JUDGMENT OF THE COURT (First Chamber)
18 November 1999 *

In Case C-191/98 P,

Georges Tzoanos, a former official of the Commission of the European Communities, residing in Athens (Greece), represented by E. Boigelot, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of L. Schiltz, 2 Rue du Fort Rheinsheim,

appellant,

APPEAL against the judgment of the Court of First Instance of the European Communities (Fourth Chamber) of 19 March 1998 in Case T-74/96 *Tzoanos* v *Commission* [1998] ECR-SC I-A-129 and II-343, seeking to have that judgment set aside,

the other party to the proceedings being:

Commission of the European Communities, represented by G. Valsesia, Principal Legal Adviser, acting as Agent, with D. Waelbroeck and O. Speltdoorn, of the

* Language of the case: French.

Brussels Bar, with an address for service in Luxembourg at the office of C. Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

THE COURT (First Chamber),

composed of: D.A.O. Edward (Rapporteur), President of the Fifth Chamber, acting as President of the First Chamber, P. Jann and M. Wathelet, Judges,

Advocate General: S. Alber,

Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 9 March 1999,

gives the following

Judgment

1 By application lodged at the Registry of the Court of Justice on 19 May 1998, Mr Tzoanos brought an appeal, pursuant to Article 49 of the EC Statute of the Court of Justice and the corresponding provisions of the ECSC and Euratom Statutes of

the Court of Justice, against the judgment of 19 March 1998 in Case T-74/96 *Tzoanos* v *Commission* [1998] ECR-SC I-A-129 and II-343 ('the contested judgment'), in which the Court of First Instance dismissed the action he had brought against the Commission's decision of 22 June 1995 to remove him from his post without loss of his entitlement to a retirement pension and the decision of 19 February 1996 expressly rejecting his complaint of 21 September 1995 against the decision of 22 June 1995.

2 It appears from the contested judgment that Mr Tzoanos is a former official of the Commission in Grade A 3 who, from 1 July 1989, had been Head of Unit 3 'Tourism' in Directorate A 'Business development and improvement of the business environment' of the Directorate-General for Enterprise Policy, Distributive Trades, Tourism and Cooperatives (DG XXIII) (hereinafter 'Unit XXIII.A.3') (paragraph 1 of the contested judgment).

3 Towards the end of 1993, the Directorate-General for Financial Control (DG XX) discovered a number of problems in the management of Unit XXIII.A.3. At the beginning of 1994 a press article which had appeared in Greece in July 1993 concerning the conduct of Mr Tzoanos was brought to the attention of his superiors (paragraph 2 of the contested judgment).

4 The appointing authority held an inquiry into Mr Tzoanos's activities within Unit XXIII.A.3 and on 22 December 1994 it referred five complaints against Mr Tzoanos to the Disciplinary Board, namely:

— that he '[had] exercised and continue[d] to exercise unauthorised outside activities';

— that he had 'failed to observe his duty of discretion in that, without informing his superiors, he had [had] his residence at the same address as that of an

outside firm which regularly participated in projects funded or to be funded by the Commission and [had] publicly criticised a national body involved in the field of tourism';

— that he had 'provided services to the Commission in the field of his professional activities on behalf of persons or bodies outside the institution in such a way as to have compromised his independence in the performance of his duties as Head of Unit within the Commission';

— that he had 'prepared for persons or bodies outside the institution documents ultimately destined either for the Commission, and contrary to its interests, or for outside partners in projects funded by the Community';

— that he had 'committed administrative irregularities and been guilty of budgetary and financial mismanagement in the performance of his duties as Head of the "Tourism" Unit' (paragraphs 3 and 10 of the contested judgment).

5 On 5 April 1995 the appointing authority sent an additional report to the Disciplinary Board (paragraph 15 of the contested judgment).

6 On 23 May 1995 the Disciplinary Board delivered a unanimous reasoned opinion recommending that the appointing authority should impose on Mr Tzoanos the disciplinary measure referred to in Article 86(2)(f) of the Staff Regulations of Officials of the European Communities ('the Staff Regulations'), namely removal

from post without loss of entitlement to a retirement pension. That opinion was notified to Mr Tzoanos on 1 June 1995 (paragraph 16 of the contested judgment).

7 On 12 June 1995 Mr Tzoanos was heard in accordance with the third paragraph of Article 7 of Annex IX to the Staff Regulations (paragraph 17 of the contested judgment).

8 On 22 June 1995 the appointing authority decided to uphold the five complaints which it had referred to the Disciplinary Board (see paragraph 4 of this judgment), since it agreed with the Disciplinary Board that the charges against Mr Tzoanos were substantiated by incontrovertible evidence and to a large degree admitted by him, and to impose a disciplinary measure referred to in Article 86(2)(f) of the Staff Regulations, namely removal from post without reduction or withdrawal of entitlement to retirement pension ('the contested decision'). That decision was notified to Mr Tzoanos on 23 June 1995 and took effect on 1 August 1995 (paragraph 18 of the contested judgment).

9 By note of 21 September 1995, which was registered at the Secretariat-General of the Commission on 25 September 1995, Mr Tzoanos submitted a complaint under Article 90(2) of the Staff Regulations, which was expressly rejected by decision of 19 February 1996 (paragraph 19 of the contested judgment).

10 It was against that background that, by application lodged at the Registry of the Court of First Instance on 17 May 1996, Mr Tzoanos brought an action for the

annulment of the contested decision and of the express rejection of his complaint of 21 September 1995 against the decision of 22 June 1995.

The contested judgment

11 By the contested judgment, after examining the pleas in law relied on by Mr Tzoanos, the Court of First Instance dismissed the application in its entirety.

12 For a fuller account of the legal background and facts of the case, reference should be made to the contested judgment.

13 The appeal is based on infringement of Community law, in particular:

— infringement of Article 33 of the EC Statute of the Court of Justice, which provides that judgments are to state the reasons on which they are based and which, pursuant to Article 46 of that Statute, is applicable to the Court of First Instance. Mr Tzoanos claims that the obligation to state reasons implies, in particular, that the reasons given must be legally permissible, that is to say adequate, relevant, not vitiated by any error of law or of fact and not contradictory;

— infringement of the Staff Regulations, specifically Articles 12, 13, 14, 17, 21, first and second paragraphs, 25, 87, second paragraph, and 88, fifth

paragraph, and Annex IX to the Staff Regulations, more particularly Articles 1, 2, 3, 7, second paragraph, and 11 thereof;

— infringement of general principles of Community law, namely the principles that the rights of the defence must be observed, the right to an *inter partes* hearing and an impartial court (and of Article 6 of the European Convention on Human Rights and Fundamental Freedoms), legal certainty, good faith, protection of legitimate expectations, the duty to have regard for the welfare and interests of officials and the principle that all administrative measures must be based on legally permissible grounds, that is to say grounds which are relevant and not vitiated by any error of law and/or of fact.

14 Mr Tzoanos's arguments may be summarised under three headings:

— application of the fifth paragraph of Article 88 of the Staff Regulations;

— application of the Staff Regulations, in particular Article 21, with regard to Mr Tzoanos's financial obligations;

— observance of the rights of the defence concerning, in particular, access to documents.

15 It is appropriate to examine, first, the appellant's arguments regarding the application of the fifth paragraph of Article 88 of the Staff Regulations, which

allege that the Court of First Instance misapplied that provision. First of all the Court must establish that that article is applicable to the present case.

16 The first and fifth paragraphs of Article 88 of the Staff Regulations are worded as follows:

'Where an allegation of serious misconduct is made against an official ... [the appointing authority] may order that he be suspended forthwith.

...

Where, however, the official is prosecuted for those same acts, a final decision shall be taken only after a final verdict has been reached by the court hearing the case.'

17 As regards application of that provision, the Court of First Instance first examined its purpose, in paragraphs 33 and 34 of the contested judgment. Then, in paragraph 35, it held that it followed from the scheme of Article 88 that it was for the official concerned to provide the appointing authority with sufficient information to enable it to determine whether the matters of which he was accused in disciplinary proceedings were at the same time the subject of criminal proceedings against him. The Court considered that in order to meet that obligation the official concerned had, as a rule, to show that criminal proceedings had been initiated against him while he was subject to disciplinary proceedings. The Court observed that it was only where such criminal proceedings had been

initiated that the matters to which they related could be identified and compared with the matters in respect of which the disciplinary proceedings had been instituted so that it could be determined whether they were the same.

18 In Mr Tzoanos's case the Court of First Instance held, in paragraphs 36 and 37 of the contested judgment, that the evidence before it showed that on the date on which the contested decision had been adopted no criminal proceedings had been initiated against the applicant.

19 Then, in paragraph 38 of the contested judgment, the Court of First Instance considered that in so far as Mr Tzoanos was at that time the subject of inquiries liable to lead to criminal proceedings he had to be allowed, in accordance with the *ratio legis* of the fifth paragraph of Article 88 of the Staff Regulations, to show specifically that a final decision on his case in disciplinary proceedings was capable of affecting his position in any criminal proceedings to which the inquiries might lead.

20 The Court of First Instance considered, in paragraph 39 of the contested judgment, that it was clear from the documents before it that Mr Tzoanos had not precisely identified matters capable of being classified as the 'same acts' in respect of which he was subject simultaneously to disciplinary proceedings which had led to the adoption of the contested decision and to criminal proceedings. In paragraph 208 of the contested judgment the Court of First Instance concluded that Mr Tzoanos had also failed to demonstrate the existence of such matters in the context of the proceedings before it.

21 Thus it follows from the contested judgment that the Court of First Instance concluded that the fifth paragraph of Article 88 of the Staff Regulations was not applicable for two reasons. First, on the date on which the contested decision had been adopted no criminal proceedings had been initiated against Mr Tzoanos. Second, in so far as Mr Tzoanos had referred to the existence of criminal

inquiries, he had not identified, either in the disciplinary proceedings leading to the adoption of the contested decision or in the proceedings before the Court of First Instance, any matters forming the subject of disciplinary proceedings and at the same time the subject of criminal proceedings.

22 In taking the view that it was for Mr Tzoanos to provide the appointing authority and the Court of First Instance with the necessary evidence to conclude that he was subject at the same time to disciplinary proceedings and to criminal proceedings relating to the same matters, the Court of First Instance did not commit an error of law.

23 The finding of the Court of First Instance that Mr Tzoanos had not provided the necessary evidence in that regard is a finding of fact which comes within the exclusive jurisdiction of the Court of First Instance and cannot be called into question in the context of an appeal (see, to this effect, Case C-283/90 P *Vidrányi* v *Commission* [1991] ECR I-4339, paragraph 12, and Case C-53/92 P *Hilti* v *Commission* [1994] ECR I-667, paragraph 10).

24 Since the conditions governing the application of the fifth paragraph of Article 88 of the Staff Regulations are not satisfied in this case, there is no need to consider the other arguments which Mr Tzoanos has put forward on this point.

25 Secondly, the arguments concerning infringement of the Staff Regulations, in particular Article 21, must be examined.

26 Mr Tzoanos claims, first, that since he was not the authorising officer for payments he could not be held responsible for the budgetary and financial monitoring of a project. Secondly, he maintains that the contested judgment contains a manifest error of law. He claims that under the first paragraph of

Article 21 of the Staff Regulations he can only be held responsible, where appropriate, for the performance of his specific duties, which did not consist in the control and financial monitoring of projects. He considers that responsibility for mismanagement of the resources of the 'Tourism' Unit lay with the Director-General, not with himself.

27 As regards the first of these arguments, it is clear, from paragraphs 202 and 203 of the contested judgment, that the Court of First Instance considered that even if Mr Tzoanos was not formally an authorising officer for payments he was none the less under an obligation, as Head of Unit XXIII.A.3, to effect a preliminary verification of the merits of applications for payment submitted by recipients of subsidies granted by decision of DG XXIII.

28 As the Advocate General observed in point 60 of his Opinion, in reaching the conclusion that the deficiencies cited fell within Mr Tzoanos's responsibilities, irrespective of whether he was the authorising officer for payments, the Court of First Instance made a finding of fact which cannot be reviewed in an appeal.

29 The Court must therefore reject Mr Tzoanos's argument that since he was not the authorising officer for payments he could not be held responsible for them.

30 Mr Tzoanos's second argument, concerning the application of Article 21 of the Staff Regulations, must also be rejected. In ascertaining the precise scope of the tasks entrusted to Mr Tzoanos and defining his responsibility in terms of those

tasks, the Court of First Instance fully complied with the requirements of that provision.

31 Lastly, the Court must examine Mr Tzoanos's arguments concerning observance of his rights of defence. He claims that the judgment should be set aside on the ground that it misapplied the principles of *audi alteram partem*, equality of arms and the obligation to state reasons.

32 It is apparent from paragraph 329 of the contested judgment that the Court of First Instance concluded from the fact that Mr Tzoanos had not responded at the hearing to the Commission's statements to the effect that he had had access, during the disciplinary proceedings, to the file which had been available to the Disciplinary Board when it delivered its opinion and to the appointing authority when it adopted the contested decision, that the principle of equality of arms laid down in the case-law had been observed. The Court further held that Mr Tzoanos had been able to acquaint himself with all the facts on which the contested decision was based in sufficient time to submit his observations. The Court also observed that although the applicant had to be recognised as entitled to access to documents other than those communicated in the course of the disciplinary proceedings, the exercise of that right was not such as to affect the findings established and, accordingly, to show that there had been a breach of Mr Tzoanos's rights of defence.

33 Mr Tzoanos claims that the Court of First Instance wrongly concluded that he had had access to the file which had been available to the Disciplinary Board when it delivered its opinion and to the appointing authority when it adopted the contested decision. He also disputes the Court's finding that he had been able to acquaint himself with all the facts on which the contested decision was based in sufficient time to submit his observations.

34 In that regard, it should be pointed out that, according to the principle that the rights of the defence must be observed, an official must have the opportunity to comment on every document which the institution intends to use against him (see,

in particular, *Vidrányi*, paragraph 20). Where an official is not given such an opportunity the undisclosed documents must not be taken into consideration as evidence. However, the exclusion of certain documents used by the Commission is of no significance except to the extent to which the Commission's objection can be proved only by reference to those documents (Case 107/82 *AEG* v *Commission* [1983] ECR 3151, paragraphs 24 to 30).

35 In accordance with that case-law, the Court of First Instance considered whether the non-disclosure of the documents requested could have influenced the course taken by the proceedings and the content of the contested decision to Mr Tzoanos's detriment. It concluded that the exercise of the right to have access to documents other than those communicated in the course of the disciplinary proceedings was not such as to affect the findings established, since these were the clear consequence of the statements of the parties and the documents to which Mr Tzoanos had had access during the disciplinary proceedings. Furthermore, the Court emphasised, in paragraph 329 of the contested judgment, that the documents to which Mr Tzoanos had not had access were not of such a kind as to show that he was not responsible for the budgetary and financial monitoring of the projects subsidised in the tourism sector and that his powers had been misused by his superiors without his knowledge. The Court also considered that none of the documents produced by the Commission in answer to the written questions put by the Court enabled Mr Tzoanos to deny that he did in fact participate in the budgetary and financial monitoring of the projects in issue.

36 The findings of the Court of First Instance in this regard form part of an assessment of the facts which cannot be called into question in an appeal. Since the Court of First Instance's approach is consistent with the case-law of the Court of Justice, the appellant's arguments on that point must be rejected.

37 The Court of Justice must therefore consider the arguments which Mr Tzoanos raised against paragraphs 266, 277 and 298 of the contested judgment. He maintains that it follows from the file that, in the case of the IFTO, IERAD and

BDG projects, the appointing authority had put forward no specific charge and that the Court of First Instance took it upon itself to formulate such a charge against him. Mr Tzoanos considers that the Court thus failed to fulfil its obligation to remain impartial.

38 Before the Court of First Instance Mr Tzoanos contended that the charges against him in the context of those projects were not to be found in the contested decision, which should therefore be annulled for failure to state reasons. The Court of First Instance rejected that argument.

39 In this case the complaint raised by Mr Tzoanos is based on the claim that the Court of First Instance sought information in the reports of DG XX to fill the gaps in the reasoning of the contested decision. The Court must therefore examine the approach which the Court of First Instance adopted in rejecting Mr Tzoanos's arguments.

40 It is clear from the contested judgment that, in the light of Mr Tzoanos's allegations, the Court of First Instance examined the contested decision in order to ascertain the specific charges against him in the relevant grounds of that decision.

41 As regards the IFTO and IERAD projects, and also the BDG project, referred to in paragraphs 265, 277 and 297 respectively of the contested judgment, the Court of First Instance first referred to the contested decision. In the absence of further indications in that decision, the Court decided that it was necessary to examine the specific DG XX report to which the contested decision referred.

42 As regards the IFTO and BDG projects (see paragraphs 266 and 298, respectively, of the contested judgment), the Court of First Instance identified two charges, in respect of each of these projects, specifically concerning Mr Tzoanos.

43 As regards the IERAD project, the Court of First Instance considered that it was apparent from the specific report that the irregularities described in the section on Greek involvement in the project were more specifically attributable to Mr Tzoanos, even though he was not named. The Court then found that, having regard to the information provided by that report, the content of the decision expressly rejecting his complaint and Mr Tzoanos's reactions, as set out in his pleadings, four specific charges against him could be made out.

44 In paragraph 280 of the contested judgment, the Court of First Instance also pointed out that the 27th recital in the preamble to the contested decision cited the IERAD project and on that occasion referred to the specific report of DG XX relating to that project, which had been brought to Mr Tzoanos's attention. The Court also referred to the 28th recital and observed that that recital, which was couched in general terms, clarified the irregularities found in the various projects referred to in the preceding recital. The Court also observed that the Commission had specified its particular charges relating to the IERAD project in its decision expressly rejecting the complaint.

45 It is therefore evident that, contrary to the arguments put forward by Mr Tzoanos, the Court of First Instance merely ascertained the particular charges against him and did not substitute its own reasoning for the Commission's, since all the charges upheld against Mr Tzoanos were contained in the reports to which the contested decision expressly referred.

46 Mr Tzoanos's arguments in that regard are therefore unfounded.

47 In those circumstances, it follows from the foregoing that the appeal must be dismissed.

Costs

48 Under Article 69(2) of the Rules of Procedure, which applies to the appeal procedure pursuant to Article 118, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has requested that Mr Tzoanos be ordered to bear the costs and Mr Tzoanos has been unsuccessful, he must be ordered to pay the costs of this appeal.

On those grounds,

THE COURT (First Chamber)

hereby:

1. **Dismisses the appeal;**

2. **Orders Mr Tzoanos to pay the costs of this appeal.**

Edward Jann Wathelet

Delivered in open court in Luxembourg on 18 November 1999.

R. Grass

Registrar

L. Sevón

President of the First Chamber