OPINION OF MR ADVOCATE GENERAL MANCINI
delivered on 19 January 1988 *

Mr President,
Members of the Court,

1. By an application lodged at the Court Registry on 25 October 1985 Mr Rudolf Misset, an official of the Council of the European Communities, brought an action for the annulment of the following: (a) the decision of 9 January 1985 by which the Secretary-General of the Council reprimanded the applicant under Article 86 (2) (b) and the first paragraph of Article 87 of the Staff Regulations, and (b) the same authority's rejection dated 19 July 1985 of the applicant's complaint against the reprimand.

The facts are as follows. During the summer of 1984 Mr Misset, a lawyer-linguist in Grade L/A 7, was absent from his office for a total of 32 days: more precisely from 18 July to 3 August, from 12 August to 7 September and on 17 September. As regards the first period of absence, although the applicant claimed to be sick, he did not produce the medical certificate required under the second paragraph of Article 59 (1) of the Staff Regulations in due time (in connection with which I would add that Mr Misset brought an action in respect of the decision charging him with that failure and that the action was dismissed by the Court as inadmissible on the ground that it had been made out of time: judgment of 15 January 1987 in Case 152/85 *Misset* v *Council of the European Communities* [1987] ECR 223). As regards the second period of absence, the charge against the applicant is that he failed to resume work despite the fact that, due to financial difficulties, he did not travel to the country, namely Greece, in which he was to attend a language course, for which he had been granted special leave. Finally, according to Mr Misset, his absence on 17 September was due to an error in calculating his days of leave.

On 25 September the applicant attended a meeting with five superiors; Mr t'Kindt, Head of the Dutch language Division of the Translation Department, Mr Motte, Head of the Translation Department, Mr Weinstock, Director-General, Mr Gueben, Director, and Mr Pisters, Principal Administrator. By a memorandum of the same date forwarded by Mr Weinstock to Mr Gueben the former emphasized the seriousness of Mr Misset's conduct and stated that he would propose to the Secretary-General as the appointing authority the adoption of a disciplinary measure in respect of Mr Misset. It appears that Mr Misset did not attempt at that meeting to justify the periods of absence. Several days later (9 October 1984) Mr Gueben informed the applicant that he had suspended the applicant's participation in vocational training 'pending the steps which may be taken as a result of' his abuse of the leave granted to him for the purpose of attending a language course in Greece.

On 8 January 1985 the applicant was summoned by telephone to appear a few hours later before the Secretary-General in

* Translated from the Italian.

the presence of Mr Gueben, Mr Motte and Mr t'Kindt. The Secretary-General informed him of his intention to reprimand him and asked him if he had any observations on the matter. Mr Misset took the view that the Secretary-General had already decided to impose the disciplinary measure on him and that there was therefore no point in defending himself. He accordingly answered in the negative. On 9 January the appointing authority notified the applicant of the reprimand. The complaint lodged by the applicant against that measure on 4 April 1985 was rejected by the Secretary-General on 19 July.

2. In support of his application Mr Misset puts forward two submissions: (a) that his right to a fair hearing as guaranteed in Article 87 of the Staff Regulations and in Annex IX thereto was not respected, and (b) that the statement of reasons was inadequate and contradictory. The first submission consists of five complaints, namely (a) that the applicant did not receive a written communication of the charges against him or of the proposal to adopt a disciplinary measure against him, (b) that he had not been summoned to the meeting held on 8 January 1985 in good time, (c) that because of the failure to notify him of the reasons for the summons to the meeting and because the notice of the meeting was too short he had had no opportunity to prepare his defence properly or to seek the assistance of a lawyer, (d) that he had not been given an opportunity to be heard as is required by Article 87 of the Staff Regulations, and (e) that he did not receive the minutes of his meeting with the Secretary-General.

All the applicant's arguments are based on the proposition — for which he cites as authority the Court's judgment of 17 December 1981 in Case 115/80 *Demont* v *Commission* [1981] ECR 3147 — that the right to a fair hearing and the principle that a party must be enabled to present his case fully are guaranteed not only in the context of proceedings before the Disciplinary Board which are governed by Annex IX to the Staff Regulations but also in the context of the specific procedure provided for by the first paragraph of Article 87 of the Staff Regulations in the case of the issue of a written warning and of a reprimand.

That interpretation is disputed by the Council. In its opinion it is not necessary to comply with all the guarantees laid down in Annex IX in what I shall call the 'simplified' procedure. According to the Council the *Demont* judgment requires merely that the 'essential prerogatives of the right to a fair hearing' are safeguarded. Relying on the Court's judgment of 11 July 1985 in Joined Cases 255 and 256/83 *R.* v *Commission* [1985] ECR 2473 paragraphs 17 and 18 of the decision, it claims that there is no provision imposing an obligation to give written notification of the institution of disciplinary proceedings.

3. In my opinion the Council's arguments distort the letter and spirit of the provisions referred to, as interpreted by the Court in the *Demont* judgment. In paragraph 9 of the judgment in that case the Court states as follows: 'Neither Article 87 of the Staff Regulations nor Annex IX thereto nor those two provisions read in conjunction allow a distinction to be drawn between the different defences of which an official may avail himself in the course of disciplinary proceedings depending upon whether or not those proceedings entail a reference to the Disciplinary Board or according to the severity of the disciplinary measure which might be imposed'. In paragraph 10 it goes on to state that the opposite interpretation would 'result in an unacceptable position', namely that 'in disciplinary proceedings other than those referred to in Annex IX to the Staff Regulations, the official could not avail himself of the *essential prerogatives*

which form part of the right to defend oneself and would thus in practice be deprived of the right' (emphasis added).

In my view it is clear from those words that the Court considers *all* the guarantees forming part of the right to a fair hearing to be 'essential prerogatives' and that it is arbitrary to attribute to the principle that a party must be enabled to present his case fully a narrower scope in the context of the simplified procedure. The sole difference between the two types of proceedings is that in proceedings before the Disciplinary Board, since they are capable of resulting in the imposition of a more severe penalty, respect for the rights of the defence 's'impose de manière *d'autant plus* rigoureuse' (I use the French expression contained in paragraph 11 of the judgment, which is more to the point than the Italian expression; the emphasis is my own). However, in the end the essential point is that respect for such rights is of even greater importance; it cannot be otherwise, given that, as is affirmed in paragraph 12 of the judgment, the right to a fair hearing constitutes a 'fundamental legal principle' and, as such, calls for *comprehensive* protection.

On the other hand the Council's reference to the judgment in *R.* v *Commission* is inapposite because that case did not concern the failure to give written notice of the charges but the failure to communicate an official's personal file to him. The two obligations are in fact different in scope. According to Article 2 of Annex IX the official charged has the right to see his personal file, but obviously only in so far as he requests to do so; consequently there is no obligation on the administration to communicate the file to him 'in the absence of a request to do so' (paragraphs 17 and 18 of the judgment).

4. Mr Misset's complaints must be examined in the light of those principles. It will be recalled that the applicant maintains in the first place that he did not receive prior written notice of the charges against him and of the proposal to institute disciplinary proceedings on the basis of those charges.

The complaint must be upheld. I have just said that in the simplified procedure an official benefits from the guarantees laid down in Annex IX; that being the case, not only must he 'be heard before . . . action is taken', as is provided in the second sentence of the first paragraph of Article 87 but he is also entitled under Article 1 of Annex IX to a written communication from the appointing authority 'stating clearly the facts complained of and, where appropriate, the circumstances in which they arose' (analogous rules are, moreover, in force in numerous national legal systems: in the case of Italy, see Virga, *Diritto amministrativo*, Volume I, Principles, Milan, 1983, pp.148-150; in the case of France, see Salon and Savignac, *La fonction publique*, Paris, 1985, pp. 273-275).

Consequently, the failure to send Mr Misset the said communication infringed his rights and invalidated the disciplinary proceedings brought against him. In those circumstances it is not necessary to examine the other complaints contained in the applicant's first and second submissions in order to conclude that the decision adopted as a result of those proceedings must be annulled.

5. In view of all the foregoing considerations I propose to the Court that the application lodged by Mr Rudolf Misset should be granted and that, consequently, the decision of 9 January 1985 by which the Secretary-General of the Council imposed a disciplinary measure on the applicant in form of a reprimand should be annulled.

Since the Council has failed in its submissions, it should be ordered to bear the costs.