

MAURISSEN v COURT OF AUDITORS

JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)
21 October 1992 *

In Case T-23/91,

Henri Maurissen, an official of the Court of Auditors of the European Communities, represented by J. N. Louis, of the Brussels Bar, with an address for service in Luxembourg at Fiduciaire Myson SARL, 1, Rue Glesener,

applicant,

v

Court of Auditors of the European Communities, represented by Jean-Marie Sténier, of its Legal Service, acting as Agent, with an address for service in Luxembourg at the Court of Auditors,

defendant,

APPLICATION for the annulment of the applicant's definitive staff report for 1988-1989,

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

composed of: B. Vesterdorf, President, A. Saggio and J. Biancarelli, Judges,

Registrar: B. Pastor, Administrator,

having regard to the written procedure and further to the hearing on 16 September 1992,

gives the following

* Language of the case: French.

Judgment

Facts and procedure

- 1 The applicant, Mr Maurissen, was appointed an official of the Court of Auditors in 1983 in Grade B 3. After his establishment he was assigned to the Development Aid sector, then to the European Development Fund sector (hereinafter 'the EDF') until 4 December 1989. On that date he was assigned directly to a post with the Director of Group III, Mr S., who was the superior of his former head of division in the EDF sector, Mr G. That director was transferred to another post on 24 January 1991 and the head of Audit Group III informed Mr Maurissen, by a memorandum of 25 January 1991, that he was transferred, with immediate effect, to the Administrative Expenditure sector; the post of Director of Group III remained vacant until 6 June 1991.
- 2 Since 1985-1986 the applicant has been a member of the Staff Committee and the executive committee of the Public Service Union, Luxembourg.
- 3 The applicant's staff report for the period 4 January 1988 to 31 December 1989 was drawn up on 7 February 1990 by his assessor, Mr G., after consultation with Mr S., who signed it on 9 February 1990. Like all the officials and other staff whose reports were drawn up by Mr G., the applicant received a standard increase of five points in the context of a harmonization between the various assessors. He therefore obtained a total of 42 points out of 70 when the assessments in the analytical grid in his staff report had been converted to figures.
- 4 That mark represented a reduction of 22% compared with his mark for the period 1986-1987 and was the lowest of all the officials at the Court of Auditors for the reference period 1988-1989. The staff report contained the following general assessment:

'Mr H. Maurissen's efficiency and achievements are not commensurate with his abilities. Mr H. Maurissen is so sparing in his efforts that he is reluctant to make up files and submit them for revision by his superiors. He delights in the mentality and conduct of someone persecuted, which gives him the opportunity to evade a part of his duties at work. That distinct lack of any sense of responsibility has

meant that during 1989 Mr H. Maurissen has made no tangible contribution to the EDF sector. In that sense, his recent change of post should be the occasion of a radical change of conduct.'

On 5 May 1990 the applicant appealed against the abovementioned staff report. The Joint Committee on Staff Reports delivered its opinion on 22 June 1990. With regard to the content of the staff report, that opinion was expressed as follows:

'1. The Committee has endeavoured, by hearing the official assessed and the assessor separately and by examining the appeal and its annexes and also a voluminous file submitted by the assessor, to form an opinion on the validity of the assessments in the staff report and the arguments in the appeal.

2. Regarding the allegations of the official assessed in which he accuses the assessor of interfering in his union activities or those connected with staff representation and of being associated with an intention to take "revenge" on the official, the Committee, in the light of the file produced, is not convinced of the validity of such an argument.

3. The Committee finds that:

- the personal relations between the official assessed and the assessor were not of the best; and
- no dialogue was established between them during the period covered by this report.

Nevertheless, the Committee considers that the reference factors used, namely the work carried out by the official assessed during the reference period, are correct and that those factors were fairly evaluated by the assessor himself.

4. Consequently, the Committee considers it unnecessary to amend the marks in the grid in paragraph 10, regard being had, in particular, to the fact that, according

to the assessor's statement, the five points awarded at a standard rate by way of technical compensation to all the staff assessed in his division are included in Mr Maurissen's current marks.

5. The Commission nevertheless considers that an improvement in the comments in the analytical and general assessments would be likely to bring the written assessments more into line with the marks awarded in the grid.'

- 6 The applicant's definitive staff report was drawn up on 27 July 1990 by his appeal assessor, Mr R. It confirmed all the analytical assessments in the grid and amended certain of the optional comments regarding those assessments. Furthermore, it contained the following general assessment: 'The Court's records indicate that the sector work of Mr Maurissen in the period 1988/89 is not of a sufficient calibre to warrant the maintenance without change of the previous staff report. Coincidental with the falling-off in performance was Mr Maurissen's manifest desire for what he called "a solution" to the difficulties he perceived as having been caused by the appointment over him of a certain Chef de Division. He appears to lack the cooperative spirit necessary to enable the audit team of the sector to operate efficiently. He displays a predilection to resent the instructions and advice of his Chef de Division or any review of his work by Principal Administrators. This impairs his personal contribution to the working of the sector.'
- 7 On 30 October 1990 the applicant lodged a complaint against that definitive staff report, which had been communicated to him on 31 July 1990. Following the express decision rejecting that complaint, which was communicated to him on 15 January 1991, he sought, by an application lodged at the Registry of the Court of First Instance on 13 April 1991, the annulment of the decision of 27 July 1990 drawing up his staff report for the period 1988-1989. In the written procedure the applicant refrained from submitting a reply to the defence under Article 47 of the Rules of Procedure of the Court of First Instance. Upon hearing the report of the Judge-Rapporteur, the Court decided, in accordance with Article 53 of its Rules of Procedure, to open the oral procedure without any preparatory inquiry.

Forms of order sought by the parties

- 8 The applicant claims that the Court should:
- annul the decision of 27 July 1990 drawing up the staff report for the period 1988-1989;
 - order the defendant to pay the costs.

The defendant contends that the Court should:

- dismiss the application as unfounded;
- order the parties to bear their own costs.

Substance

- 9 In support of his application for annulment, the applicant relies on three pleas in law, alleging, first, a breach of Article 24a of the Staff Regulations of Officials of the European Communities (hereinafter 'the Staff Regulations') and of Article 1 of Annex II to the Staff Regulations and also the manifest error of assessment which results therefrom, secondly misuse of powers and, thirdly, the inconsistency in the reasoning in the staff report and the fact that it is impossible to ascertain whether it is well founded.

The plea in law alleging a breach of Article 24a of the Staff Regulations and Article 1 of Annex II thereto and the manifest error of assessment resulting therefrom

Arguments of the parties

- 10 In the first plea the applicant observes, first, that, pursuant to Article 24a of the Staff Regulations and the sixth paragraph of Article 1 of Annex II thereto, the

duties which he undertook as a member of the Staff Committee and representative of the Public Service Union must be regarded as forming part of the services which he is required to perform in his post. He refers to the judgment in Joined Cases C-193 and C-194/87 in which the Court of Justice held that freedom of trade union activity means that trade union representatives must be granted time off work in order to participate in consultation with the Community institutions on all matters concerning staff under conditions to be laid down, unilaterally or by agreement, by the authorities of each of those institutions (*Maurissen and European Public Service Union v Court of Auditors* [1990] ECR I-95, at paragraph 37).

- 11 The applicant claims that neither the first assessor nor the appeal assessor took account in his assessment of the activities connected with his mandates as a member of the Staff Committee and organs set up under the Staff Regulations or of his participation in the work of the Mobility Committee set up by the Court of Auditors. The same applies to his activities as a union representative and especially his participation in consultation meetings with the Commission of the European Communities. He claims that in 1989, out of 205 working days, he devoted 73 days to his post in the EDF sector and that the balance was devoted to his union activities and those associated with staff representation. Furthermore, the time spent in vocational training authorized by the appointing authority and absences for health reasons were not taken into consideration for the purpose of drawing up his staff report. Consequently, the applicant considers that his assessors 'not only infringed Article 24a and Article 1 of Annex II to the Staff Regulations but are also guilty of deliberately committing a manifest error of assessment in comparing the work carried out by the applicant in 73 days with that carried out by his colleagues in 205 days'.
- 12 The defendant denies that the applicant was penalized when his staff report was drawn up because of his duties as a member of the Staff committee or trade union representative. The defendant contends that the performance of those duties was taken into account by the assessor and the appeal assessor as services which the applicant was required to carry out within his institution. In that respect, the applicant was moreover treated in exactly the same way as the four officials in his sector who were members of the Staff Committee. As for the precise number of days

which the applicant devoted to audit work in 1989, the defendant confirmed at the hearing that it came to 73. The defendant considers that that time was adequate to allow his work and efficiency to be assessed and they were assessed in comparison with the normal performance in a 73-day period of an official of the same grade as the applicant. For the purposes of the report, the defendant therefore took account not only of sick leave and special leave for occupational training activities authorized by the appointing authority but also of the time devoted by the applicant to his activities as a staff representative and trade union delegate.

Assessment in law

13 The Court notes that in pursuance of the Staff Regulations as interpreted by the Court of Justice, staff representatives must be provided by the institution with the facilities which prove necessary for the exercise of their representative duties. Article I of Annex II to the Staff Regulations provides in its sixth paragraph that 'the duties undertaken by members of the Staff Committee and by officials appointed by the committee to organs set up under the Staff Regulations or by the institution shall be deemed to be part of their normal service in their institution. The fact of performing such duties shall in no way be prejudicial to the person concerned'. Furthermore, freedom of union activity, recognized in Article 24a of the Staff Regulations, means in particular that trade union representatives must themselves be granted time off work in order to participate in consultation with the institutions, as the Court of Justice held in the *Maurissen and European Public Service Union* judgment (Joined Cases C-193 and C-194/87, previously cited).

14 It follows, in particular, that the activities associated with staff representation must be taken into consideration when the staff reports of the officials concerned are drawn up, in such a way that they are not penalized for carrying out such activities. Consequently, even though the assessor and appeal assessor are authorized solely to assess the performance in the post to which he is assigned of an official who has a mandate as staff representative, to the exclusion of the activities connected with that mandate, which are not within their competence, they must none the less take account of the constraints connected with the exercise of those duties as staff representative. More specifically, in circumstances such as those in this case, they must take account of the fact that the number of days' work which the official concerned has been able to provide in his branch is less than the normal number of

working days in the reference period as provided for in the Staff Regulations. The proficiency and work of that official must therefore be assessed, for the purposes of the staff report, on the basis of the performance which the institution is normally entitled to expect from an official of the same grade during a period corresponding to the time he has actually devoted to his activity in the branch to which he is posted after deducting the time spent, under the conditions laid down in the Staff Regulations, as described above, in his activity as staff representative.

- 15 In this case the Court finds that the applicant has provided no evidence for the presumption that the defendant did not take account of his activities as staff representative, and has thus ignored Article 24a of the Staff Regulations and the sixth paragraph of Article 1 of Annex II thereto or has thereby committed both an error in law and a manifest error of assessment when drawing up his staff report for the reference period 1988-1989.
- 16 On the contrary, it is apparent from the documents before the Court that the applicant's duties arising from his mandates as staff representative were taken into consideration by his assessor and appeal assessor. That is borne out by the express reference in the staff report, under the heading *Detailed description of duties carried out during the reference period*, to his 'activities on the Staff Committee' and also to his 'trade union tasks recognized by the Court'.
- 17 Furthermore, the documents before the Court, and in particular the assessments and comments in the staff report, show that in order to draw up the staff report the assessor and appeal assessor assessed the applicant's performance on the basis of the finding that in 1989 the applicant had devoted 73 days to his work in the EDF sector out of 205 working days. That clearly follows from the memorandum, to which the contested staff report was attached, sent to the applicant on 27 July 1990 by the appeal assessor, who stated that 'the relevant time sheets for the first 11 months of 1989 indicate 73 working days on Sector tasks. There is no record on the file for December 1989. I am satisfied that the time devoted to audit work in the period under review and the records thereof are adequate to assess your performance and output.'

- 18 In the light of all those circumstances, it is apparent that the contested staff report was drawn up, as the defendant contends, by assessing the applicant's proficiency and work during the reference period compared with the normal performance of an official of the same grade in 73 days, in other words after deducting the time which the applicant spent in his activities as a staff representative and also taking into account his sick leave and his special leave for occupational training. Consequently, the first plea must be rejected.

The plea in law alleging misuse of power

Arguments of the parties

- 19 In his second plea the applicant claims that by adopting the decision at issue the defendant misused its powers. It specifically used the staff report to penalize him for his activities as staff representative and trade union representative, which were carried out lawfully under Article 9(3) of the Staff Regulations and Article 1 of Annex II thereto.
- 20 The applicant submits a number of facts which he believes prove such misuse of power. First, he relies on a comparison of the contested staff report with his previous reports and assessments. His end-of-probation report stated that his proficiency was much higher than average with regard to comprehension, versatility and judgment. His work at that time was referred to as 'excellent'. The applicant also points out that those appreciative assessments were confirmed in his first staff report for the period 1984-1985. For the following period, 1986-1987, he was initially given a particularly unfavourable report, following the judgment of the Court of Justice of 4 February 1987 allowing his appeal against the decision refusing to admit him to the tests for an internal competition (Case 417/85 *Maurissen v Court of Auditors* [1987] ECR 551). He was criticized in particular for his activities as staff representative and trade union representative and also for participating in courses classified as occupational training courses. It was only after an interview with his assessor at that time that the latter agreed to reconsider certain unfavourable assessments and confirmed the report awarded for 1984-1985 in the definitive report for the period 1986-1987, drawn up on 19 April 1988.

- 21 The applicant also notes that during the oral procedure in Cases C-193 and C-194/87 counsel for the Court of Auditors stated that he was either a 'destabilizing influence' in the institution or manipulated by his trade union organization to 'destabilize the Court'. Moreover, since the publication on 26 February 1987 of a European Public Service Union document criticizing the increase in the number of temporary staff at the Court of Auditors, the applicant has been treated unfavourably by the appointing authority. Thus the application for occupational training which he had submitted in 1987 was accepted, after more than six months, only after he had lodged a complaint against an initial refusal, whilst one of his colleagues had received approval within 13 days. He also refers to the delays in granting his request to be allowed to spend time away from his place of employment during his sick leave in the first half of 1989.
- 22 Finally, the applicant stresses that his relations with his head of division have continually deteriorated ever since the latter took up his duties in January 1989. He particularly criticizes Mr G. for indicating to him, at his first interview with him on 30 January 1989, that his work in the EDF sector must take priority over any other activity, in particular staff representation. Mr G. added that if the applicant were to continue participating in the working party on mobility, he would strongly advise him to ask the President's office for a transfer. Following that interview the applicant claims that he sent a registered letter to his head of division on 1 February 1989 in which he particularly criticized 'a deliberate and sustained process of intimidation, pressure and discrimination against [him] as a staff representative and union official'. After that date his head of division did not speak to him again until the interview which took place in the context of the procedure for the staff report in question. Furthermore, the applicant received no reply from Mr G. to his application for a description of duties and of the part which Mr G. intended to allot to him. Mr G.'s attitude towards him was incompatible with that of a responsible superior, who, according to the applicant, is under a duty to provide guidance and assistance to his colleagues in their daily tasks. His head of division, on the contrary, clearly showed his desire to have him transferred, to the applicant's detriment. That aim was achieved on 4 December 1989 when the applicant was transferred to another post.
- 23 The defendant rejects the complaint of misuse of power. It maintains that the contested staff report was properly and objectively drawn up, taking into account the

work carried out by the applicant, with no purpose other than that of reflecting his performance during the period in question. The defendant claims that the applicant's arguments contain no objective, relevant or consistent facts showing that the report at issue followed any other than its customary purpose, namely to provide the administration with periodic information on how its officials perform their work.

- 24 The defendant disputes in turn all the points raised by the applicant. First it rejects the allegation concerning the unfavourable treatment to which he was subjected, with regard to both occupational training and permission to stay abroad on medical grounds. It points out that the applicant's requests in respect of those matters were granted. Moreover, it holds the applicant responsible for the deterioration in his relations with his head of division. The defendant claims that following the registered letter sent to him by the applicant on 1 February 1989, 'in view of the applicant's unforeseeable reactions, Mr G. cannot be criticized for wishing to avoid aggravating matters by distancing himself from Mr Maurissen and acting through his immediate A 4/A 5 subordinates'. The defendant also points out that it was not for the head of division to specify the description of the duties falling to the applicant in so far as that question was under examination within the Court of Auditors. It was whilst awaiting that official description, therefore, that Mr G. referred to the notice of competition and vacancy notice on the basis of which he had been recruited.
- 25 With regard to the alleged obligation for the applicant to devote himself exclusively to Sector work, the defendant denies that Mr G. indicated that he should spend all his time on the EDF sector or, failing that, seek a transfer. He simply asked him not to devote himself to Staff Committee activities beyond normal committee meetings, because, of his total staff of eight persons, four were members of the Staff Committee, which was itself composed of 16 persons. That is borne out by the reply of 13 February 1989 to the applicant's registered letter of 1 February 1989, in which Mr G. states that 'whilst it is quite true to say that, for my own part, the essential concern is the carrying out of the Court's work programme, it must be stated with regard to your trade union activities that they seem to me to be reasonable ... As for your duties as an esteemed representative of the staff, they are

laid down in the regulations and, contrary to the impression you give, I have no intention of criticizing them. During our interview, I asked you to take account of the Sector's workload and, in view of the number of representatives on the Staff Committee, to ensure that you did not take on commitments beyond what is reasonable when groups or committees are formed.' Consequently, the defendant believes, there is no evidence for presuming any lack of objectivity or misuse of power when the report was drawn up.

- 26 The defendant also disputes the applicant's argument that his two compulsory transfers were in the nature of a penalty. With regard to the first of these, the defendant notes that the applicant was assigned to a post with Mr G.'s new director. In view of the applicant's difficult relations with his former head of division for six months, it was, according to the Court of Auditors, in the interests of both the administration and the two officials concerned that they should no longer work together. Similarly, the transfer of 25 January 1991 was also decided in the interests of the service, following the transfer of the director of Group III, for whom Mr Maurissen was working, and the subsequent vacancy in that post of director until 6 June 1991.
- 27 As for the applicant's claims that his activities as a representative of the Staff Committee and as a trade union representative were already criticized in the first draft staff report for the preceding period, 1986-1987, the defendant states that the criticism made by the assessor at that time did not relate to the actual exercise of the applicant's trade union or occupational training activities but to the fact that those activities — however reasonable — prevented him from carrying out his audit work at the time specified in his work schedule. Moreover, that assessment was amended by the assessor in his definitive report following an interview with Mr Maurissen, as provided for in the Staff Regulations. Those factors do not therefore make it possible to presume that the staff report for 1988-1989, drawn up by a different assessor and appeal assessor, is vitiated by misuse of power. In this case the extent to which the latter report was less favourable than that for the previous period represents a falling off in the quality of the applicant's performance and is explained by the 'second chance' given to him by his former assessor for the period 1986-1987, during which his work was already beginning to be unsatisfactory.

Legal assessment

- 28 In order to determine whether the defendant misused its powers by reducing the marks awarded in the applicant's report by 22% compared with his marks for the previous reference period, it must be ascertained, in accordance with consistent case-law, whether in this case it can be established, on the basis of objective, relevant and consistent evidence, that the contested decision pursued a purpose other than that assigned to it by the applicable provisions of the Staff Regulations (see, for example, judgments of the Court of Justice in Joined Cases 18 and 35/65 *Gutmann v Commission* [1966] ECR 103 and Case 105/75 *Guiffrida v Council* [1976] ECR 1395, at paragraph 11; see also judgment of the Court of First Instance in Case T-46/89 *Pitrone v Commission* [1990] ECR II-577, at paragraphs 70 and 71).
- 29 In that respect, Article 43 of the Staff Regulations provides that 'the ability, efficiency and conduct in the service of each official, with the exception of those in Grades A 1 and A 2, shall be the subject of a periodical report made at least once every two years ...'. It follows that the staff report is an 'internal document whose primary function is to provide the administration with periodic information on the performance of their duties by officials', as the Court of Justice held in Joined Cases 6 and 97/79 *Grassi v Council* [1980] ECR 2141, at paragraph 20.
- 30 In this case the Court finds that the facts relied on by the applicant do not make it possible to establish that his staff report was not aimed at an objective assessment of his proficiency and performance during the reference period or that it was used, as the applicant claims, for the purpose of penalizing his activities as staff representative and union delegate.
- 31 The applicant's arguments based on a comparison of the staff report in question with his previous staff reports and his end-of-probation report do not make it possible to establish that the defendant did not intend to make an objective assessment of the work specifically performed during the reference period 1988-1989. The purpose of drawing up a staff report every two years is specifically to assess an official's proficiency and performance during a given period. Therefore a variation in that assessment from one reference period to another cannot constitute *per se* evidence of misuse of power.

- 32 As regards the argument alleging discriminatory treatment experienced by the applicant, in particular in relation to sick leave and occupational training courses, the Court of First Instance considers that such circumstances, even supposing them to have been checked, do not show any connection whatsoever with the drawing up of the staff report. In the absence of other relevant factors, they do not therefore make it possible to establish that the report was not drawn up with complete impartiality. Furthermore, it is apparent from the defendant's observations, which were not challenged by the applicant, that his requests for sick leave and special leave for occupational training as a commercial engineer, financed in part by the defendant, were ultimately granted.
- 33 With regard to the applicant's allegations regarding, first, the possible influence of his previous actions before the Community judicature and, secondly, the deterioration in his relations with his superior officer, the Court considers that such factors are not of such a kind as to show that former acrimonious relations between the applicant and the defendant, or the incompatibility of character between himself and Mr G., might have influenced the assessors when they were drawing up his staff report (see the judgment of the Court of Justice in Joined Cases 35/62 and 16/63 *Leroy v High Authority* [1963] ECR 197, at page 207). Furthermore, regard being had to the deterioration in his relations with his head of division, it is clear that the applicant's transfer on 4 December 1989 to the office of the Director of Group III, Mr S., met the interests of both the service and the applicant, as the defendant maintains. Likewise, his second transfer, on 25 January 1991, after the Director to whom he was directly posted was transferred to another post and that vacancy for a directorship was not filled for almost six months, shows no intention whatsoever on the part of the defendant to penalize the applicant for his activities as staff representative.
- 34 It follows from the foregoing that the plea alleging misuse of power must be dismissed.

The plea alleging the inconsistency in the reasoning and the impossibility determining whether it is well founded

Arguments of the parties

- 35 In his third plea the applicant places emphasis on the duty of the assessor and appeal assessor to state the precise reasons why his marks were lower than in the previous period. He points out in that respect that the analytical and general assessments do not correspond to the marks in the grid; nor do they refer to his activities as a staff representative or as a union representative, which are authorized by the appointing authority, or to the effect of his justifiable absences on health grounds. Therefore the comments in the staff report do not make it possible to check whether it is well founded. Furthermore, the memorandum of 27 July 1990 which accompanied the definitive staff report sent to the applicant by his appeal assessor was identical to the memorandum sent to another official of the Court who had also appealed against his report.
- 36 The defendant disputes the applicant's arguments. It claims that the statement of the reasons on which the new report was based was complete and detailed, since the precise reasons were stated by both the assessor and the appeal assessor wherever the analytical marks were amended. Furthermore, the appeal assessor clearly explained to the applicant in his letter of 27 July 1990 the reasons for his definitive report. The defendant claims that the alleged difference between the comments and the marks awarded in the grid is the result of the technical correction, in the form of a standard award of five marks, awarded to all the officials assessed by the applicant's first assessor by way of compensation for his more rigid interpretation of the various criteria for assessment compared with the other assessors. In that respect, the Joint Committee on Staff Reports expressed the view that there was no need to amend the marks in the definitive grid. The defendant claimed at the hearing that the difference between certain marks and the corresponding comments was corrected by the appeal assessor, who amended some of the analytical comments. Consequently, the comments in the applicant's staff report make it possible for the Court to effect its review, which is confined to cases of manifest error and misuse of power, since, according to established case-law, 'assessors have the widest discretion when judging the work of persons upon whom they must report' (judgment of the Court of Justice in Joined Cases 36, 37 and 218/81 *Seton v Commission* [1983] ECR 1789, at paragraph 23).

37 With regard to the similarity between the memoranda sent by the appeal assessor to the two employees assessed, the defendant points out that the appeal assessor has the widest discretion and that, accordingly, there is nothing to prevent his forming the same opinion of the work of two officials. Moreover, the identical passages refer exclusively to the procedure, to general considerations and to arguments common to both officials. The specific arguments relating to the applicant were developed individually.

Assessment in law

- 38 In order to determine whether this plea is well founded, the Court must first of all determine the legal framework and the extent of its review as regards staff reports and then apply those principles to this case.
- 39 Regarding the legal framework and the extent of the power of review of the Community judicature in respect of staff reports, it should be pointed out at the outset that staff reports, which are not decisions within the meaning of Article 25 of the Staff Regulations, are governed by the specific provisions laid down in Article 43 (see the judgment of the Court of Justice in Case 122/75 *Küster v Parliament* [1976] ECR 1685, at paragraphs 24 and 25). In that respect, the decision of the Court of Auditors of 22 March 1984 — general provisions for implementing the said Article 43 — lays down in Article 5 the duty to state explanations for any change in the analytical assessment since the previous report.
- 40 It should further be pointed out that, according to established case-law, ‘assessors have the widest discretion when judging the work of persons upon whom they must report and ... it is not for the Court to interfere with their assessments save in the case of error or manifest exaggeration’ (judgment of the Court of Justice in the *Seton* case, previously cited, at paragraph 23).
- 41 Whilst assessors therefore have wide discretion when judging the work of persons upon whom they must report, it should none the less be pointed out that, as the

Court of Justice has held in Case C-269/90, where the administration has such a power of appraisal, ‘respect for the rights guaranteed by the Community legal order ... is of even more fundamental importance. Those guarantees include, in particular, the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case, the right of the person concerned to make his views known and to have an adequately reasoned decision. Only in this way can [the Community judicature] verify whether the factual and legal elements upon which the exercise of the power of appraisal depends were present’ (Case C-269/90 *Technische Universität München* [1991] ECR I-5469, at paragraph 14). It follows that the purpose of the optional comments accompanying the assessments in the analytical grid is to justify those assessments, in order to enable the applicant to determine whether they are well founded and, where appropriate, to enable the Court to effect its review. Such a review, which, although limited, means that assessments which are less favourable than those in the previous report must be justified by the assessors, also requires consistency between the assessments and the comments intended to justify them.

- ⁴² It should finally be pointed out that the Commission’s Guide to Staff Reports, which was made applicable to the Court of Auditors in pursuance of its decision of 22 March 1984 laying down general provisions for implementing Article 43 of the Staff Regulations, has the status of an internal instruction which, according to consistent case-law, is binding on the institution unless the latter chooses to disregard it by a reasoned and detailed decision, which is not the case here.
- ⁴³ Applying those principles to this case, the Court of First Instance considers that, in order to determine whether the assessments were consistent with the analytical comments, it is necessary to refer to the criteria adopted by the institution to define the various assessments as set out in the said Guide to Staff Reports and summarized in the staff report itself. It is apparent, *inter alia*, that the assessment ‘good’ corresponds to the ‘level which can reasonably be expected of a Community official’, and ‘adequate’ corresponds to an ‘acceptable level’. Furthermore, it should be observed that the Guide to Staff Reports states that ‘One major principle must be

observed in the analytical assessments: each aspect must be dealt with on its own and not with a view to the general assessment to be given of the official. The spirit of the staff reports would be totally distorted if analytical assessments were slanted in order to justify a general assessment. Lastly, where one person has a large number of staff reports to draw up, he should constantly refer to this Guide so as not to diverge from the various definitions given in it.'

- 44 Consequently, it is for this Court to review the logical consistency between the assessments and the comments in the light of the above criteria and it is not possible to justify any discrepancies by the technical correction referred to by the defendant. It clearly follows from the Guide to Staff Reports that each heading must be the subject of an individual assessment, duly justified. The need to harmonize the views of the various assessors can therefore never have the effect of dissociating the analytical assessments from the comments for the sole purpose, as in this case, of improving the general assessment of the official concerned.
- 45 In that respect, the Court finds that examination of the analytical grid in the staff report drawn up by the appeal assessor reveals a number of serious and manifest inconsistencies between the assessments and the comments. It should be pointed out, in particular, that under the heading 'Conduct in the service', the applicant's 'sense of responsibility' was assessed as 'good', which was justified by the contradictory comment 'Sector tasks do not receive the attention reasonably required'. Moreover, the assessment 'adequate', that is to say, 'acceptable' according to the criteria defined in the Guide to Staff Reports, used to describe the applicant's 'initiative', was accompanied by the comment 'none'. The justification for the 'adequate' was therefore contradictory, since the expression 'none' can mean only a total absence of initiative. The applicant's 'ability to work as a member of a team', which was also described as 'adequate', was inconsistently justified by the comment 'minimal'. It should also be noted that under the heading 'ability' the assessments 'good', corresponding, according to the above-mentioned criteria, to a 'level which can reasonably be expected from a Community official', awarded in respect of the applicant's 'judgment' and 'articulateness — written word' were accompanied, respectively, by the following contradictory comments: 'Too often inclined to make

assertions without providing evidence. His findings are not sufficiently reasoned' and 'Written work careless; reports inadequate in both form and structure'. Equally contradictory was the way in which the assessment 'good' describing his 'organizational ability' was justified, namely 'Working papers distinctly below standard as regards evidence of checks carried out. Files disorganized and incomplete'. That serious and manifest inconsistency between the analytical assessments and the comments is repeated under the heading 'Efficiency', where 'speed', 'consistency' and 'versatility' were described as 'good' and justified, respectively, by the comments 'Overruns times set for executing tasks', 'Uneven effort given to different tasks' and 'Inflexible attitudes to work'.

- ⁴⁶ The Court of First Instance further points out that, after observing that there was no need to amend the marks in the analytical grid, taking account in particular of the five points awarded at a standard rate by way of technical compensation, the Joint Committee on Staff Reports expressed the view that an improvement in the comments, both analytical and general, 'would be likely to bring the written assessments more into line with the marks awarded in the grid'. Following that opinion, the appeal assessor, whilst confirming the analytical assessments and significantly amending the wording of the general assessment, confined himself to changing a number of the comments accompanying the analytical assessments without making the more substantial amendments desired by the Joint Committee.
- ⁴⁷ Regard being had to all those factors, it must be stated that the contested staff report is vitiated by serious and manifest inconsistency in its reasoning, in so far as nine of the ten comments in the analytical grid completely contradict the assessments which they are, in principle, required to justify. The applicant was therefore correct to maintain that it was impossible for him to check whether his staff report was well founded. For the same reasons the Community court finds it impossible to check the lawfulness of the contested document.
- ⁴⁸ It follows that the third plea must be upheld.

- 49 Accordingly, the applicant's claim that his staff report should be annulled must be granted.

Costs

- 50 Pursuant to Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. As the defendant has been unsuccessful, it must be ordered to pay all the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby:

1. Annuls the decision of 27 July 1990 confirming the applicant's report for the reference period 1988-1989;
2. Orders the Court of Auditors to pay all the costs.

Vesterdorf

Saggio

Biancarelli

Delivered in open court in Luxembourg on 21 October 1992.

H. Jung

Registrar

B. Vesterdorf

President