ORDER OF THE COURT (First Chamber)
11 January 1996 *

In Case C-89/95 P,

D, a former official of the Commission of the European Communities, represented by Eric Boigelot, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Louis Schiltz, 2 Rue du Fort Rheinsheim,

appellant,

APPEAL against the judgment of the Court of First Instance of the European Communities (Fourth Chamber) in Case T-549/93 of 26 January 1995 between D and the Commission, [1995] ECR-SC II-43, seeking to have that judgment set aside,

the other party to the proceedings being:

Commission of the European Communities, represented by Ana Maria Alves Vieira, of its Legal Service, acting as Agent, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

THE COURT (First Chamber),

composed of: D. A. O. Edward, President of the Chamber, P. Jann (Rapporteur) and L. Sevón, Judges,

* Language of the case: French.

Advocate General: M. B. Elmer,
Registrar: R. Grass,

after hearing the Advocate General,

makes the following

Order

1 By application lodged at the Court Registry on 24 March 1995, D brought an appeal under Article 49 of the EC Statute and the corresponding provisions of the EAEC and ECSC Statutes of the Court of Justice against the judgment of 26 January 1995 in Case T-549/93 *D* v *Commission* [1995] ECR-SC II-43, in which the Court of First Instance dismissed his application for the annulment of the Commission's decision of 30 September 1993 imposing on the appellant the disciplinary measure of removal from post without withdrawal or reduction of entitlement to retirement pension provided for by Article 86(2)(f) of the Staff Regulations.

2 As to the background to the dispute between D and the Commission, the Court of First Instance made the following findings:

'1. On 28 April 1988 the applicant was appointed head of the Commission's delegation for the Pacific, based in F., where he carried out his duties until November 1991. From 1 December 1991, the applicant held the post of head of the Commission's delegation in Zambia. He had previously been an adviser and subsequently head of the Commission's delegation in various countries.

2. During an inquiry carried out in February 1993 by the general inspectorate of the Commission's delegations at the delegation in F., a number of allegations made against the applicant in respect of the period during which he had been head of the delegation were made known to the inspectors. Those allegations (see the report of Inspectors Wolff and Long (Annex 3 to the defence) and the statements of Ms M., Ms C. and Ms T. to the inspectors (Annex 4 to the defence)) essentially concerned sexual harassment of which the female staff of the delegation had complained and breaches of the administrative rules consisting in particular of unjustified payments which discriminated against certain members of staff and, in general, improper and wrongful management of the staff and property.

3. On 4 May 1993, the Director General of the Directorate-General for Personnel and Administration ..., acting as the appointing authority, informed the applicant of the initiation of disciplinary proceedings against him.

4. After hearing the applicant on 26 May 1993, the appointing authority, by decision of 28 May 1993, suspended him from his duties without loss of remuneration, pursuant to Article 88 of the Staff Regulations of Officials of the European Communities (hereinafter "the Staff Regulations").

5. On 2 June 1993, the appointing authority appointed an adviser in the Directorate-General for Personnel and Administration "to proceed on its behalf and in its stead to hear the witnesses who had come forward in F. and to inspect the *locus in quo*". The complainants and other members of the local staff were heard between 7 and 13 June 1993. Other officials and employees who had worked with the applicant in the past, were also questioned between 18 June and 2 July 1993.

6. After informing the applicant on 29 June 1993 of its intentions, the appointing authority referred the matter to the Disciplinary Board by way of a report of 9 July 1993 (Annex 5 to the defence). In that report, it was complained that the applicant, whilst head of the delegation in question, had sexually harassed female local staff employed by the Commission's delegation in F. The appointing authority made no mention in its report of the "serious breaches of the administrative rules" previously alleged, stating that ... "in view of the nature of the allegations and of the evidence relating to them (it) does not consider it appropriate, at this stage, to seise the Disciplinary Board in respect of them".

7. In its report of 27 July 1993, the Disciplinary Board, after taking note of all the documents on the file and hearing the applicant, assisted by his lawyer, and the Commission investigator, recommended that the appointing authority should "impose on D the disciplinary measure referred to in Article 86(2)(f) of the Staff Regulations, namely, removal from post, without withdrawal of his entitlement to retirement pension". Upon being heard by the Disciplinary Board, the applicant requested that a further inquiry be held, in which each side could submit its case and reply to the other side, including in particular a face-to-face meeting with the three complainants and an expert medical opinion. That request was rejected by the Disciplinary Board.

8. After hearing the applicant again on 29 July 1993, the appointing authority informed him by memorandum of 30 July 1993, that it had "decided to allow (his) application ... for a face-to-face meeting with each of the complainants before a decision was taken in relation to the disciplinary proceedings initiated against (him). The outcome of those meetings, which are to take place in the next few weeks, will supplement the opinion of the Disciplinary Board of 27 July 1993 and will be included in the file".

9. The meeting between the applicant and the three complainants, assisted by their respective lawyers, took place on 7 September 1993 in the presence of a representative of the appointing authority.

10. On 15 September 1993, the appointing authority proceeded to a final hearing of the applicant, in accordance with Article 7 of Annex IX to the Staff Regulations.

11. Upon the termination of those proceedings, the appointing authority, by a decision of 30 September 1993, imposed on the applicant the disciplinary measure, with effect from 1 December 1993, of removal from post without withdrawal of his entitlement to retirement pension. In its decision, the appointing authority considers, essentially, that the facts complained of, as revealed by the depositions of the victims, constituted very serious misconduct as well as an offence under ordinary law, which could not be excused by the applicant's state of health or by any other circumstance.'

3 By application lodged on 25 October 1993 the appellant brought an action before the Court of First Instance. By decision of 23 February 1994 the appointing authority explicitly rejected his complaint. By judgment of 26 January 1995 the Court of First Instance dismissed his application.

4 In his appeal against that judgment, the appellant requests the Court of Justice to set aside the judgment of the Court of First Instance and, by upholding the initial application of the appellant, to annul the Commission's decision of 30 September 1993 and the appointing authority's decision of 23 February 1994 and consequently to rule that the respondent is to reinstate the appellant in all his duties and to his grade, step and salary, with retrospective effect to the date on which the contested decision took effect, in accordance with the decision which the Court adopts, and order the respondent to pay the appellant all his arrears of salary, including the benefits accruing to him, which are due to him from 1 December 1993 until the date of the decision to be adopted, together with interest at the annual rate of 8% from the date on which salary fell due, and, in any event, to pay the costs of the two proceedings.

5 In its observations concerning the appeal, the Commission considers that the appeal is inadmissible or at the very least unfounded.

6 Under Article 119 of the Rules of Procedure of the Court of Justice, the Court may at any time dismiss an appeal where it is clearly inadmissible or clearly unfounded, without opening the oral procedure.

7 In support of his appeal, the appellant puts forward two pleas in law.

The first plea in law

8 In his first plea, the appellant complains that the Court of First Instance considered that the sexual harassment of which he was accused was proven. According to the appellant, the available evidence did not support such a conclusion. In fact, the file submitted by the Commission contained only complaints of victims and statements of other persons who admitted that they had not witnessed the alleged events. The judgment equates 'the complaints' with 'proof' by considering that the evidence of the victims, who are necessarily not impartial, was sufficient to establish the veracity of the conduct in question. Moreover, so far as concerns sexual harassment, according to Commission Recommendation 92/131/EEC of 27 November 1991 on the protection of the dignity of women and men at work, and more in particular the annex thereto which lays down a code of practice on measures to combat sexual harassment (OJ 1992 L 49, p. 1), there must in each case be proof independent of the complaints.

9 It should be pointed out that, contrary to the appellant's contention, the code of practice, referred to above, cannot be interpreted as prohibiting the taking into account, as evidence, of the statements made by a complainant. Whoever is called on to judge the facts alleged has absolute discretion in assessing the probative value of the evidence adduced.

10 Suffice it to note in that regard that, as is evident from paragraphs 69 to 72 of the judgment appealed against, the Court of First Instance did not rely solely on the evidence of the three victims of the appellant's conduct; it also took account of the fact that those statements were made on three occasions and agreed in all particulars and that those three persons complained at the same time of the same type of conduct, as well as a number of statements from persons who noticed the flustered state of the women after the attacks by the appellant upon them and who were able to make other observations in that respect.

11 It cannot therefore be alleged that the Court of First Instance disregarded the general principles of law and rules regarding the burden of proof. That element of the appellant's first plea is therefore manifestly unfounded.

12 As regards the remainder of the appellant's argument, in particular that the Court of First Instance made an erroneous assessment of the evidence, it should be noted that, according to Article 168a of the EC Treaty and the corresponding provisions of the ECSC and EAEC Treaties, an appeal is confined to points of law. That limitation is further embodied in the first paragraph of Article 51 of the EC Statute and in the corresponding provisions of the ECSC and EAEC Statutes of the Court of Justice.

13 The Court has held on several occasions that an appeal may rely only on grounds relating to the infringement of rules of law, to the exclusion of any appraisal of the facts, and is therefore admissible only in so far as it is claimed that the decision of the Court of First Instance is incompatible with the rules of law the application of which it had to ensure (see Cases C-283/90 P *Vidrányi* v *Commission* [1991] ECR I-4339, paragraphs 12 and 13, C-346/90 P *F* v *Commission* [1992] ECR I-2691, paragraph 7, C-53/92 P *Hilti* v *Commission* [1994] ECR I-667, paragraph 10, and C-136/92 P *Commission* v *Brazzelli and Others* [1994] ECR I-1981, paragraph 48).

14 The Court of Justice is no more competent in principle, to examine the evidence accepted by the Court of First Instance in support of those facts than it is to find the facts themselves. In so far as the evidence was duly obtained and the rules and general principles of law relating to the burden of proof were observed, as well as the procedural rules in relation to the taking of evidence, it is for the Court of First Instance alone to assess the value which should be attached to the items of evidence produced to it (see, in particular, *Commission* v *Brazzelli*, paragraph 66).

15 Since the Court has no jurisdiction to review the assessment of the Court of First Instance, the appellant's arguments on that aspect in his first plea must be rejected as manifestly inadmissible.

The second plea in law

16 In his second plea, the appellant complains that the Court of First Instance disregarded the general principles of law which require that disciplinary matters should be examined impartially and the right to a fair hearing should be completely and stringently observed.

17 In the first part of that plea, the appellant claims that the Court of First Instance failed to take account of several declarations by women who stated that they had never been the victims of any sexual harassment whatsoever on the part of the appellant, but based itself solely on the evidence against him of certain victims, without explaining or giving reasons for such omission.

18 It is sufficient to note that in paragraph 73 of its judgment the Court of First Instance accepted that the statements in his favour referred to by the appellant

could not in any event cast doubt on the probative value of the statements against him, inasmuch as the fact that those persons never witnessed the conduct alleged against the appellant does not mean that that conduct never took place. The Court of First Instance therefore did in fact take into account the evidence in his favour referred to by the appellant and gave sufficient explanation of why it did not consider them to be probative. The first part of the second plea is accordingly manifestly unfounded.

19 In the second part of his second plea, the appellant considers that the judgment of the Court of First Instance is vitiated by a defective statement of reasons inasmuch as it does not reply to his complaint that the inquiry before the appointing authority considered the evidence against him but not the evidence for him. The general principle that an accused person is presumed innocent was therefore infringed.

20 Suffice it to state that the Court of First Instance observed in paragraph 74 of the contested judgment that the appellant did not call any witnesses in his defence at any time during the proceedings before the Disciplinary Board, as he is permitted to do pursuant to Article 4 of Annex IX to the Staff Regulations. The second part of the second plea is therefore also manifestly unfounded.

Costs

21 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Article 70 of those Rules provides that in proceedings between the Communities and their servants the institutions are to bear their own costs. However, by virtue of the second paragraph of Article 122 of those rules, Article 70 is not to apply to appeals brought by officials or other servants of the

institutions. Since the appellant has been unsuccessful, he must be ordered to pay the costs of these proceedings.

On those grounds,

THE COURT (First Chamber)

hereby orders:

1. The appeal is dismissed.

2. The appellant shall pay the costs.

Luxembourg, 11 January 1996.

R. Grass

Registrar

D. A. O. Edward

President of the First Chamber