judges,

Advocate General: G. F. Mancini
Registrar: H. A. Rühl, Principal Administrator

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gives the following

JUDGMENT

(The account of the facts and issues which is contained in the complete text of the judgment is not reproduced)

Decision

1 By application lodged at the Court Registry on 6 October 1983, F., a former official of the Commission of the European Communities, brought an action primarily for the annulment of the Commission's decision of 7 April 1983 removing the applicant from his post, adopted as a result of the disciplinary proceedings instituted against him, and, if necessary, for the annulment of the Disciplinary Board's Opinion of 8 March 1983. In the alternative, the applicant essentially claims compensation for the material and non-material damage which he suffered as a result of the wrongful conduct of the Commission and which he sets at a sum representing three years' salary.

Background of the case

2 The applicant entered the employment of the Commission in May 1975 as a member of the temporary staff. He was established as an official in Grade A 5 with effect from 1 April 1980.

* after hearing the Opinion of the Advocate General delivered at the sitting on 13 December 1984,

3 As part of the policy of exchanging officials with a view to developing cooperation between the national civil services and the Commission, the applicant was seconded to the French Ministry of Cooperation and Development for a period of two years from 1 July 1982. As a result the applicant and his family moved to Paris.

4 At the beginning of that period the applicant, who is of Corsican origin, put himself forward as a candidate in the elections for the new Corsican Assembly. To that end he obtained electoral leave from the French Ministry but did not inform the Commission of his candidature as provided for in Article 15 of the Staff Regulations. When the results were announced on 8 August 1982, the applicant found that he had been elected a member of the Assembly and he brought this to the notice of the French Ministry. However, it was not until 8 September 1982 that he sent a letter to the Commission informing it of his election and requesting permission to carry out his mandate.

5 In the meantime the Commission had already learned of the applicant's election, and the Director General for Administration and Personnel, Mr Morel, had asked his staff to examine the various problems connected with the applicant's candidature and election. On hearing rumours to the effect that the Commission intended to terminate his secondment the applicant requested an interview with Mr Morel.

Misconduct with which the applicant is charged

6 On 6 October 1982 Mr Morel received the applicant in his office in the presence of his assistant, Mr Petit-Laurent. The events which occurred at that meeting were summarized by the Disciplinary Board in its Opinion of 8 March 1983 as follows:

'The purpose of the meeting was to consider the administrative consequences of the [applicant's] election to the Corsican Assembly.

The following questions arose:

Observance of the provisions of the first paragraph of Article 15 of the Staff Regulations by the [applicant] on his election to the Corsican Assembly;

Compatibility of the exercise of his electoral mandate with the performance of his duties at the Commission, having regard to the second paragraph of Article 15 of the Staff Regulations;

Compatibility of the new situation resulting from his electoral mandate with the performance of duties in France as part of the exchange policy.

Although the discussion was at times very lively the meeting was largely conducted in a calm and quite objective atmosphere. The meeting became acrimonious only towards the end when it became apparent that no reconciliation of views was possible and following Mr Morel's reply to [the applicant's] statement that he intended to bring his case before the Court of Justice.

[The applicant] suddenly launched a violent assault on Mr Morel. He punched him in the face and grabbed hold of the front of his shirt, causing it to tear. The violence of the assault caused Mr Morel to fall from the armchair in which he was sitting. He hurt his hand while trying to catch hold of the edge of the low glass table around which the three participants at the meeting were seated.

Mr Morel added that [the applicant] kicked him repeatedly when he was on the ground and that to protect his stomach he raised his leg, which thus became bruised. [The applicant] stated that he had no recollection of this. Mr Petit-Laurent stated that he had not seen this since he was trying to restrain [the applicant].

Mr Morel and Mr Petit-Laurent stated further that when Mr Morel was on the ground [the applicant] seized an ashtray which was on the table to throw it at Mr Morel and that it was only due to the intervention of Mr Petit-Laurent, who caught hold of [the applicant] from behind to restrain him, that the trajectory of the ashtray deviated so that it simply grazed Mr Morel's ear. Mr Morel stated that this was how the injury to his ear was caused. [The applicant] categorically denied that he had thrown the ashtray, stating that it had probably fallen from the table.'

7 Before the Court the applicant added that during the meeting Mr Morel informed him of his irrevocable decision to terminate his secondment and led him to believe that he had received the agreement of the French Ministry of Cooperation on this matter. At first the applicant kept calm. He emphasized that the termination of his secondment before the agreed period of two years had expired would place himself and his family in a difficult situation because of private and domestic commitments undertaken as a result of his posting to Paris and that the exercise of his mandate as a member of the Corsican Assembly entailed only limited absences, which he was ready to take as part of his annual leave. Nevertheless Mr Morel maintained his firm intention of terminating the secondment. The applicant, who was in

despair since he felt that none of the arguments he had put forward was succeeding in altering Mr Morel's position, got up saying that he would have no choice but to bring the matter before the Court. Mr Morel thereupon burst out laughing. According to the applicant, Mr Morel's laughter suddenly evoked within him a profound feeling of insecurity and anxiety, making him unable to contain his frustration.

8 The Commission stated before the Court that at the meeting with the applicant Mr Morel had only informed him of his personal view that his continued secondment to the French authorities would be contrary to the spirit and philosophy of the system of exchange of officials. When the applicant explained to him the financial and domestic difficulties which his return to Brussels would inevitably entail, Mr Morel stated that he would be prepared to allow him a certain period to settle such questions. Moreover Mr Morel asked the applicant to forward him further information concerning the extent of the duties of a member of the Corsican Assembly. The Commission drew attention to the fact that Mr Morel denied having burst out laughing.

9 Immediately after those events the applicant underwent a psychiatric examination. In an opinion of 27 October 1982 given by two psychiatrists, it was stated *inter alia* that the applicant had to be considered legally responsible for his actions at the time of the facts referred to above, but that account should be taken of his 'neurotic personality characterized, in particular, by an inability to contain frustration and of his Mediterranean temperament'.

Disciplinary proceedings

10 By a decision of 20 October 1982 adopted by Mr Burke, the Member of the Commission responsible for personnel matters, the applicant was suspended from his duties on full pay; subsequently the disciplinary proceedings provided for in Annex IX to the Staff Regulations were initiated.

11 In order to constitute the Disciplinary Board it was necessary, because of objections, to draw lots three times. Furthermore, the proceedings were delayed because the Commission initially refused to make available to the Board a draft

answer to the applicant's letter of 8 September 1982 and a note drawn up with regard thereto by the Legal Department and because following that refusal the applicant, between 31 January and 7 February 1983, interrupted his participation in the Board's proceedings. Finally, the Board heard a total of 14 witnesses at three hearings.

12 After considering the matter the Disciplinary Board delivered an extremely detailed opinion on 8 March 1982 recommending that the applicant should be downgraded and concluding as follows:

'Conduct such as that described merits very severe judgment, particularly since it was that of an official of the rank of principal administrator . . . An official guilty of such conduct . . . should suffer in consequence the severest penalty.

Consideration of the facts, however, . . . leads the Disciplinary Board to consider that there were mitigating circumstances. They are as follows:

First, [the applicant's] neurotic character, characterized by an inability to contain frustration;

Secondly, the feeling of insecurity and anxiety associated with the high level of frustation to which [the applicant] was subject owing to the serious consequences which any decisions taken might have for him, to the circumstances in which the meeting was arranged and to the course which it took;

Finally, the obvious absence of premeditation.'

13 By a decision of 7 April 1983, Mr Burke, in his capacity as appointing authority, after hearing the applicant and his advisers, removed the applicant from his post without any withdrawal or reduction of entitlement to retirement pension. The decision, which took effect on 1 May 1983, contained the following statement of reasons:

'Whereas it is established that at the end of a meeting between [the applicant] and Mr J.-C. Morel, Director General for Personnel and Administration, on 6 October 1982, [the applicant] committed a violent act of aggression against the Director General for Personnel and Administration causing him injuries;

Whereas the gravity of such conduct merits a particularly severe judgment, especially as it was the act of an official of the rank of principal administrator;

Whereas the correspondence placed on the file of the Disciplinary Board (and in particular the draft note prepared by the Directorate General for Personnel and Administration at the end of September 1982 and the note from the Legal Department of 30 September 1982) shows that no decision concerning the [applicant's] administrative position had been taken at the time of the meeting held on 6 October 1982 in the office of the Director General for Personnel and Administration; nor indeed has any decision yet been taken on the matter, and thus [the applicant] at present is still seconded to the French Ministry of Cooperation;

Whereas the object of the meeting was to consider the administrative consequences of [the applicant's] election to the Corsican Assembly and to clarify the position for the purpose of determining what administrative decisions should be taken;

Whereas, whatever the [applicant's] impressions may have been at that meeting with the Director General for Personnel and Administration and however great the frustration which he may have felt, it is none the less true that an official must expect to encounter changes in his administrative position during his career and that, in any event, the Staff Regulations and the administrative rules provide an extensive range of remedies at various levels;

Whereas Article 86 (1) of the Staff Regulations makes it a condition for the imposition of disciplinary measures that the failure to comply with obligations should have been intentional or through negligence;

Whereas for disciplinary purposes an official is to be excused responsibility for his actions only in the case of mental illness so serious as to reduce the degree of intent;

Whereas in the light of the medical opinion submitted . . . on 27 October 1982 it is clear that that was not so in [the applicant's] case; when he committed the acts he was fully aware of what he was doing;

Whereas, in the light of the foregoing, the circumstances referred to by the Disciplinary Board do not have the mitigating character which the Board attributes to them and do not diminish the seriousness of [the applicant's] conduct or lessen his responsibility;

Whereas in those circumstances the penalty recommended by the Disciplinary Board is inappropriate in relation to the misconduct in question.'

The application to the Court

14 The applicant's complaint was rejected on 11 July 1983 and consequently he brought the present action. In support of his main claim for annulment he makes a number of submissions, which may be summarized as follows:

Infringement of essential procedural requirements, in particular infringement of the *audi alteram partem* principle applicable in disciplinary proceedings and the rights of the defence;

Errors of fact: in particular the appointing authority took the view in its decision of 7 April 1983 that there were no mitigating circumstances;

Mistakes of law: in particular the appointing authority imposed a penalty which was disproportionate to the misconduct complained of;

The decision of the appointing authority contained an incorrect, incomplete and inadequate statement of reasons.

Finally, in relation to the alternative claim for damages, the applicant states that the errors committed by the appointing authority caused him both material and non-material damage.

The claim for annulment of the opinion of the Disciplinary Board

15 The Commission raises an objection of inadmissibility against the claim for annulment in so far as it relates to the opinion of the Disciplinary Board of 8 March 1983. It considers that the opinion is only a preparatory and non-binding measure which cannot be challenged directly. Consequently, the application may be directed only against the disciplinary decision itself, which the applicant may challenge by referring to irregularities affecting both the opinion and previous measures.

16 That argument disregards the nature and structure of the disciplinary procedure as set out in Title VI of the Staff Regulations and, more particularly, Annex IX thereto. It is apparent from those provisions that the function of the Disciplinary Board, as an investigative body, is to carry out inquiries at the request of the appointing authority to establish disciplinary offences and to ascertain the circumstances which are necessary to determine the severity of the penalty to be imposed. Although it is a consultative body, it must conduct a completely independent inquiry according to a special and distinct procedure based on the *audi alteram partem* rule and respecting the fundamental principles concerning the rights of the defence. It would be contrary to those characteristics to deny the applicant the opportunity of challenging separately the proceedings before the Disciplinary Board and of obtaining the annulment of the opinion given by it so that the disciplinary proceedings had to be commenced *de novo*.

17 It follows that the objection of inadmissibility raised by the Commission must be dismissed and that it is necessary to consider first the applicant's complaints against the proceedings before the Disciplinary Board.

18 In that regard the applicant alleges that the minutes recording the depositions of witnesses at the hearings and the minutes of the Board were forwarded only after considerable delay. The former were forwarded to the applicant after the Disciplinary Board had given its opinion and two sets of minutes were even forwarded after the appointing authority had adopted its decision on 7 April 1983. The minutes of the meetings of the Disciplinary Board were not forwarded to the applicant until after the disciplinary proceedings were closed.

19 The applicant claims that in those circumstances he and his advisers were not in a position to prepare their defence in good time and the Disciplinary Board gave its opinion on the basis of an incomplete file. Furthermore, since they had not

received the minutes, neither the applicant nor his advisers knew, at the time when they were heard by the appointing authority, that the members of the Board had been divided about the penalty to propose, namely a relegation in step or downgrading. That information was essential for the defence.

20 The applicant concludes that the proceedings before the Disciplinary Board were conducted in breach of Articles 2, 7, 8 and 9 of Annex IX to the Staff Regulations and in disregard of the *audi alteram partem* principle and the rights of the defence.

21 The Commission denies any infringement of the *audi alteram partem* principle or the rights of the defence. The applicant and his advisers were able to attend the hearing of all the witnesses and they had the opportunity at any time to question them and to make known their point of view before the members of the Disciplinary Board. As regards the hearing on 31 January 1983 which the applicant refused to attend or be represented at, he and his advisers listened to a tape-recording of it in February 1983. They thus had all the information in sufficient time to prepare their defence before the Disciplinary Board.

22 Moreover, all the annexes to the minutes of the meetings of the Disciplinary Board, made up essentially of the minutes recording the depositions of witnesses at the hearing, were forwarded to the applicant together with the other documents relating to the proceedings; the intervals which occurred before they were so forwarded were due to the considerable burden of work which their preparation represented and the time needed to obtain the signatures of the witnesses. The minutes of the meetings of the Disciplinary Board were the only documents not to have been forwarded to the applicant and his advisers, and this was because it had always been the practice to regard those as internal documents.

23 With regard to those arguments, it must be remembered that the *audi alteram partem* principle applicable in proceedings such as those before the Disciplinary Board and the rights of the defence in such proceedings require that the applicant and his advisers should have knowledge of all the facts on which a decision has been based in sufficient time to submit their observations.

24 As regards the documents which the applicant claims were late in being forwarded, the provisions of the Staff Regulatons merely require their preparation and make no provision regarding their transmission to the parties. The applicant's right to receive such documents must therefore be determined on the basis of their nature.

25 In that regard the Commission is right in drawing a distinction between, on the one hand, the minutes of the meetings of the Board, which give only a brief summary of the Board's deliberations and are thus of a purely internal nature and, on the other, the minutes recording the depositions of witnesses, which the latter must approve and sign and which thus are clearly of interest to the parties.

26 It is therefore apparent that the applicant was entitled to receive the latter documents. To facilitate the preparation of the defence they should be forwarded in sufficient time, before the proceedings before the Board are closed.

27 It should be noted, however, that the applicant and his advisers either attended or listened to recordings of the hearings to which the minutes relate. Moreover, it is apparent from the evidence presented to the Court at the hearing that the fact that there was a delay in the preparation and forwarding of the documents owing to the length of the inquiry did not in any way deprive the applicant of the opportunity to present pertinent observations at the disciplinary proceedings. When questioned by the Court, the applicant was able to point to only one item of information of which he was not aware in sufficient time, namely the difference of opinion within the Board. That information, contained in one of the documents which, as has been stated above, is of a purely internal nature, is of no relevance as far as the establishment of the facts is concerned.

28 It follows that the delay in forwarding certain documents which, strictly speaking, the applicant was entitled to receive did not in the present case infringe the *audi alteram partem* principle applicable in proceedings before the Disciplinary Board or the applicant's right of defence. The submission based on the delay in forwarding the documents must therefore be rejected.

29 The applicant further claims that the opinion of the Disciplinary Board was not drawn up within the period laid down in the first paragraph of Article 7 of Annex IX to the Staff Regulations, namely within a period of three months from the date on which the matter was referred to the Board. He submits that such a delay constitutes a breach of the fundamental principles of procedural law.

30 That submission is manifestly unfounded. In its judgment of 4 February 1970 in Case 13/69 (*Van Eick* v *Commission* [1970] ECR 3), the Court held that the period of one month from the transmission of the Disciplinary Board's opinion which the third paragraph of Article 7 of Annex IX to the Staff Regulations gives the appointing authority for taking its final decision cannot be regarded as a mandatory time-limit, in the sense that any measures adopted after its expiry are void, but constitutes a rule of sound administration, with the result that a failure to observe it may render the institution liable for any damage caused to those concerned. The same remarks apply to the time-limit laid down in the first paragraph of Article 7. As the present case shows, the Disciplinary Board may require a longer period in order to undertake an inquiry which is sufficiently complete and which affords the person concerned all the guarantees intended by the Staff Regulations. In the present case the applicant has not provided the slightest evidence justifying any criticism of the Disciplinary Board in that respect.

31 The claim for annulment must therefore be dismissed in so far as it is directed against the opinion of the Disciplinary Board.

Claim for annulment of the decision of the appointing authority

32 The applicant claims that the decision of the appointing authority dated 7 April 1983 is vitiated by an incorrect appraisal of the facts, in so far as it states that there were no mitigating circumstances and that no decision relating to his administrative position had been taken at the time of the meeting on 6 October 1982. The decision is further vitiated by mistakes of law inasmuch as it imposes a penalty disproportionate to the conduct complained of and omits to take account of the absence of premeditation on the part of the applicant. Finally the statement of reasons for the decision is incorrect, incomplete and inadequate, especially in so far as the decision does not follow the opinion of the Disciplinary Board.

33 The Commission emphasizes that the decision of the appointing authority was taken with full knowledge of the facts which led to disciplinary proceedings being brought against the applicant, the circumstances in which the acts were committed, all the psychological and other matters which the applicant could put forward in his defence and the reasoned opinion of the Disciplinary Board. It maintains that the appointing authority had taken no decision in relation to the applicant's administrative position at the time when the acts in question were committed, but it does not deny that when he met the applicant Mr Morel informed him of his

personal opinion that the applicant's election as a member of the Corsican Assembly was incompatible with his secondment to the French authorities and that the compatibility of his election with his continued employment had to be considered. The Commission considers that the removal of the applicant from his post was an appropriate penalty for the acts which he was found to have committed and was justified by the statement of reasons in the decision.

34 As the Court has already held, *inter alia* in its judgment of 30 May 1973 in Case 46/72 (*De Greef* v *Commission* [1973] ECR 543), 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.

35 In order to enable the Court to carry out that limited review, it is indispensable that the preamble to the decision should specify the acts which the official is found to have committed and the considerations which have led the appointing authority to impose the particular penalty. If, as in the present case, the penalty imposed by the appointing authority is severer than that suggested by the Disciplinary Board in its opinion, the reasons for this must be clearly stated.

36 It is therefore necessary to consider first whether the applicant's complaints concerning the statement of reasons in the contested decision are well founded.

37 As regards the allegations made against the applicant, the decision restricts itself to stating in the first recital that the applicant committed 'a violent assault' on Mr Morel 'causing him injuries'. That brief statement does not reveal whether the decision is based solely on the explanation given by the applicant or whether, and if so to what extent, the appointing authority relied also on the depositions of Mr Morel and his assistant, which were to a large extent challenged by the applicant.

38 In the third recital the appointing authority states that no decision on the applicant's administrative position had been taken at the time of the meeting on 6 October 1982. That finding is not of decisive importance as far as the choice of

the proper penalty is concerned, since the applicant's conduct must be considered on the basis of the impression which Mr Morel gave him during the meeting.

39 Apart from that recital, the decision merely reproduces in an abridged form (the second to the eighth recital) the particulars already included in the opinion of the Disciplinary Board. Consequently, the appointing authority is in fact simply referring to part of the Board's own arguments when, in the ninth and 10th recitals of the decision, it states that 'in the light of the foregoing . . . the circumstances referred to by the Disciplinary Board do not have the mitigating character which it attributes to them and do not diminish the seriousness [of the applicant's] conduct or lessen his responsibility' and that in those circumstances the penalty proposed by the Disciplinary Board is 'inappropriate in relation to the misconduct in question'.

40 The statement of reasons contained in the contested decison does not allow the Court either to verify the facts on which the decision is based or, more importantly, to assess the reasons for which the appointing authority chose a penalty which was more severe than that proposed by the Disciplinary Board.

41 In view of the foregoing the Commission's decision of 7 April 1983 removing the applicant from his post must be annulled. It is therefore unnecessary to consider the other submissions put forward against the decision. As a result of that annulment the Commission must adopt a fresh decision, with a proper statement of reasons, terminating the disciplinary proceedings.

Costs

42 Under the terms of Article 69 (2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the Commission has failed in the major part of its submissions it must be ordered to pay the costs.

On those grounds,

THE COURT (Second Chamber)

hereby:

1. **Dismisses the action in so far as it is directed against the opinion of the Disciplinary Board dated 8 March 1983;**

2. **Annuls the Commission's decision of 7 April 1983 removing the applicant from his post;**

3. **Refers the matter back to the Commission for it to take a properly reasoned decision terminating the disciplinary proceedings against the applicant;**

4. **Orders the Commission to pay the costs.**

Due Pescatore Bahlmann

Delivered in open court in Luxembourg on 29 January 1985.

P. Heim
Registrar

O. Due
President of the Second Chamber