

JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber)
26 January 1995

Case T-549/93

D
v
Commission of the European Communities

(Officials – Disciplinary proceedings – Disciplinary Board – Inquiry – Sexual harassment)

Full text in French II - 43

Application for: the annulment of the decision of the Commission of 30 September 1993 imposing on the applicant 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.

Decision: Application dismissed.

Abstract of the Judgment

On 4 May 1993, the applicant was informed of the initiation of disciplinary proceedings against him on the ground that he was alleged, in the performance of

his duties as head of delegation, to have sexually harassed the female staff of the delegation and to have committed breaches of the administrative rules. Having been heard, he was suspended from his duties without loss of remuneration, pursuant to Article 88 of the Staff Regulations. The appointing authority then appointed an official to proceed on its behalf and in its stead to hear the complainants and witnesses who had come forward and to inspect each *locus in quo*. On 9 July 1993, the appointing authority referred the matter to the Disciplinary Board, submitting to it a report in which it was complained that the applicant, whilst head of the delegation in question, had sexually harassed the female local staff employed by it. The report contained no further mention of 'serious breaches of the administrative rules'. In its opinion of 27 July 1993, the Disciplinary Board 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'. 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. After hearing the applicant further, the appointing authority informed him 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. That meeting took place on 7 September 1993 in the presence of a representative of the appointing authority. 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.

Upon the termination of those proceedings, the appointing authority 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, on the ground 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.

The first plea: infringement of the third paragraph of Article 7 of Annex IX to the Staff Regulations and the third paragraph of Article 88 of the Staff Regulations

Infringement of the third paragraph of Article 7 of Annex IX to the Staff Regulations

Although the time-limit prescribed by the third paragraph of Article 7 of Annex IX to the Staff Regulations is not mandatory, it constitutes a rule of sound administration the purpose of which is to avoid, in the interests both of the administration and of officials, undue delay in adopting the decision terminating the disciplinary proceedings. Consequently, the disciplinary authorities are obliged to conduct disciplinary proceedings diligently and to ensure that each procedural step is taken within a reasonable period following the previous step. Failure to comply with that period (which can be assessed only in the light of the specific circumstances of the case) may result in the decision being declared void (paragraph 25).

See: 13/69 *Van Eick v Commission* [1970] ECR 3; 228/83 *F v Commission* [1985] ECR 275; 175/86 and 209/86 *M v Council* [1988] ECR 1891; T-26/89 *De Compte v Parliament* [1991] ECR II-781, para. 88

The Court finds, having regard to the circumstances of the present case, that each of the steps successively taken against the applicant was taken within a reasonable time following the preceding step (paragraph 26).

Infringement of the third paragraph of Article 88 of the Staff Regulations

The purpose of the third paragraph of Article 88 of the Staff Regulations is to prevent an official subject to disciplinary proceedings from being deprived of his remuneration for over four months without his case being decided. That time-limit of four months is mandatory only to the extent that, following its expiry, the official once again becomes entitled to payment of his full remuneration, as provided for by the fourth paragraph of Article 88 (paragraphs 32 and 33).

Since the applicant continued to receive his remuneration during his suspension, the argument alleging infringement of the time-limit prescribed by the third paragraph of Article 88 of the Staff Regulations is of no consequence (paragraph 34).

The second plea: infringement of the second paragraph of Article 87 of the Staff Regulations and breach of the right to a fair hearing

The Disciplinary Board has power, under Article 6 of Annex IX to the Staff Regulations, to assess whether it is necessary to order an inquiry in which each side can submit its case and reply to the case of the other side (paragraph 44).

See: 255/83 and 256/83 *R v Commission* [1985] ECR 2473, para. 24

In the present case, the appointing authority, having received from the Disciplinary Board an opinion agreed by the parties as being in due form, decided in the interests of the applicant to hold a face-to-face meeting between him and the complainants notwithstanding that the Disciplinary Board regarded this as unnecessary. The applicant maintains that, having regard to the fact that the Disciplinary Board was not empowered to act in the matter on its own initiative, the appointing authority was under an obligation to resubmit to it the results of that face-to-face meeting (paragraphs 43 and 45).

Although the wording of Article 11 of Annex IX to the Staff Regulations does not require the appointing authority to reopen the disciplinary proceedings by resubmitting the case to the Disciplinary Board, that does not mean that that provision, read in the light of the higher principle of law that a person has the right to a fair hearing, cannot give rise to such an obligation (paragraphs 47 and 48).

The nature of the concept of ‘new facts’ referred to in Article 11 of Annex IX to the Staff Regulations must be determined in the light of Article 1 of that Annex,

which provides that the report submitted to the Disciplinary Board must state clearly 'the facts complained of and, where appropriate, the circumstances in which they arose'. Consequently, where a further measure of inquiry discloses a new fact complained of or a new circumstance in which the facts complained of arose, or any other factor liable substantially to alter the assessment of the real nature, extent or seriousness of the facts complained of, thereby altering the content of the report submitted to the Disciplinary Board, the appointing authority is under an obligation, pursuant to Article 11 of Annex IX to the Staff Regulations read in the light of the higher principle of law that a person has the right to a fair hearing, to reopen the disciplinary proceedings by submitting a fresh report to the Disciplinary Board (paragraph 49).

The Court considers that the appointing authority rightly concluded in the present case that the face-to-face meeting did not reveal any new facts and that it was not therefore required to resubmit the case to the Disciplinary Board (paragraph 54).

The appointing authority is authorized to delegate its powers for reasons connected with the proper functioning of the service during the disciplinary proceedings, provided that the safeguards afforded to officials by the Staff Regulations are maintained and that the rules of sound administration concerning personnel management are not jeopardized (paragraph 57).

See: 27/64 and 30/64 *Fonzi v Commission* [1965] ECR 481; 46/72 *De Greef v Commission* [1973] ECR 543; 49/72 *Drescig v Commission* [1973] ECR 565

The Court finds in the present case that the safeguards afforded to the applicant by the Staff Regulations were not disregarded, since the appointing authority was adequately informed of the manner in which the face-to-face meeting proceeded by a detailed minute thereof (paragraph 58).

The third plea: manifest error of assessment

In concluding that the facts complained of were established, the appointing authority did not treat the complaints of the victims as evidence of their veracity. The facts concern acts having a sexual connotation allegedly committed by the applicant in relation to three female members of the staff of his delegation in his office, which was generally locked, or in a private flat placed at the disposal of a probationer who was absent at the time. The applicant was alleged *inter alia* to have addressed the victims in a vulgar fashion, expressing his sexual desires. He allegedly committed acts of indecent exposure, masturbated in front of one of the victims, forced one of the victims to touch his genital organs and attempted to have sexual intercourse with one of them. Each of those acts is said to have occurred on several occasions and without the consent of the local staff members involved (paragraphs 67 and 68).

A number of items of evidence were adduced by the appointing authority. First of all, there were the statements of the three victims, which were made on three occasions and agree in all particulars. The fact that the three female staff members all complain at the same time of the same type of conduct lends greater weight to their statements than if only one of them had made such statements. The credibility of those statements is corroborated by the statements of other members of the staff of the delegation obtained by the Commission's investigators (paragraphs 69 to 71).

The Court finds that that evidence was sufficiently probative to enable the appointing authority to regard the facts complained of as having been established (paragraph 72).

Since those acts reflected upon the applicant's position within the meaning of Article 12 of the Staff Regulations, the appointing authority was entitled to conclude that the applicant had been in serious breach of his obligations under the Staff Regulations and of the obligations attaching to his duties (paragraph 75).

The facts thus established fall within the concept of sexual harassment as laid down in the Annex to Recommendation 92/131, which states that such conduct must have a sexual connotation or be based on sex, must be regarded as unwelcome by the party at whom it is directed and must create an atmosphere of intimidation, hostility or humiliation for the person at whom it is directed, or must be presented to that person as necessarily being to his or her professional advantage or disadvantage, depending on whether he or she accepts it or rejects it. Where a case involves conduct such as that of the applicant, its victims do not have to prove that such conduct is unwelcome in order for it to qualify as sexual harassment, since that criterion needs to be fulfilled only where the facts complained of relate solely to the mere manifestation of sexual interest (paragraphs 76 and 77).

The Court finds that the three criteria constituting sexual harassment are fulfilled in the present case (paragraph 81).

The fourth plea: misuse of powers

Since the facts established fully justify, in principle, the contested decision, the aim of which is to suppress the wrongful conduct of the applicant under the disciplinary rules, the plea alleging misuse of powers is necessarily unfounded (paragraph 87).

The fifth plea: breach of the principle of proportionality, infringement of Recommendation 92/131 and non-fulfilment of the obligation to state reasons

Where the truth of the facts alleged against an official is established, it is for the appointing authority to choose the appropriate disciplinary measure to be imposed. The Court may therefore substitute its own assessment for that of the appointing authority only in the event of manifest error or misuse of powers (paragraph 96).

See: *F v Commission*, cited above.

In the view of the Court, and having regard to the seriousness of the facts established, the disciplinary measure imposed by the appointing authority does not result from a manifest error of assessment (paragraph 97).

Sexual harassment constitutes a disciplinary offence for which Article 86 of the Staff Regulations lays down a scale of applicable measures. The disciplinary measures laid down by the Staff Regulations do not establish any fixed correlation between the measure to be imposed and the offence committed. Consequently, the Commission was not bound, in order to be able to penalize such acts by means of disciplinary proceedings, to establish a scale of measures corresponding to different types of sexual harassment (paragraph 98).

The purpose of the duty to state the reasons on which a decision adversely affecting an official is based is, first, to enable the lawfulness of the decision to be reviewed by the Community judiciary and, second, to provide the person concerned with the information necessary to determine whether or not it is well founded. The extent of that duty must be determined on the basis of the particular facts of each case, taking into account the circumstances in which the contested decision was taken (paragraph 99).

See: 225/82 *Verzyck v Commission* [1983] ECR 1991; 108/88 *Cendoya v Commission* [1989] ECR 2711; 69/83 *Lux v Court of Auditors* [1984] ECR 2447, para. 36

The Court finds that an adequate statement of reasons was given for the contested decision (paragraphs 100 and 101).

Sixth plea: breach of the obligation to have the applicant psychiatrically examined

The abnormal nature of the applicant's conduct does not in itself constitute evidence that he was not responsible for his acts and was not, therefore, such as to require the Disciplinary Board or the appointing authority to have the applicant psychiatrically examined (paragraphs 105 and 106).

Operative part:

The application is dismissed.