JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)
16 July 1992 *

In Case T-1/91,

Hilaire Della Pietra, an official of the Commission of the European Communities, represented by Pierre Gérard, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Christine Goerens, 54 Avenue de la Liberté,

applicant,

v

Commission of the European Communities, represented by Sean van Raepenbusch, of its Legal Service, acting as Agent, assisted by Claude Verbraeken and Denis Waelbroeck, of the Brussels Bar, with an address for service in Luxembourg at the office of Roberto Hayder, representing the Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for annulment of the applicant's staff report for the period 1985 to 1987 and compensation for material and non-material damage alleged by the applicant,

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Third Chamber),

composed of: B. Vesterdorf, President of the Chamber, A. Saggio and C. Yeraris, Judges,

Registrar: B. Pastor, Administrator,

having regard to the written procedure and further to the hearing on 7 May 1992,

* Language of the case: French.

gives the following

Judgment

Facts and procedure

1 The applicant is an official in Grade B 2 in the Commission of the European Communities. During the period in question he was assigned, until 15 March 1987, to the Directorate-General for Regional Policy and then to the Directorate General for Personnel and Administration.

2 On 6 May 1988 the defendant forwarded to the applicant his staff report as provided for in Article 43 of the Staff Regulations of Officials of the European Communities (hereinafter 'the Staff Regulations') for the period from 1 July 1985 to 30 June 1987.

3 By memorandum of 14 June 1988 the applicant informed the competent assessor that he had requested the application of Article 6 of the General Provisions implementing Article 43 of the Staff Regulations, adopted by the Commission on 27 July 1979 (hereinafter 'the General Provisions') in order that the said report might be submitted in a spirit of conciliation to the appeal assessor under Article 7 of the General Provisions.

4 By memorandum of 18 November 1988 the appeal assessor returned his report to the applicant and informed him of his decision to make no change in the assessment made by the competent assessor. He also stated that the memorandum amounted to confirmation of the staff report and would be annexed as such to the report.

5 By memorandum of 5 December 1988 for the attention of the appeal assessor, the applicant requested that the Joint Committee on Staff Reports be consulted. In the observations annexed to his memorandum he complained that two of the assessments in his last report were less favourable than those in the previous staff report. They related to the headings 'efficiency/consistency' (changed from 'excellent' to 'very good') and 'conduct in the service/sense of responsibility' (changed from 'excellent' to 'very good'). The applicant alleged that he had been given no written explanation for those changes. He pointed out that during the period of 24 months covered by the report he had had several immediate superiors by reason of his various postings. It appeared from the report that only one of them had been consulted by the assessors.

6 On 11 August 1989 the Joint Committee on Staff Reports forwarded its opinion to the appeal assessor in which it mentioned: (a) the belated drawing up of the staff report and disregard of the time-limits at the various stages of the report procedure; (b) the deterioration, in comparison with the 1983-1985 staff report, of the assessments under the headings 'consistency' and 'sense of responsibility' and (c) the failure to state grounds for that deterioration in the general assessment. In those circumstances the committee requested the appeal assessor to revise the report in view of point B.6.3.2 of the Guide to Staff Reports.

7 By memorandum of 26 September 1989 sent to the Personnel Director the appeal assessor justified the less favourable assessments by the fact that the applicant's performance and his sense of responsibility could not be described as excellent.

8 By memorandum of 10 November 1989 sent to the applicant, the appeal assessor, who stated he had previously noted the opinion of the Joint Committee on Staff Reports, confirmed his decision not to alter his original assessment for the reasons already given in his memorandum of 26 September 1989, a copy of which was annexed. Since the applicant did not receive the memorandum it was forwarded to him again on 18 April 1990 under cover of a memorandum dated 20 March 1990.

9 On 6 June 1990 the applicant lodged a complaint under Article 90(2) of the Staff Regulations against the decision of 10 November 1989 (hereinafter 'the decision') merely stating his 'disagreement' with the decision.

10 The complaint in question was rejected by implied decision of the appointing authority, which failed to reply within the period of four months provided for by Article 90 of the Staff Regulations.

11 By memorandum of 22 November 1990 sent to the appeal assessor the Personnel Director stated that following consideration of the applicant's complaint by the Interservices Committee it appeared that there was a risk that the statement of grounds in the memorandum of 10 November 1989 might not, in the event of an action, be considered sufficiently detailed to satisfy the requirements of the General Provisions. He therefore requested a more detailed statement of grounds for the less favourable assessment.

12 In those circumstances the applicant brought this action before the Court of First Instance on 4 January 1991.

13 By memorandum of 13 February 1991, sent to the Personnel Director, the appeal assessor gave grounds for his decision a second time. After explaining the practical difficulties of proving a qualitative assessment, especially the fact that certain officials with whom the applicant had worked were no longer with the Commission, he stated that in the period 1985 to 1987 Mr Della Pietra had not demonstrated 'all the application and care necessary to fulfil certain tasks entrusted to him'. In particular the applicant had not been disposed to treat seriously the research connected with the ERDF files. The result was that his performance was not reliable when he

was called upon to assist 'A' Grade officials in very delicate matters. In view of those facts, the report in question was generous towards Mr Della Pietra in the opinion of those who had been assisted by him during the period in question.

14 On 6 March 1991 the supplementary statement of the grounds on which the decision was based was forwarded by the Personnel Director to the applicant.

15 Following a request from the Court of First Instance the Commission produced, by letters of 28 February and 4 March 1992, certain documents considered necessary to complete the file.

16 Upon hearing the Report of the Judge-Rapporteur the Court of First Instance (Third Chamber) decided to open the oral procedure and requested the parties to give their views at the hearing on the admissibility of the application in view of the judgment of the Court of Justice in Case 52/85 *Rihoux* v *Commission* [1986] ECR 1555 and the wording of the complaint in this case.

17 The hearing was held on 7 May 1992. The representatives of the parties presented oral argument and replied to questions put by the Court of First Instance.

The forms of order sought by the parties

18 The applicant claims that the Court of First Instance should:

— annul the decision of 10 November 1989 of the appeal assessor to make no change in the applicant's staff report for the period from 1 July 1985 to 30 June 1987;

— order the competent assessor to recommence the whole procedure and to draw up a proper report in strict compliance with the General Provisions for giving effect to Article 43 of the Staff Regulations including, at the very least, a reaffirmation of the report for 1983 to 1985;

— order the Commission to pay him compensation of 1 ECU in respect of non-material damage and ECU 1 000 in respect of material damage;

— order the Commission to pay the costs.

19 The Commission contends that the Court of First Instance should:

— dismiss the application as unfounded;

— order the applicant to bear his own costs in accordance with Article 64(1) of the Rules of Procedure of the Court of Justice, applicable *mutatis mutandis* to proceedings before the Court of First Instance.

The application for annulment

20 In support of his claim for annulment, the applicant puts forward three pleas in law relating first to disregard of the time-limits laid down by the General Provisions for drawing up the staff report, secondly to failure to consult certain of his superiors and thirdly to failure to state grounds for the less favourable entries recorded in two analytical assessments.

The first and second pleas

21 In answer to the request made by the Court of First Instance to the parties to give their views at the hearing on the admissibility of the application having regard to the wording of the complaint of 6 June 1990, the applicant maintained that he could not be criticized for relying in his application to the Court on pleas which had not previously been put forward in the complaint in view of the fact that the latter made reference to arguments which he had already advanced in his observations of 5 December 1988, which had been addressed to the Joint Committee on Staff Reports and thus brought to the attention of his superior officers and the Commission. All the pleas included in those arguments had been adopted in the documents and pleadings put before the Court of First Instance.

22 The Commission observed at the hearing that the complaint merely stated that there was a disagreement and did not allow it to ascertain sufficiently precisely the applicant's complaints and wishes. With reference to the order of the Court of First Instance in Case T-39/91 *Hermann* v *Cedefop* [1992] ECR II-233 the Commission considers that the complaint does not observe the minimum formalities required by the case-law. However, it recognizes that the applicant had, in the memorandum which he forwarded to the Joint Committee on Staff Reports, put forward certain grounds cited in these proceedings and the Commission therefore left the assessment of the admissibility of the application to the Court.

23 The Court points out that it has been consistently held that the lodging of a formal complaint within the meaning of Article 90 of the Staff Regulations is not a necessary preliminary to bringing an application before the Court against a staff report provided for under Article 43 of the Staff Regulations, which expresses the freely expressed opinion of the reporting officers and not the assessment by the appointing authority. Accordingly an application to the Court may be made from the time when the report may be regarded as definitive (Joined Cases 6/79 and 97/79 *Grassi* v *Council* [1980] ECR 2141; Joined Cases 122/79 and 123/79 *Schiavo* v *Council* [1981] ECR 473 and Case 140/87 *Bevan* v *Commission* [1989] ECR 701; Case T-29/89 *Moritz* v *Commission* [1990] ECR II-787). For the same reasons the case-law does not require the prior formality of a complaint within the meaning of Article 90 of the Staff Regulations in the case of a decision by a selection board which

by its nature is not capable of being annulled or amended by the appointing authority (see in particular the aforementioned judgment of the Court of Justice in *Rihoux* v *Commission*).

24 However, although the person concerned has the choice of bringing proceedings before the Community judicature direct or lodging a complaint through official channels, he must in the second case observe all the procedural constraints attaching to the recourse to prior complaint which he has selected. If the person concerned were relieved of the need to observe those procedural constraints the result would be to give him greater rights than those given to officials who have chosen to bring proceedings before the Community judicature direct. Among those procedural constraints is the principle consistently upheld by the Community judicature according to which Article 90 of the Staff Regulations is designed to permit and encourage the amicable settlement of differences which have arisen between officials and the administration. In order to comply with that requirement it is essential that the administration should be in a position to know with sufficient certainty the complaints or wishes of the person concerned. On the other hand, it is not the purpose of that provision to bind strictly and absolutely the contentious stage of the proceedings, provided that the claims submitted at that stage change neither the legal basis nor the subject-matter of the complaint. Accordingly, after the expiry of the time-limit for bringing an application before the Court direct, an official who has preferred to make a preliminary complaint through administrative channels may not seek from the Court a form of order having a subject-matter different from the remedy sought in the complaint or put forward heads of claim based on matters other than those relied on in the complaint. The submissions and arguments made to the Court in support of those heads of claim need not necessarily appear in the complaint, but must be closely linked to it (see in particular the aforementioned judgment of the Court of Justice in *Rihoux* v *Commission* at paragraphs 11, 12 and 13).

25 In view of the foregoing considerations it is necessary to check that the complaint lodged by the applicant on 6 June 1990 corresponds to the present action as regards the pleas put forward and the forms of order sought. Although that question of admissibility has not been raised by the parties, it must be considered by the Court of First Instance of its own motion because it is a matter of public policy in so far as it relates to the regularity of the administrative procedure. More precisely, consideration of the question by the Court of its own motion is justified in view of the objective of the prior administrative procedure which, as has just been stated, is

intended to allow an amicable settlement of differences which have arisen between officials or servants and the Community institutions (see most recently Case T-57/89 *Alexandrakis* v *Commission* [1990] ECR II-143). That objective may be achieved even where the contested decision, in this case the staff report, issues from an authority other than the appointing authority, for the latter may still bring about an amicable settlement either by referring the staff report to the competent authority for reconsideration or persuading the official concerned that he has no ground for complaint.

26 In this case the complaint, which was lodged on 6 June 1990 and addressed to the Secretary General of the Commission, was worded as follows:

'I enclose for registration a copy of the complaint which I am bringing under Article 90 of the Staff Regulations.

Subject: Staff Report 1985/1987 (disagreement in relation to the decision of 10.11.89 notified on 18.04.90).'

The complaint then mentions the applicant's surname and first name as well as the details of his position under the Staff Regulations and is dated and signed by him. It must be observed that although the complaint in question may, from a formal point of view, be regarded as a complaint within the meaning of Article 90 of the Staff Regulations, it is nevertheless very laconic and makes no reference to a memorandum sent previously to the Joint Committee on Staff Reports, as the applicant wrongly claimed. It is confined to mentioning the disagreement with the decision of the appeal assessor to make no change in the staff report drawn up for the 1985 to 1987 period without stating either the scope of that head of challenge or the conclusions which ought to be drawn from it. However, viewing the position with an open mind, it is possible to accept that the third ground of annulment cited in the application in this case relating to the failure to state grounds for certain less favourable assessments in the 1985-1987 staff report rests on the same legal basis as the head of challenge in the complaint. On the other hand, the pleas of disregard of time-limits laid down by the Guide to Staff Reports and the failure to consult cer-

tain superiors raise heads of challenge which rest on legal bases different from that on which the head of challenge in the complaint is based. In those circumstances, both the abovementioned latter grounds of annulment must be rejected as inadmissible because they were not included in the complaint.

Third plea

27 As regards the plea of failure to state reasons for the contested decision, which is the only one which is admissible, the applicant states that the analytical assessments in his 1985-1987 staff report under the headings 'efficiency/consistency' and 'conduct in the service/sense of responsibility' show, in comparison with the assessments for the 1983 to 1985 period, a deterioration which is unjustified, for which no grounds are stated and which disregards the objective criteria in his file. Such failure to state grounds, he alleges, constitutes an infringement of the second paragraph of Article 25 of the Staff Regulations as well as Article 5 of the General Provisions. In his view, the 'internal' statement of grounds given by the appeal assessor in his memorandum of 26 September 1991 to the Personnel Director does not constitute the statement of grounds required by the Guide to Staff Reports. Likewise the memorandum of 13 February 1991 from the appeal assessor, written after the action was commenced, cannot remedy the failure to state grounds. The applicant stresses that the requirement to state grounds is intended to ensure observance of the rule that the parties should be heard and to enable the official to defend himself by putting forward his objections with knowledge of the matter at issue.

28 The Commission observes that both the Court of Justice and the Court of First Instance have consistently abstained on principle from reviewing the value assessments given in staff reports. Assessors have the widest power of assessment and review by the Court is confined to cases of error or patent misuse of powers. In that respect the applicant cites no error of fact, no patent error of assessment and no misuse of power. Furthermore, in the Commission's view, a statement of grounds for the deterioration recorded in the analytical assessments in question was given by the appeal assessor in his memorandum of 26 September 1989. In addition, a more detailed statement of grounds was given in the memorandum of 13 February 1991 from the same appeal assessor. Although the explanations which were thus provided were subsequent to the commencement of the proceedings, they deprived the applicant, who has not disputed that they are well founded, of any interest in persisting in the plea of failure to state grounds.

29 In assessing the merits of this plea the Court of First Instance would point out in the first place that the first and second paragraphs of Article 5 of the General Provisions state:

'The report shall relate exclusively to the reference period.

Explanations must be provided for any change in the analytical assessment since the previous report ...'.

Furthermore, the Guide to Staff Reports, which for legal purposes is equivalent to an internal directive (judgment of the Court of First Instance in Case T-63/89 *Latham* v *Commission* [1991] ECR II-19, paragraph 25) provides in relation to analytical assessments for a scale of assessments containing five levels (excellent, very good, good, adequate and unsatisfactory). At point B.6.2.2 the Guide states that the level 'excellent' should be marked only where the person assessed displays qualities which are of an exceptionally high level, very substantially above the requirements of the post, while the level 'very good' should be marked only where the person assessed displays qualities which are clearly above the high level which the Commission is reasonably entitled to expect from a Community official, having regard to the post he occupies. Finally, at point B.6.3.2 the Guide adds that the assessor must provide as explicit as possible a justification for changes in the analytical assessment as compared with the previous staff report.

30 It must be borne in mind in the second place that when the Court of Justice had to consider provisions similar to the abovementioned provisions it held that the duty to state reasons for any change in relation to the previous staff report was intended to 'enable the official to know why the analytical assessments have changed, to verify the factors relied upon and hence to submit his observations on the statement of reasons in the context of his right to be heard. The periodic report is vitiated by failure to observe an essential procedural requirement if the failure to state reasons has infringed the official's right to be heard. The fact that the official in question could not in any event have expected better analytical assessments — that is to say, if the reporting officer had explained his assessments — is therefore irrelevant.' (Case 178/86 *Turner* v *Commission* [1987] ECR 5367, paragraph 18, and Joined Cases 173/82, 157/83 and 186/84 *Castille* v *Commission* [1986] ECR 497.) Accordingly, the Commission is not justified in maintaining that the statement of grounds for the contested staff report, supplied in a measure subsequent to the commencement of the proceedings, deprives the applicant of his interest in putting forward the present plea.

31 In the third place, as regards the question whether or not the appeal assessor in this case fulfilled his duty to state grounds for the deterioration shown in the analytical assessments given under two headings, it is necessary to bear in mind the following observations. It is apparent from the documents that the contested decision definitively confirmed the award of the mark 'very good' under the headings in question for the period from 1985 to 1987, whereas for the previous period, 1983 to 1985, the applicant had obtained the mark 'excellent'. In his memorandum of 26 September 1989 addressed to the Personnel Director, the appeal assessor gave the following reasons for those changes: 'the analytical assessments, which were slightly less favourable than the previous ones, were due to the fact that during the period in question officials who were to be assisted by the person assessed found on several occasions that in the performance of tasks entrusted to him he displayed a consistency and sense of responsibility which could not be described as "excellent"'. In his memorandum of 10 November 1989, which was received by the applicant on 18 April 1990 and constitutes the contested decision, the appeal assessor, after stating that he had taken note of the opinion issued by the Joint Committee on Promotions, confirmed definitively his original report for the reasons already given in his memorandum of 26 September 1989, a copy of which was annexed. The statement of grounds for the deterioration revealed in the analytical assessments must therefore be sought in the wording of the latter memorandum which is an integral part of the contested decision and the receipt of which the applicant has never denied either to the administration or in the proceedings before the Court of First Instance.

32 The Court of First Instance observes that the explanation given in the memorandum for the deterioration in question is that the applicant, during the period covered by the staff report, did not display qualities of an exceptionally high level in the performance of his tasks of assistance to officials in charge in the ERDF Committee (see the detailed description of the applicant's tasks in relation to the preparation and organization of the ERDF Committee and the drafting of monthly bulletins on ERDF activity included in his 1985-1987 staff report. The Court of First Instance considers that that finding of fact constitutes a statement of grounds which, albeit summary, is sufficient to justify the slight deterioration from the highest assessment to the one immediately below it, which was given in the assessment of the applicant's consistency and sense of responsibility. Accordingly this plea must be rejected as unfounded.

The claim for damages

33 Regarding the claim for damages, the applicant, who did not state reasons for it in his application, alleged in his reply that in view of the defendant's attitude he had not been able to have the report drawn up for the 1983 to 1985 period carried over for the 1985 to 1987 period. Nor would that be possible for the 1987 to 1989 period. Those matters constituted material damage. Furthermore, the disquiet engendered by that situation regarding his further career constituted non-material damage.

34 The Court of First Instance considers that the claim thus made must be rejected in so far as it is closely associated with the claims seeking annulment which have themselves been dismissed as inadmissible or as unfounded. The said claim must also be rejected as inadmissible even if it is considered that the damage alleged by the applicant has its origin in a wrongful act or omission independent of the decision which is the subject of the claim for annulment because he did not make a prior complaint to the appointing authority under Article 90(1) of the Staff Regulations, requesting the administration to make good the damage suffered.

35 It follows from all the foregoing that the action must be dismissed in its entirety.

Costs

36 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. However, Article 88 of those rules provides that in proceedings between the Communities and their servants the institutions are to bear their own costs. The parties must therefore be ordered to bear their own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby:

1. Dismisses the action.

2. Orders the parties to bear their own costs.

Vesterdorf Saggio Yeraris

Delivered in open court in Luxembourg on 16 July 1992.

H. Jung C. Yeraris

Registrar acting as President