Case T-549/93 R

D.

v

Commission of the European Communities

(Officials — Procedure for interim relief — Suspension of the operation of a measure — Disciplinary proceedings — Removal from post)

Order of the President of the Court of First Instance, 30 November 1993 ..... II - 1347

Summary of the Order

Applications for interim measures — Suspension of the operation of a measure — Suspension of the operation of a disciplinary measure — Conditions for granting — Prima facie grounds — Serious and irreparable harm — Non-economic damage — Balancing of all the interests involved — Financial damage

(EEC Treaty, Art. 185; Rules of Procedure of the Court of First Instance, Art. 104(2))

ORDER OF THE PRESIDENT OF THE COURT OF FIRST INSTANCE
30 November 1993 *

In Case T-549/93 R,

D., an 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,

applicant,

* Language of the case: French.

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 Nicola Annecchino, of its Legal Service, Centre Wagner, Kirchberg,

defendant,

APPLICATION for suspension of the implementation of the decision of 30 September 1993 whereby the appointing authority imposed the disciplinary measure of removing the applicant from his post without withdrawal of entitlement to a retirement pension as provided for in Article 86(2)(f) of the Staff Regulations of Officials of the European Communities,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES

makes the following

Order

Facts and procedure

1 By application lodged at the Registry of the Court of First Instance on 25 October 1993 the applicant brought an action under Article 91(4) of the Staff Regulations of Officials of the European Communities ('the Staff Regulations') seeking the annulment of the decision of the appointing authority of 30 September 1993 removing him from his post without withdrawal of his entitlement to retirement pension by way of a disciplinary measure, as provided for in Article 86(2)(f) of the Staff Regulations.

2 By a separate document lodged at the Registry of the Court of First Instance on the same day the applicant also made an application pursuant to Article 91(4) of the Staff Regulations for interim measures suspending the implementation of the decision.

3 The Commission submitted its written observations on 11 November 1993. The parties presented oral argument on 17 November 1993.

4 Before considering the substance of this application for interim measures it is necessary to recall briefly the facts which led to the dispute as they are indicated in the statements lodged by the parties and the explanations provided by them in the course of the hearing.

5 On 28 April 1988 the applicant was appointed head of the Commission delegation in (omissis), in which post he remained until November 1991. Since 1 December 1991 he has been head of the Commission delegation in (omissis). Prior to that he had been an advisor at the Commission delegations in (omissis) from 1981 to 1984 and in (omissis) from 1984 to 1987, and head of delegation in (omissis) from January to April 1988.

6 In the course of an investigation in February 1993 made by the General Inspectorate of the Commission Delegations at the delegation in (omissis) a number of accusations against the applicant concerning the period during which he had been head of the delegation were brought to the notice of the inspectors. The accusations essentially related to sexual harassment of female staff and administrative irregularities, consisting in the main in unwarranted and discriminatory payments to certain members of the staff and, in general, mismanagement, deliberate and otherwise, of Commission staff and property.

7 On 4 May 1993 the appointing authority informed the applicant of the initiation of disciplinary proceedings against him. After having heard his views on 26 May 1993 the appointing authority adopted a decision on 28 May 1993 suspending him under Article 88 of the Staff Regulations without loss of pay.

8 On 2 June 1993 the appointing authority instructed Mr Petersen, an advisor at the Directorate General of Personnel and Administration, to 'proceed in (its) stead to hear the witnesses who have come forward and who are in (omissis) 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 staff, some of them officials, who had worked with the applicant in the past were also questioned between 18 June and 2 July 1993.

9 After having informed the applicant on 29 June 1993 the appointing authority referred the matter to the Disciplinary Board by means of a report dated 7 July 1993. In the report it was alleged that whilst head of the delegation in question the applicant had sexually harassed the female local staff employed at the Commission delegation in (omissis). However, the report did not mention the 'serious breaches of the administrative rules' which had previously been alleged; the appointing authority stated 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'.

10 In its opinion of 27 July 1993 the Disciplinary Board, after having considered all the documents in the file and interviewed the applicant and Mr Petersen, recommended that the appointing authority should 'impose on Mr (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'. At his interview with 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, and that an expert medical opinion be obtained. That request was rejected by the Disciplinary Board.

11 After hearing the applicant once more 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 (him). The results of those meetings, which will take place in the coming weeks, will be recorded together with the opinion of the Disciplinary Board of 27 July 1993 and will be included in the file on the case.'

12 The meetings between the applicant and three complainants, assisted by their lawyers, took place on 7 September 1993. 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.

13 In the light of those events the appointing authority adopted a decision on 30 September 1993 imposing on the applicant the disciplinary measure, with effect from 1 December 1993, of removal from his post without withdrawal of his entitlement to retirement pension. In the decision the appointing authority states, in essence, that the facts alleged against the applicant, as recorded in the testimony of the complainants, constitute very serious misconduct as well as a criminal offence, which could not be excused by the applicant's state of health or by any other circumstance.

Law

14 Under the combined provisions of Articles 185 and 186 of the EEC Treaty actions brought before the Court of First Instance do not have suspensory effect. The Court of First Instance may, however, if it considers that circumstances so require, order that application of the contested act be suspended or prescribe any necessary interim measures.

15 Article 104(2) of the Rules of Procedure of the Court of First Instance provides that it is for the applicant to state the circumstances giving rise to urgency and the pleas of fact and law establishing a prima facie case for the interim measures applied for.

Arguments of the parties

16 As to whether there are prima facie grounds justifying suspension of the operation of the contested decision the applicant argues, in substance, that there are a number of factual circumstances indicating at least that the issue between the parties is serious and that there are sound arguments for his views.

17 In the first place, the appointing authority failed to have regard for the procedural rules applicable in disciplinary matters, since it adopted the definitive decision outside the time limit of one month from the opinion of the Disciplinary Board provided for in the third paragraph of Article 7 of Annex IX to the Staff Regulations, and outside the time limit of four months from the date when the decision to suspend him came into force, provided for in the third paragraph of Article 88 of the Staff Regulations.

18 Secondly, when the decision was adopted the appointing authority did not have a proper opinion of the Disciplinary Board, which had given its opinion without being in possession of all the contents of the case-file, in particular the inquiry in which both parties were heard and which was conducted subsequently. In the light of that the applicant considers not only that the procedure was defective but also that his right to a fair hearing was infringed since it was made impossible for him to set out his arguments in full before the body charged with issuing a reasoned opinion prior to the decision of the appointing authority.

19 Thirdly, the applicant complains that the appointing authority failed to provide evidence of the alleged facts, having been content to treat the statements of the complainants as proof of the facts at issue, thereby violating the rights of the defence and the general principle *in dubio pro reo* which is recognized in all the legal systems of the Member States. In particular, the contested decision contains no statement of reasons concerning either the existence of the facts or their status, and it fails to comply with both Council Regulation 90/C 157/02 of 29 May 1990 on the protection of the dignity of women and men at work (OJ 1990 C 157, p. 3), and Recommendation 92/131/EEC, which the defendant itself adopted on 27 November 1991, on the protection of the dignity of women and men at work and, in particular, the annex thereto introducing a code of practice on measures to combat sexual harassment (OJ 1992 L 49, p. 1).

20 Fourthly, the applicant stresses that the allegations against him were made between two and five years after the alleged occurrences and 15 months after his departure from the delegation at which they were supposed to have taken place and that that is incompatible with the very notion of sexual harassment. He also considers that there is a flagrant lack of proportion between the facts alleged and the penalty, considering that the facts have not been clearly and irrefutably established by the appointing authority, which has ignored numerous statements by witnesses and evidence in the case-file indicating that the conduct at issue never occurred. As a result, he claims, by adopting the disciplinary measure which is in practice the most severe, since he will receive no pension, the appointing authority failed to have regard for the abovementioned recommendation which lays down the principle of graded penalties.

21 Finally, he considers that the contested decision is incompatible with the principle that an act incurs a penalty only if committed by a person recognized as being responsible for his actions. He emphasizes the fact that the report by a medical expert which he had asked the Disciplinary Board to obtain in order to establish his degree of responsibility was refused him on the ground that there was no evidence of psychological disturbance. A mere reading of the facts alleged against him, however, were they true, tends to show rather the contrary.

22 As to urgency, the applicant claims that the contested decision has caused him serious and irreparable harm both financially and to his reputation, his honour and his dignity.

23 As far as financial damage is concerned he points out, first, that from 1 December 1993 he will be without a job and without any remuneration whatsoever. In addition, since he has been a Commission official for less than 10 years he will not be entitled to any pension but can only obtain reimbursement of his personal contributions to the pension scheme. According to the information he has obtained that represents an amount of about BFR 1 000 000. In view of the many expenses he has incurred, in particular those connected with his defence in this case and with the studies his son is pursuing in the United Kingdom, he considers that he will soon find himself without resources and will be obliged to turn in some of his family assets in conditions which will necessarily be disadvantageous.

24 He observes that in any event if the decision the suspension of which is sought were to take effect immediately on 1 December 1993 it would be virtually impossible for him to be reinstated in his post in a matter of months, or even years, because his post would necessarily be occupied by another appointee and because he would have lost all credibility with regard to third countries and his own delegation.

25 As regards the damage to his reputation, his honour and his dignity, he maintains that that damage is wholly irreparable because even if the contested decision is subsequently annulled, his removal from his post and the reasons therefor are known to all European Community officials and the heads of other delegations, and even by persons outside the Community institutions.

26 The Commission contends that the conditions which must be satisfied before the interim measures sought by the applicant may be granted are not met in this case.

27 As regards the prima facie grounds the Commission maintains that the pleas and arguments relied on by the applicant do not appear prima facie to be well founded. In particular, according to the consistent case-law of the Court of Justice and the Court of First Instance, the time limit of one month provided for in Article 7 of Annex IX to the Staff Regulations is not mandatory and, in view of the circumstances of the case, the appointing authority's final decision was taken within a reasonable time. As regards the claim that the final decision was taken more than four months after the applicant's suspension, the Commission considers that that is not a substantive defect capable of justifying the annulment of the decision at issue. The defendant argues that the only 'penalty' imposed by the third and fourth paragraphs of Article 88 of the Staff Regulations in the event that the time limit of four months is exceeded is that the official may once again draw his pay and receive the amounts which may have been deducted. However, the decision to suspend the applicant provided expressly that he would continue to receive his remuneration during his suspension. The Commission emphasizes that in any event it cannot be said to have been dilatory in adopting the final decision when, in the first place, the four month period was exceeded by only three days and, on the other, that was the

consequence of having endeavoured to afford the maximum protection to the rights of the defence, in particular by arranging the face-to-face meeting requested by the applicant.

28 The Commission also considers that the fact that the Disciplinary Board did not take into consideration in its opinion all the elements in the case-file, in particular those resulting from the meeting between the applicant and the complainants, is not a defect capable of vitiating the procedure and the final decision. The defendant observes that the Disciplinary Board considered that it had enough information and therefore decided not to have a meeting between the parties and not to obtain an expert medical report on the applicant. It adds that the appointing authority is not bound to arrange such a meeting and that in any event the meeting produced no additional evidence.

29 The defendant also maintains that the plea alleging that the characterization of the applicant's alleged conduct as sexual harassment is wrong is unfounded. Apart from the fact that in any event the legal characterization of the alleged conduct is of secondary significance compared to the existence of the facts themselves the Commission argues that in this case the existence of hierarchical constraint cannot be denied.

30 As regards the plea that there is no indication of the scale of penalties which may be applied in such cases the defendant, after pointing out that the Commission recommendation of 27 November 1991 has no binding force, states that in the first place the Staff Regulations do not lay down a scale of penalties depending on the disciplinary breach committed and in the second place in such circumstances the imposition of such an obligation on the appointing authority would be incompatible with the principle that it is for that authority to determine the disciplinary measure to be imposed once the facts alleged against the official have been established.

31 As regards urgency, the Commission is of the opinion that the applicant has not established that there is a risk of grave and irreparable harm to him.

32 As regards in the first place the alleged financial damage, the defendant remarks that if the Court of First Instance were to annul the disputed decision the applicant would be entitled to payment of all the sums which he ought to have been paid with effect from 1 December 1993 until his reinstatement. It adds that in any event the applicant will receive immediate payment of BFR 1 300 000 approximately, representing the pension contributions he paid during his service with the Commission as an official. He will also, according to the Commission, be entitled to a Belgian pension from the age of 62. Finally, the Commission considers that the applicant has failed to establish that he will be obliged to sell off family assets pending the judgment on the substance. As regards in particular the cost of his son's studies in the United Kingdom the defendant points out that he is in receipt of a British Government grant and that he is in accommodation provided by Sussex University for the modest sum of UK £350. At the hearing, the Commission also stated that apart from the sum representing his pension contributions the applicant should also receive approximately BFR 1 000 000 for holidays not taken. According to a document produced to the Court by the Commission, dated 19 November 1993, the sum is BFR 1 086 828, representing 86 days of holiday not taken by the applicant when he stopped working.

33 As regards the non-pecuniary damage, the defendant argues that this case has been carefully handled by both the administration and the hierarchy, in order to avoid anything capable of damaging the applicant's standing, reputation and professional integrity. The Commission also suggested that the very credibility of the institution with third countries in which the applicant has worked must exclude any public revelation of the affair. Finally, the defendant considers, as regards the complaint that it will be impossible for the applicant to resume duty as head of a delegation if his case before the Court of First Instance is successful, that without excluding the possibility that the applicant may be reinstated in his former duties there is a consistent line of decisions to the effect that officials are not entitled to be appointed to or to retain a particular post, the institutions enjoying a wide discretion in the organization of their departments and in the appointments of the staff available to them.

Findings of the Court

Prima facie grounds

34 In order to establish whether there are prima facie grounds for granting the interim measures the Court must ascertain whether in the light of the circumstances of fact and law, the pleas and arguments relied on by the applicant in support of his application for annulment before the Court of First Instance are serious.

35 The decision challenged merely states that the applicant is alleged 'to have sexually harassed — whilst he was a Commission delegate in (omissis) — local female staff' without any indication whatsoever as to the place, circumstances, duration and regularity of the facts which constitute the breach of discipline.

36 Secondly, according to the decision the disputed facts were revealed by statements made by the complainants and were confirmed by the latter both during the investigation conducted in the context of the disciplinary proceedings and at the meeting held with the applicant. However, the decision makes no reference to evidence from witnesses gathered in the course of the disciplinary procedure capable of confirming or negating the complainants' statements.

37 Thirdly, the decision is very reticent as to the considerations which led the appointing authority to adopt the penalty which it did, despite the fact that in this case it was one of the most serious disciplinary penalties, namely removal from post without withdrawal of entitlement to retirement pension. In fact the decision is restricted to describing the facts at issue as a 'very grave fault' and 'a criminal offence', without stating which offence that would be, and declaring that the quality of the applicant's work was 'without any influence on the facts alleged against him' and that 'neither his state of health nor any other circumstance could exonerate his conduct in any way'.

38 The Court has consistently held (see in particular Case T-115/89 *González Holguera* v *Parliament* [1990] ECR II-831, paragraphs 42 to 45) that the purpose of the obligation to state reasons for any individual decision taken on the basis of the Staff Regulations is, first, to provide the official with the information necessary to enable him to ascertain whether or not the decision is well founded and, second, to provide a basis for judicial review. In order for the Court of First Instance to be able to exercise that review it is indispensable that the preamble to the decision imposing a disciplinary measure should specify the facts found against the official and the considerations which have led the appointing authority to impose the particular penalty (Case 228/83 *F.* v *Commission* [1985] ECR 275).

39 It should also be noted that after the Disciplinary Board had delivered its reasoned opinion the appointing authority decided to arrange a meeting between the applicant and the complainants. However, it decided not to refer the matter to the Disciplinary Board anew after that meeting. As a result, the applicant was unable to submit to the Disciplinary Board his written or oral observations on part of the results of the inquiry conducted by the appointing authority and the Disciplinary Board did not have all the elements contained in the disciplinary file when it delivered its reasoned opinion.

40 In the light of those factors, and without prejudice to the issue of the lawfulness or otherwise of the disputed decision, the Court considers that as regards both the establishment and the categorization of the facts made by the appointing authority and the observance of the rights of the defence during the disciplinary procedure, the information available to it at this stage in the procedure is capable of constituting serious support for the arguments submitted by the applicant in support of his action for the annulment of the contested decision.

41 Consequently, it is necessary to ascertain whether the decision is capable of causing the applicant grave and irreparable harm justifying suspension of the implementation of the measure at issue or the adoption of other interim measures.

The risk of grave and irreparable harm

42 The Court has consistently held (see the order of the President of the Court of First Instance in Case T-24/93 R *CMBT* v *Commission* [1993] ECR II-543, paragraph 31) that the urgency of an application for interim measures must be assessed in the light of the necessity for an order granting interim relief in order to prevent serious and irreparable damage to the party requesting the interim measure. It is for the party requesting suspension of the operation of the contested decision to prove that he cannot await the outcome of the main proceedings without suffering harm which would entail serious and irreparable consequences.

43 As regards in the first place the damage resulting from the harm to his reputation, honour and dignity, it should be noted at the outset that in the case of non-pecuniary damage it is difficult for the Court deciding an application for interim measures to ascertain whether the damage is irreparable or difficult to repair. That being so, the Court must weigh carefully the interests of the parties in order to establish whether the interim measures requested are necessary. In so doing it must balance the alleged serious and irreparable harm for the applicant against the Commission's interest in avoiding having to maintain an employment relationship where an official has been removed from his post after disciplinary proceedings for a fault described as extremely serious.

44 In that context it must be observed that the harm alleged by the applicant to have resulted from the damage to his reputation, honour and dignity, if such harm is assumed to be established, has essentially already materialized. As regards in particular the fact, relied on by the applicant, that it has become impossible for him to resume his duties within the Commission delegation in (omissis) even if the decision is subsequently annulled because his removal from his post is known to all, it is sufficient to recall that the applicant was suspended as head of the Commission delegation in (omissis) as early as 28 May 1993 and has already moved his personal effects from (omissis) to (omissis). In any event, suspending the implementation of the contested decision would not restore his reputation, honour and dignity more than the possible future annulment of the decision at the end of the main action.

45 As regards, next, the pecuniary damage alleged by the applicant it is well established in the case-law (see, most recently, the order of the President of the Court of First Instance in Case T-497/93 R II *Hogan* v *Court of Justice* [1993] ECR II-1005) purely financial damage cannot, in principle, be regarded as irreparable, or even difficult to repair, because financial compensation can be made for it subsequently.

46 In this case, if the contested decision is annulled by the Court of First Instance the applicant will be entitled to payment of all the sums which he ought to have received from 1 December 1993 until his reinstatement.

47 Nevertheless, the Court hearing an application for interim measures must determine in the light of the circumstances of the individual case whether immediate implementation of the decision may cause the applicant serious and immediate harm which even the annulment of the decision at the end of the main action could no longer repair.

48 As soon as the contested decision comes into effect the applicant will receive BFR 1 326 536, the reimbursement of his pension contributions, to which will be added BFR 1 086 828, representing holiday not taken, resulting in a total of about BFR 2 400 000.

49 That sum, which represents approximately eight basic salaries of an official in the applicant's grade (A 4, step 5, BFR 308 681), ought normally to enable him to meet all the expense necessary in order to cover his own needs and those of his family pending the judgment of the Court of First Instance on the main action. Accordingly, unlike the findings in the order of the President of the Third Chamber in Case 141/84 R *De Compte* v *Parliament* [1984] ECR 2575 and the order of the President of the Fourth Chamber in Case 90/87 R *C. W.* v *Court of Auditors* [1987] ECR 1801, implementation of the contested decision will not, prima facie, cause the applicant grave and immediate pecuniary damage.

50 In any event it should be noted that according to Article 108 of the Rules of Procedure an order for interim measures may at any time be varied or cancelled, on application by a party, on account of a change in circumstances. It will therefore be for the applicant to advise the Court of First Instance, if necessary, should he find himself as a result of the time taken by the proceedings in a financial situation capable of causing him direct harm which cannot await the outcome of the main action.

51 In the circumstances the request for the suspension of the implementation of the contested decision must be dismissed at this stage.

On those grounds,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE

hereby orders:

1. The application for interim measures is dismissed;

2. Costs are reserved.

Luxembourg, 13 November 1993.

H. Jung

Registrar

J. L. Cruz Vilaça

President