OPINION OF MR ADVOCATE-GENERAL TRABUCCHI DELIVERED ON 21 JUNE 1974 [1]

Mr President,
Members of the Court,

1. Once again the Court is being asked to rule in a dispute which, as it concerns an official in the scientific branch of the service, involves the delicate relationship between the status of a research worker, the freedom he is entitled to enjoy in his work and the obligations which fall upon him as a member of an organization which has to be administered. Freedom of inquiry, the need for supervision and the problem of appraisal involving responsibility for management: all these considerations have a bearing on the decision in law which it is your duty to take. Clearly, in the present case, another immediate comment is justified: your task is to pronounce only on some aspects of a state of affairs which, at the present stage of the action, consists wholly, with varying overtones, in conflicting statements from officials involved, so it is not always easy to keep clearly and firmly in mind the real subject-matter of an appraisal which is concerned only with some legal implications of a situation which, at least up to now, remains confused.

A scientific officer of the Joint Research Centre at Ispra stands, in connexion with some research work, accused by his superior of actions and attitudes which may cast doubt on his professional rectitude. The Commission, in the person of the Director-General of the Centre, regards these strictures as being of sufficient gravity for consideration to be given to the possibility of initiating disciplinary proceedings. The person accused denies that there is any foundation for these criticisms and accuses his immediate superior of acting out of personal malice towards him. In turn, the Commission refuses to become involved in the affair, expressing the view that it is a 'scientific argument' which concerns no one except the two individual officials.

Faced with the formal refusal of the Commission to declare the accusations against him to be baseless, the person accused, in an attempt to retrieve his good name, now asks the Court to make up for the institution's failure to do so.

The defendant institution maintains, however, that it has never made these accusations and, throughout the proceedings, has adopted an attitude of total neutrality.

Thus, the man who made the accusations in the first place appears to be the only person maintaining them, and he is not a party to this action, in which he has not even appeared as a witness.

The present action is not in the nature of criminal proceedings in which the accused must, in the absence of proof of the charges levied against him, be declared not guilty. Nor does it constitute proceedings in opposition to a disciplinary measure, in which, in the absence of evidence establishing the facts on which the disputed decision is based, the decision could be annulled. The situation is the rather paradoxical one in which the party being called to account, which would be best able to shed light on the complicated practical details of the development which gave rise to the action, does not consider itself to be involved and has dissociated itself completely from the basic purpose of the application, which is to establish whether there is any justification for the charges levied against the applicant by his immediate superior.

1 — Translated from the Italian.

On account of considerations partly of form (the fact that the accuser is not a party to the action) and partly of substance (the need for prior clarification of complicated practical details), it will, therefore, be impossible, at the present stage of proceedings, to come to a decision on the merits of the dispute. As regards the action of annulment against the decision of the Commission to refuse the applicant's main request, which is basically for a restoration of his good name, the essential task of the Court is confined to establishing whether, by its refusal to become involved, the Commission has infringed one of its obligations.

If this were the case, the decision to refuse the request should be annulled, and it would be incumbent on the Commission itself to decide which was the most suitable method of discharging its obligations in the situation which, as a result of the accusations, has arisen among its staff.

2. The immediate cause of the present dispute was the memorandum headed 'Falsification of Experiment Results' addressed on 4 May 1971 by the Head of Division, Mr Malvicini, under whom the applicant worked, to Dr. Caprioglio, Director-General of the Euratom Joint Research Centre at Ispra. In this document, the applicant, a scientific officer at the Centre, was accused of having, with the object of making it appear that a particular result had been obtained, falsified the experimental data concerning research on isotope separation on which he was engaged in conjunction with the Euratom Biology Department. The same accusation was repeated in a memorandum addressed by Mr Malvicini on 6 July 1971 to Director-General Caprioglio, in which he castigated Mr Guillot for having contrived 'to alter the values of experimental results so as to make it appear that a certain effect had been obtained'.

In the course of the subsequent proceedings, an internal note of 20 October 1971 from Mr Malvicini came to light; this note, of which the applicant denies having had any previous knowledge, sets out in greater detail the facts on which the accusations made against Mr Guillot are based. As this is a document of some importance, which came to light late in the day, I think it would be helpful to quote its central passage at length:

'When Mr Guillot sent me the results of the measurements carried out from the time the experiment began (at 9.46 on 28 April) until 11.25 on 29 April, together with the printer tapes of the analyser, he included only the results of 11 out of the 14 measurements carried out between 11.35 on 29 April and 7.10 on 30 April.

When, on the following day, 1 May, I prepared to plot the points of the final measurements, I realized that I did not have the printer tapes for them. I went to the office, thinking I had left them on the table, but they were not there. But in a waste-paper basket I found a strip of tape from an Olivetti computer showing the spectrum values of the last six measurements. These values did not correspond with those given me by Mr Guillot.

On the morning of Monday 3 May, Mr Guillot, in answer to my questions, assured me that the data he had given me were those provided by the analyser, without any alteration. When I made it clear to him that I was in possession of the data shown on the computer tape, he could give no explanation and left the building.

My suspicions aroused, I recovered all the snips from the printer and computer tape from the dustbins.

In the afternoon Mr Guillot returned and stated that he had made the necessary corrections to the measurement readings after finding, when he was taking down the apparatus on 30 April, that the flask holding the radioactive mixture was tilted. In support of this statement, he produced a note containing serious accusations against me, together with a technical appendix

of eight pages of calculations, tables and graphs, to prove that the recalculation applied to the results of the last six measurements was a correction, rendered necessary by the tilting of the flask, to bring them into line with the values obtained on 29 April.

After piecing together the printer slips, I was surprised to see that the data obtained after 11.35 on 29 April has also been corrected "as necessary" and realized why, when he was preparing the technical appendix, Mr Guillot had asked me in writing for a list of the spectra in my possession.'

For the time being, it is unnecessary to go into further details concerning the dispute which arose from Mr Malvicini's strictures, or the explanations given by the applicant concerning the need for a correcting factor (and its effectiveness) which, contrary to what is stated in the note quoted above from Mr Malvicini, the former declares he applied exclusively to the last part of his study in order to allow for an accidental movement of an instrument used in the experiment, but there can be no doubt that the terms employed in reference to the applicant reflect on his professional integrity and seriously compromise him in the scientific circles in which he is called upon to work.

The applicant alleges that there has for some time been some unpleasantness in the relations between him and Mr Malvicini, so much so that he regards himself as being the object of systematic persecution on the part of his Head of Division. The applicant states that a good example of this was the earlier refusal to allow him to publish an article on some results of his researches, which led to an action being brought before this Court (Case 91/71), though it did not proceed to judgment because authority to publish was later granted. It is, on the other hand, clear from Annexes I, II and XVI of the statement of defence that a number of other scientific officers at the Ispra Centre, apart from Mr Malvicini, had said that they were not in favour of publication, which was eventually granted expressly on condition that the author accepted full and sole responsibility for his views.

Among other examples adduced by the applicant as evidence of alleged prejudice against him are the fact that, in contrast with his colleagues and staff junior to him, he has not for many years received any promotion or bonus, and the rejection of his requests to be allowed to take part in study groups on the subjects with which he is concerned. But there is no point in dwelling on these details. For our purpose, a reference to them will have conveyed something of the difficult personal and professional relationship which underlie the events which have occurred and in the light of which these events must be reviewed.

3. Following receipt of the memorandum of 4 May 1971 the Director, Mr Caprioglio, in a note of 17 May 1971, expressed the view that the incidents criticized by Mr Malvicini appeared to him to be sufficiently serious to justify disciplinary proceedings, and requested his staff to investigate. In reply to a subsequent memorandum from the applicant asking for information, the Director, Mr Caprioglio, informed him that he was still awaiting a report from his staff before deciding whether disciplinary proceedings were called for.

In a note of 9 July 1971, Mr Malvicini, in answer to a question from the applicant on the subject of continuing his research on isotope separation, wrote as follows: 'With regard to your request, I believe conclusions should be drawn from the results of research completed to date on separation effects before current work is continued and fresh experiments embarked upon'.

With this, a halt was called, apparently only for the time being, to the work which the applicant had been asked to carry out on behalf of the Biology Department and which he had performed for part of his time in addition to his

other function of systematically checking individual members of staff at the Ispra Centre for irradiation. Under the applicant's annual programme of work for 1971, these research activities on behalf of the Biology Department were planned to last the whole year.

In a memorandum of 8 November 1971, addressed to the Director, Mr Caprioglio, the applicant complained of having had no further information about the results of the inquiry into the accusations made against him by Mr Malvicini and called for them to be publicly withdrawn in their entirety.

In the memorandum the applicant also asked for the suspension of his experiments by Mr Malvicini to be overruled and for the schedule of experiments laid down for 1971 to be transferred to 1972. He made similar requests in a memorandum of 6 December 1971.

On 3 January 1972, in a memorandum to the President of the Commission of the European Communities, Mr Guillot applied under Article 90 of the Staff Regulations for:

(i) Withdrawal of the accusations made against him by Mr Malvicini and recognition that the results of his experiments were correct;

(ii) authorization and provision of the resources necessary for continuing his research;

(iii) adequate compensation for the harm done to him by the accusations and by the ban on continuing his research.

On 14 April 1972, the Vice-President of the Commission, without explicitly replying to the first request, for withdrawal of the accusations reflecting on the applicant's professional integrity, declared that he had never been the subject of disciplinary proceedings and gave instructions for removal from the applicant's personal file of the abovementioned memorandum of 4 May from Mr Malvicini to Mr Caprioglio, the memorandum of 17 May from the Director (Caprioglio) on the request for information in connexion with possible disciplinary proceedings, the memorandum of 24 June 1971 (wrongly dated 26 June) addressed to the Director (Caprioglio) by the applicant concerning the latter's request that a group of experts should be invited to check the results of the applicant's experiments referred to in Mr Malvicini's memorandum of 4 May, and finally, the Director's memorandum of 7 July 1971, quoted above, concerning preliminary inquiries in view of the possibility of instituting disciplinary proceedings.

As regards Mr Guillot's second request, the Vice-President of the Commission replied in the negative on the ground that the work for whose continuation authority was being sought was not covered by any for the programmes of work which the Council had approved for the Joint Research Centre; he concluded by expressing his conviction that there was no justification for either the first or the second request and that there was, therefore, no ground for compensation.

4. Although, in his statement initiating proceedings, the applicant sought annulment of the rejection by the defendant of the request set out under No 1 of the applicant's appeal through administrative channels on 5 January 1972, he has since explained in his reply that this claim is solely concerned with the absence of any acknowledgement that the accusations made against him by Mr Malvicini are without foundation, and that this could not, by implication, constitute a request for a decision on the merits of his conclusions and of his scientific theories.

Even thus re-defined, however, the applicant's main claim, taken literally, must be rejected. As, in this statement initiating proceedings, the applicant confines himself to the requests contained in the administrative appeal, it is important to note that the first of

these asks the Commission to compel Mr Malvicini to withdraw his accusations. Clearly the Commission cannot force one of its officials to do anything of the kind. What the Commission could do is find out whether there was any foundation for them, and if it could not collect sufficient evidence to justify them, acknowledge as much to the person concerned: as became very clear in the course of the oral proceedings, this essentially is what the applicant wants.

The fact that the Commission did not initiate formal disciplinary proceedings against him is not enough to dispel any doubts which may have been created by the accusations reflecting on his integrity. A decision not to take disciplinary proceedings could in fact arise from reasons of sheer expediency. Therefore, the applicant maintains, by failing to ensure withdrawal of the accusations against him in respect of the performance of his duties as an official of the Commission, or at least an investigation into whether they were true or not, the institution failed in the obligation imposed on it by Article 24 of the Staff Regulations to assist any official in its service, especially in connexion with insulting or defamatory acts or utterances to which he is subjected by reasons of his position or duties.

The defendant maintains, on the other hand, that the applicant has obtained full satisfaction, since his work, which was the subject of dispute, had been submitted for examination by trustworthy persons competent to judge, in accordance with his request to the Director-General of the Joint Research Centre, who had made himself responsible for the conclusions drawn from this examination.

It should, however, be noted that the opinion formed by this group af experts is exclusively concerned with the scientific value of the results of the applicant's researches, on which they express reservations, without in the slightest way considering the correctness, the propriety or the objectivity of the methods of research employed. For this reason, the document does not meet the applicant's request to be assured of a withdrawal of the accusations, made specifically concerning his methods and conscientiousness as a scientist, in the memorandum of 4 May 1971 which had been communicated to various officials at the Research Centre.

5. Can the applicant legitimately claim that the institution to which he belongs should intervene when one of his superiors makes accusations regarding his work in the department and, if the institution cannot demonstrate that there is any truth in the accusations, absolve him from blame? In other words, can the applicant claim that the competent authorities of the institution should do all in their power to investigate the truth of the accusations and that, if they cannot be shown to have any substance, that they should be publicly retracted?

It is a principle of good management that, faced with developments of this kind, the institution may not simply stand aside and allow relationships between the officials to deteriorate as though this was something of no concern to the service. It is in duty bound to do all it can to clear up the situation, not only because it does harm to the service but also (and this is what this case is about) because it undermines respect for its officials, which, within its province, it has a duty to preserve. This is also apparent from Article 24 of the Staff Regulations, which decisions of this Court have treated as clearly applicable to occurrences taking place within the institutions (Judgment in Case 83/63, *Krawczynski*, Rec. 1965, p. 756). There can be no doubt that, in the case before us, the staff of the Commission would have been best qualified to shed light on the facts in dispute, which involve the Atomic Energy Community's own activities.

It is clear, however, from the statements of the defendant that, from the time

when the idea of disciplinary proceedings was abandoned, the Commission has considered the matter as though it were a private dispute between Mr Malvicini and the applicant. But, in the face of statements made by one of his superiors impugning an official's professional integrity and directly concerning the work of the service, it is intolerable that, after having regarded the accusations as being of sufficient gravity possibly to justify instituting disciplinary proceedings, the institution to which the two officials belong should let the whole thing go by default, without adequate clarification.

When asked by the Court at the hearing to indicate the grounds on which it did not consider it necessary to investigate the allegations made against the applicant by his superior, the Commission gave no satisfactory explanation.

A study of his personal file reveals the applicant to be an official of considerable merit both as regards his qualifications as a scientist and in his work, standards of performance, and conduct. From the time when he entered the service, which goes back to 1961, the periodic reports on him are all clearly favourable. This also applied to the two most recent reports prepared by Mr Malvicini as Head of Division in 1967 and 1969. The failure of the defendant to do all in its power to clear up the regrettable situation which arose is, therefore, all the more serious. It certainly provides grounds for saying that this failure constitutes a breach of official duty laid down under Article 24 of the Staff Regulations; it constitutes a wrongful act which, unless the defendant can prove that the accusations are justified, may give rise to liability on the part of the defendant for the loss or damage suffered by the applicant.

The Court is now faced with a situation in which, even if it finds that the attitude of the Commission in refusing to become involved is unlawful, it is unable to give full satisfaction to the applicant because, to take a decision on his request for his good name to be restored, it would have to conduct an investigation into the accusations made against him; this implies inquiries on matters of fact and conclusions on strictly technical subjects which, without expert opinion, the Court is not in a position to embark upon.

6. The Commission has, before the Court, expressly offered to obtain an expert's report if the Court does not accept its basic contention that the case concerns a disagreement between two officials on a scientific matter and that the Commission has a right not to become involved. Although he has expressed reservations on the question whether, at this distance in time, it is possible to reconstruct every circumstance with accuracy, the applicant, too, has accepted the idea of measures of inquiry designed to investigate the truth of the facts underlying Mr Malvicini's accusations.

After the hearing, the Commission made a formal offer to the applicant to repeat the experiment. But a repetition of the experiment which, if carried out at the right time, would probably have made it unnecessary to bring this action, does not decisively resolve every aspect of the dispute because this concerns the scientific validity of the results of previous research and not merely the correctness of the applicant's conduct.

For a decision to be reached on the merits of the applicant's main claim, it would be necessary to clear up the following specific points:

1. Is it true that when, after the result of his researches had been adjusted in the light of the results supplied by the printer and computer tapes, Mr Guillot submitted it to his superior, Mr Malvicini, without giving the slightest indication that this adjustment had taken place?

2. Did, as the applicant seems to be stating in his memorandum of 7 May 1972 to his Director, Mr Caprioglio,

this prior adjustment of the data submitted to Mr Malvicini involve only the last six measurements or, as Mr Malvicini states in his note of 21 October 1971, the early stages of the experiment as well; and are there scientifically acceptable grounds for this?

3. Once these two points are cleared up, it would be necessary to obtain the opinion of those qualified to give one concerning the conduct of Mr Guillot

   (a) in adjusting the values found and

   (b) when submitting the result of the research for which he had been responsible.

Only after clearing up these points would the Court be in a position to give a comprehensive ruling on the merits of every aspect of the applicant's main claim, at the same time indicating the considerations which would enable an assessment to be made of the good faith of all involved.

In the absence of an inquiry, aided by experts, set on foot by the Court itself, the mechanics of the present proceedings do not permit the applicant's basic claim to be satisfied in full. Indeed, quite apart from the fact that the Court is not in a position to go into the accusations denied by the applicant, it would not be possible to declare them to be unfounded without first hearing at least the person making them who, as has already been said, cannot be repudiated without this implying an unfavourable verdict on him — this would in fact mean that he had uttered a libel — and before he has even been given an opportunity to substantiate the truth of his statements. It would not be fair to make a third party carry the blame for the Commission's culpable inertia.

In this Court, and in view of the documents on the file, the only conclusion I can reach is that the Commission has failed in its duty to clarify the accusations made against an official by his superior concerning work which, even though it was not, strictly speaking, covered by the programme of work of the Centre where it took place, was, nevertheless, work for the Community of which the Centre formed part and for this reason must be treated as official duty. Recasting, accordingly, the applicant's main claim and taking it to mean, as he has shown in his reply that he intends it to mean, a claim for restoration of his good name, the Court can only find that the Commission has failed in its duty to investigate the truth of the accusations made against the applicant, with the consequence that, at the risk of contravening not only an obligation under the Staff Regulations, as it has already done, but also a judgment of the Court annulling its refusal to be involved, and of exposing itself to subsequent actions for damages, the Commission will no longer be able to avoid fulfilling the obligations incumbent on it.

7. The defendant contends for the inadmissibility of the applicant's claim, in his appeal, for the annulment of the refusal to authorize him to continue his experiments in conjunction with the Biology Department. In view of the fact that by note of 9 July 1971 his Head of Division prohibited him from continuing those experiments, on the date when the applicant had asked the Director-General, Mr Caprioglio, to annul that decision (8 November 1971), he would (the Commission argues) have already been out of time to lodge a complaint pursuant to Article 90 of the Staff Regulations. Therefore, again according to the defendant, the subsequent complaint, that of 3 January 1972, addressed to the Commission, could not revive a period of grace which had already expired. Moreover, the subsequent explicit decision, adopted by the Commission and which is impugned in the present action, represented nothing more than confirmation of the decision of 9 July.

The objection appears to have no substance. As a matter of fact, the

decision of 9 July 1971, suspending the experiments with which we are concerned, was phrased in such a way as to give it a purely provisional character, pending the outcome of checks being carried out on the results of previous experiments completed by the applicant. According to decisions of this Court, it has long been established that the time limit for an appeal begins to run only when the competent administrative authority takes a definite decision. Accordingly, the applicant's request to the Director-General on 8 November 1971 concerning the resumption of the experiments which had been suspended, and in which he invited the competent authority in the organization to take a decision on a question which had all the appearance of having been left open, cannot be regarded as out of time, any more than the application of 3 January 1972 addressed on the same subject to the Commission.

As regards the substance of the request, the defendant raises the further objection that an official cannot claim particular functions but only has the right to be assigned functions appropriate to his grade.

Certainly, subject to this reservation, the competent authority is free to decide what is best in the interests of the service and, consequently, how functions are to be distributed. But this is not a case of an official complaining about the duties assigned to him because, as has happened on other occasions, he regards them as inadequate or inappropriate to his qualifications. This case is concerned with a protest against a decision to suspend him from certain duties, a decision which has every appearance of having been arrived at as the result of the particular situation created by the accusations made by the person responsible for the decision. It should be borne in mind that the annual programme of work laid down for the applicant provided for him to carry out this work during the whole of 1971 in the same way as he had carried it out during the previous year.

This creates the impression that, if it had not been for the main episode which gave rise to the present case, viz. the accusations of scientific dishonesty made against the applicant, he would have been able to carry on with the research he was engaged upon. Nor can this possibility be dismissed by the statement in the disputed decision that this type of research did not form part of the Centre's programme; even at the time when the applicant was authorized to carry out the work, it was throughout under the aegis of the Biology Department, which is a separate organization from the Centre at Ispra. Moreover, according to statements made by the applicant and not denied by the defendant, the fact that the research in question was not included in the Joint Centre's programme of work did not prevent it from continuing to be carried out by other officials working under its control.

In these circumstances, the reasons given by the Commission for rejecting the applicant's request must be regarded as inadequate.

Furthermore, a suspension which, in view of the preliminary inquiry which was in hand concerning Mr Guillot, could at that juncture be justified, subsequently, when it was maintained without good reason, assumed the character of a punishment. As, moreover, the negative outcome of this request seems to have a direct connexion with the attitude of indifference displayed by the Commission towards disposing, one way or the other, of the accusations made against the applicant, this suggests an ancillary decision which, at least as regards its practical outcome, is part and parcel of a course of improper conduct.

Although the Court certainly cannot order the defendant to allow the applicant to resume his research, because this would constitute unwarranted interference in the departmental

organization of the Commission, the considerations set out above justify annulment of the Commission's decision on this point as well, with the consequential obligation on the Commission to look at the whole matter again.

8. Finally we come to the claim for compensation. The applicant submits that the defendant should be ordered to pay him the sum of BF 100 000 as compensation for the material and non-material damage caused by its refusal to compel Mr Malvicini to withdraw his accusations and to recognize the validity of the results of the experiments concerned.

Now that the first head of the claim in the appeal has been recast, the claim for compensation is more appropriately linked with the Commission's refusal to restore the good name of the applicant.

The applicant further claims BF 100 000 as compensation for material and non-material damage caused by the ban on continuing his research.

My recommendation that you should uphold the applicant's claims for annulment is without prejudice to the question whether there is any justification for the accusations on which the claims for compensation are based.

Pending the outcome of the action which the Commission will now have to take, there is no need for the Court to give a decision for the moment on these claims for damages, which must be regarded as of secondary importance.

If, let us suppose, the accusations were found to be justified, the improper conduct of the Commission in failing to act in the manner indicated would not have caused the applicant any damage. This is because it is not possible to blame the senior official, or, therefore, the Community, for criticizing work by a member of staff which is recognized as having been done improperly, even if he happens to be a research scientist. The reverse would be true if the criticisms proved to be unjustified, or if the Commission did not do everything possible to get at the truth of the matter. As a safeguard which, in this respect too, must be provided for officials against personal attacks, I must add that the claim for compensation should be upheld even if, in the event, the outcome of the investigation conducted by technical experts failed to point unmistakably to the improprieties of which the applicant has been accused.

These proceedings are not, on the other hand, concerned with the possibility that compensation may be due on account of the Commission's delay in taking action. The main reason for this is that a claim to this effect has not been submitted either expressly or by implication: *ne eat iudex ultra petita partium*. Reference to the question of delay will in any case be covered by the main decision. In fact, if the accusations against the applicant were found to be without foundation, it would be reasonable, in assessing the damage sustained, to take account of the time which, through the fault of the Commission, had been taken to restore his good name.

Judgment on the main issue is therefore reserved. These claims can be properly dealt with only at a later stage of these proceedings, which can be reopened, within a reasonable time, at the instance of either party.

I therefore recommend annulment of the disputed decision and an order for costs against the defendant.