# JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber)
26 November 1991 *

In Case T-146/89,

**Calvin Williams,** an official of the Court of Auditors of the European Communities, residing in Luxembourg, represented by Jean-Paul Noesen, of the Luxembourg Bar, with an address for service in Luxembourg at the latter's chambers, 18 Rue des Glacis,

applicant,

against

**Court of Auditors of the European Communities,** represented by Marc Ekelmans, Michel Becker and Jean-Marie Stenier, members of its Legal Service, with an address for service in Luxembourg at the seat of the Court of Auditors, 12 Rue Alcide de Gasperi, Kirchberg,

defendant,

APPLICATION for the annulment of all procedural measures taken by the Disciplinary Board which considered the allegations made against the applicant; annulment of the decision of the President of the Court of Auditors of 13 February 1989 imposing on him the disciplinary measure of deferment of advancement to a higher step; annulment of the implied decision rejecting the complaint lodged by the applicant on 28 March 1989; in the alternative, reduction of the penalty imposed to a warning,

THE COURT OF FIRST INSTANCE (Fourth Chamber),

composed of: R. Schintgen, President of the Chamber, D. A. O. Edward and R. García-Valdecasas, Judges,

Registrar: B. Pastor, Administrator,

* Language of the case: French.

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

gives the following

## Judgment

### The facts

1 Mr Williams was recruited in October 1974 by the Audit Board, a financial auditing body operating under the auspices of the Council of the European Communities, as a member of the temporary staff in Grade A 7. By a Council decision of 16 December 1976, he was subsequently appointed an official of that Board with effect from 1 October 1976, in Grade A 7. With effect from 1 May 1978, the applicant was transferred in that grade to the Court of Auditors of the European Communities when that body was established. He was promoted to Grade A 6 with effect from 1 May 1979. Following internal competition No CC/A/17/82 and the judgment delivered by the Court of Justice of the European Communities on 16 October 1984 (Case 257/83 *Williams* v *Court of Auditors* [1984] ECR 3547), the applicant was appointed principal administrator in Grade A 5, Step 3, by a decision dated 18 October 1984 of the President of the Court of Auditors in his capacity as appointing authority.

2 On 3 February 1987, Mr Williams sent to Mr Carey, a Member of the Court of Auditors, and to the Prime Minister of the United Kingdom, Mrs Thatcher, a telex making serious allegations against the President and other Members of the Court of Auditors. The applicant sent a copy of that telex to at least one daily newspaper on sale in Luxembourg and circulated it amongst the staff of the Court of Auditors. On 16 February 1987, the President of the Court of Auditors, in his capacity as appointing authority, decided to commence disciplinary proceedings against Mr Williams under the second paragraph of Article 87 of the Staff Regulations of Officials of the European Communities. Considering that the latter's conduct constituted serious misconduct within the meaning of Article 88 of the Staff Regulations, the President of the Court of Auditors, by decision of the same date, suspended Mr Williams forthwith and directed that 50% of his basic salary be withheld. On 28 February 1987, Mr Williams lodged a complaint against that decision under Article 90(2) of the Staff Regulations and on 24 March 1987

brought an action for annulment before the Court of Justice, together with an application for interim measures seeking the suspension of the enforcement of that decision. By order of 13 April 1987 in Case 90/87 R *W.* v *Court Auditors* [1987] ECR 1801, the President of the Fourth Chamber of the Court of Justice partially suspended the operation of the contested decision by reducing the amount withheld from Mr Williams' remuneration to 25% of his basic salary and dismissed the application for interim measures in other respects. The case was removed from the register of the Court of Justice on 8 December 1987.

3 On conclusion of the disciplinary proceedings commenced on 16 February 1987, the President of the Court of Auditors, having regard to the medical reports in his possession, decided not to impose any disciplinary measure on the applicant. The latter was directed to take compulsory medical leave pursuant to Article 59(2) of the Staff Regulations from 12 June 1987 to 12 June 1988.

4 On 29 February 1988, Mr Cuesta de la Fuente, the applicant's immediate superior, drew up the latter's staff report for the period 1 January 1986 to 31 December 1987. By memorandum of 20 June 1988, the applicant asked the assessor for a meeting to discuss the report.

5 By memorandum of 24 August 1988, the applicant sent to Mr Angioi, a Member of the Court of Auditors, an appeal against his staff report, as drawn up on 29 February 1988. Under the heading 'Publications' in that report, in a space to be filled in by the official assessed, the applicant had mentioned 'one telex'.

6 On 2 September 1988, the applicant sent to the President of the Court of Auditors, in his capacity as appointing authority, a complaint under Article 90(2) of the Staff Regulations, in which he requested that he be appointed to Grade A 4 pursuant to Article 3 of Decision No 81-5 of the Court of Auditors of 3 December 1981 on the rules applicable to the classification of staff in grade and step. He claimed, essentially, that, in view of the various criteria applied to the classification of other officials of the Court of Auditors, in particular Mr Ruppert

and Mr B., when they were promoted, his own classification, as determined in the appointment decision of 18 October 1984, was incorrect. He added a number of observations concerning the propriety of the procedures followed within the Court of Auditors.

7 In a reply dated 13 September 1988, the appointing authority rejected the applicant's request, reserving the right to take the disciplinary measures called for, in its view, by the accusations made by the applicant in his memorandum against the Members of the Court of Auditors and its employees.

8 By application received at the Registry of the Court of Justice on 13 November 1988, Mr Williams brought an action for the annulment of the decision rejecting that request. That case was referred to the Court of First Instance of the European Communities, which dismissed the application as inadmissible by judgment of 7 February 1991 (Case T-58/89 *Williams* v *Court of Auditors* [1991] ECR II-77).

9 By decision No 88-26 of 5 October 1988, the appointing authority designated Mr Hedderich as Chairman of the Disciplinary Board for 1988 and, by decision No 89-4 of 24 January 1989, appointed Mr Muller as Chairman of that board for 1989.

10 By memorandum of 13 October 1988, which was sent to the Chairman of the Disciplinary Board on 17 October 1988, the President of the Court of Auditors, in his capacity of appointing authority, informed the Chairman of the Disciplinary Board that he had decided to commence disciplinary proceedings against the applicant as provided for in Annex IX to the Staff Regulations. In its statement describing the applicant's alleged misconduct, the appointing authority referred in particular, first, to three memoranda sent by the applicant, secondly, to alleged attempted blackmail by Mr Williams against the appointing authority and, finally, to certain remarks which he had allegedly made in public regarding an official of the Court of Auditors.

*(paragraphs omitted)*

16 In its report, the appointing authority expressed the view that the content of the three memoranda sent by the applicant and all his alleged misconduct — including the reference under the heading 'Publications' in his staff report to the telex of 3 February 1987 — constituted a breach of his obligations under the Staff Regulations and in particular of those mentioned in the first paragraph of Article 12 (obligation to behave with the dignity appropriate to his office) and in the first paragraph of Article 21 (the obligation to assist and tender advice to his superiors).

17 After undertaking the inquiry provided for in the first paragraph of Article 7 of Annex IX to the Staff Regulations, the Disciplinary Board issued a majority opinion on 16 January 1989 to the effect that the applicant's alleged misconduct should be penalized by deferment of advancement to a higher step until 16 October 1995. The Disciplinary Board was still chaired by Mr Hedderich, although he had retired on grounds of invalidity on 31 December 1988.

18 In its appraisal of the conduct and breaches of the Staff Regulations of which the applicant was accused, the Disciplinary Board endorsed the views expressed in the appointing authority's report, except on the following points:

— the Disciplinary Board concluded that the applicant's reference in his memorandum of 24 August 1988 and in his staff report to the telex of 3 February 1987 could not be held against the applicant in so far as it was a mere allusion;

— with regard to the alleged attempted blackmail by the applicant, the Disciplinary Board considered that no such conduct had been established since no direct threat had been made against the Court of Auditors, its Members or its President; moreover, Mr Carey had sent a written deposition to the Disciplinary Board in which he stated that the phrase attributed to the applicant regarding the persistent nature of his attacks against the Court of Auditors and its Members, in particular its President, had not been spoken by the applicant;

— the Disciplinary Board considered that the applicant could not properly be accused of any infringement of Article 21 of the Staff Regulations since the written statements attributed to him were not made in the ordinary course of the duties entrusted to him.

19 The Disciplinary Board considered that the distribution of the three memoranda drawn up by the applicant on 20 June, 24 August and 2 September 1988 appeared to be an established fact and could have been 'very seriously detrimental and damaging to the people mentioned in them', since 'if he had genuinely wished to keep them confidential, Mr Williams would not have insisted that they be typewritten and recorded by the secretarial department of the division to which he was assigned but would have lodged handwritten memoranda in sealed envelopes at each stage of the procedure'.

20 Mr Williams's views were heard by the President of the Court of Auditors, in his capacity as appointing authority, on 7 February 1989.

21 By decision of 13 February 1989, the appointing authority imposed on the applicant the penalty of deferment of advancement to a higher step for the period from 13 February 1989 to 16 October 1995.

22 The appointing authority followed the opinion of the Disciplinary Board except as regards the latter's appraisal of the reference in the memorandum of 24 August 1988 and in the staff report to the telex of 3 February 1987 and the conclusion that no infringement of Article 21 of the Staff Regulations could be established. As regards the telex, the appointing authority stated, first, that, in the abovementioned memorandum of 24 August 1988, Mr Williams had stated that he had exercised great initiative in sending it and, secondly, that mere reference to a document of that nature is manifestly incompatible with the dignity of a European official and constitutes a reaffirmation and reiteration, on that occasion in full awareness of the implications, of exceptionally serious remarks. As to whether or not there had been any infringement of Article 21 of the Staff Regulations, the appointing authority considered that the obligation to assist and tender advice to

his superiors implies a duty of loyalty which binds an official even when he draws up documents concerning staff reports relating to him and his career. The appointing authority stated that, in view of the gravity of the infringements attributable to Mr Williams and of the fact that he held the rank of principal administrator, the penalties of a written warning or a reprimand were inappropriate and insufficient.

23 By memorandum dated 23 March 1989, sent to his immediate superior on 28 March 1989, the applicant lodged a complaint under Article 90(2) of the Staff Regulations against the decision of 13 February 1989.

24 The President of the Court of Auditors, to whom the matter was referred in his capacity as appointing authority, took the view that that complaint contained further damaging remarks and decided not to reply to it specifically. By memorandum of 13 July 1989, the appointing authority's deputy gave notice to the applicant to that effect.

**Procedure**

25 By application received at the registry of the Court of Justice on 20 October 1989, Mr Williams brought the present action against the Court of Auditors. The action was registered as Case 323/89.

26 Pursuant to Article 14(1) of the Council Decision of 24 October 1988 establishing a Court of First Instance of the European Communities, the Court of Justice, by order of 15 November 1989, referred the case to the Court of First Instance, where it was registered as Case T-146/89.

27 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Fourth Chamber), considering that sufficient information was available from the documents before it, decided to open the oral procedure without any preparatory inquiry.

28 The hearing took place on 28 November 1990. Counsel for the parties presented oral argument and answered the questions put to them by the Court of First Instance.

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

(i) declare the action admissible;

(ii) annul all procedural measures taken by the Disciplinary Board by reason of its failure to fulfil formal requirements, its breach of the right to a fair hearing and its misinterpretation of Article 12 of the Staff Regulations;

(iii) annul, as regards both its form and its content and in its entirety, the appointing authority's decision of 13 February 1989 for infringement of Articles 12 and 21 of the Staff Regulations;

(iv) annul the implied decision rejecting the complaint lodged on 28 March 1989;

(v) in the event of annulment, direct that all appropriate measures be adopted;

(vi) in the alternative, reduce the penalty imposed to a written warning;

(vii) in any event, order the defendant to pay the costs in their entirety.

30 The defendant contends that the Court of First Instance should:

(i) dismiss the application as inadmissible in so far as it seeks, in the alternative, to secure a reduction of the penalty;

(ii) dismiss the application as unfounded in all other respects;

(iii) order the parties to bear their own costs.

**Admissibility**

31 The defendant does not challenge the admissibility of the application as a whole but raises an objection of inadmissibility to the alternative claim that the Court should reduce the penalty imposed by the appointing authority to a written warning. It relies on the case-law of the Court of Justice according to which it is a matter for the appointing authority to choose the appropriate penalty once an official's misconduct has been established. The defendant infers that the application should therefore be dismissed as inadmissible to the extent to which the applicant seeks amendment of the contested decision.

32 In reply, the applicant states that he does not consider that case-law to be applicable to the present case, first, because the events which gave rise to the penalty have not been established and, secondly, because, even if they had been established, the enormity of the penalty imposed, in relation to the alleged misconduct, is such that the decision to impose it in itself constitutes a misuse of powers or indeed an act *ultra vires* and is more in the nature of a settlement of accounts than a penalty.

33 In that regard, it must be borne in mind that the Court of Justice has held on several occasions that once the truth of the allegations against the official has been established, it is for the appointing authority to choose the appropriate penalty.

The Court of First Instance cannot substitute its own judgment for that of the appointing authority except in the case of a manifest error or misuse of powers (judgments in Joined Cases 175/86 and 209/86 *M* v *Council* [1988] ECR 1891, paragraph 9, and Case 228/83 *F* v *Commission* [1985] ECR 275, paragraph 34). Whilst it is true that the Court may, in carrying out that review, annul the appointing authority's decision, if it is appropriate to do so, it nevertheless cannot substitute its own decision. It follows that the applicant's alternative claim, namely that the Court should reduce the penalty imposed upon him to a written warning, must be dismissed as inadmissible.

**Substance**

34 In support of his application for annulment, the applicant puts forward a number of pleas relating, first, to the propriety of the disciplinary proceedings and, secondly, to the merits of the decision of 13 February 1989, which may essentially be summarized as follows:

— the composition of the Disciplinary Board was improper;

— the statement made by one of the witnesses heard by the Disciplinary Board was biased;

— the Disciplinary Board issued its opinion belatedly;

— the disciplinary proceedings were conducted and the decision was adopted in disregard of the principle that authorities exercising judicial powers must be independent and impartial;

— the decision infringed the principle *non bis in idem*;

— the decision was based on an inappropriate classification of the circumstances of the case by reference to criminal law;

— the decision was vitiated by errors of law regarding the legal classification of the circumstances of the case in relation to Articles 12 and 21 of the Staff Regulations;

— the decision was adopted in breach of the principle of proportionality;

— the decision is vitiated by misuse of powers.

*The first plea: improper composition of the Disciplinary Board*

35 According to the applicant, in view of the fact that, when the Disciplinary Board gave its opinion, its Chairman, Mr Hedderich, had ceased to be a serving official on 1 January 1989 — having retired on grounds of invalidity with effect from 31 December 1988 — and that, by virtue of Decision No 89-4 of the Court of Auditors, the Disciplinary Board should have been chaired, throughout 1989, by Mr Muller, the Disciplinary Board was improperly constituted.

36 The defendant states that, pursuant to Article 4 of Annex II to the Staff Regulations, the Disciplinary Board must be composed of a Chairman and four members. The Chairman of the board is appointed each year by the appointing authority (Article 5(1) of Annex II to the Staff Regulations). He takes no part in the decisions of the board save on procedural questions or in case of parity of votes (first paragraph of Article 8 of Annex IX to the Staff Regulations). In the defendant's opinion, since the opinion of the Disciplinary Board was given in this case by a majority of votes and without the intervention of the Chairman, even if it is conceded that there was an irregularity regarding the status of the Chairman, such an irregularity is not sufficient to undermine the validity of the decision subsequently adopted by the appointing authority.

37 The defendant also contends that no provision of the Staff Regulations requires the Chairman of the Disciplinary Board to be a serving official. Therefore, the fact that the Disciplinary Board was chaired by an official who had retired 16 days before the board issued its opinion is not such as to detract from the propriety of the procedure.

38 The applicant considers that if the defendant's argument were taken to its conclusion, the result would be to advocate that the appointing authority might appoint as Chairman of the Disciplinary Board not only a retired official but even a person who has never had the status of official.

39 As regards the fact that a new Chairman had been appointed for 1989, the defendant contends that it is apparent from the rules adopted by it that, where a disciplinary procedure was commenced in 1988, the Disciplinary Board is to be chaired until its opinion is given by the Chairman designated for that year, namely Mr Hedderich, and, similarly, that, in the case of disciplinary proceedings commenced in 1989, the Disciplinary Board would be chaired by Mr Muller until it delivered its opinion. According to the defendant, that interpretation is dictated by the principle of sound administration, by virtue of which it is inappropriate for the chairman of a joint committee to be replaced, unnecessarily, in the course of its proceedings, and by the general principles concerning the temporal application of procedural legislation.

40 The Court of First Instance considers that, in the present case, the fact that the person who chaired the Disciplinary Board in 1988 continued to chair it for the first 16 days of January 1989 does not constitute a defect such as to render the composition of the board improper. The board received the appointing authority's report on 17 October 1988 and almost all the investigation was carried out in 1988, under the chairmanship of the same person. The fact that that same person continued to chair the board until it issued its opinion on 16 January 1989 not only does not constitute a procedural defect but, on the contrary, constitutes a correct application of the principle of sound administration. Such a course of action safeguards the rights of the official who is subject to disciplinary proceedings since it makes it possible for the people who examined the documents, heard the witnesses and, in general, took all the measures involved in the investigation, which is intended to establish the facts and any liability on the part of the official concerned, to be the same as those who issued the opinion provided for in Article 7 of Annex IX to the Staff Regulations. Furthermore, in any event, the identity of the Chairman was not in this case of decisive importance with respect to the adoption of the Disciplinary Board's opinion. The opinion was adopted by a majority of the members of the board and the Chairman took no part therein.

41 Accordingly, this plea must be dismissed.

*The plea that a witness was biased*

42 The applicant maintains that the Disciplinary Board's conclusion was largely based on statements made by Mr B., a witness who is open to challenge since he had a vested and present interest in the outcome of the case. That interest lay in the fact that that witness, who was in the same grade as the applicant, could, and can still, hope to benefit from a promotion for which the applicant is liable to be passed over.

43 According to the defendant, that fact cannot, in the absence of any other evidence, justify accusing the witness of bias or, *a fortiori*, alleging that the disciplinary proceedings were vitiated.

44 The Court of First Instance finds that the plea alleging bias on the part of a witness, as put forward by the applicant, is not supported by any evidence such as to enable its merits to be considered. It is based solely on the view that the witness in question has the same grade as the applicant. That fact alone is insufficient to establish that that witness has a personal interest incompatible with the impartiality required of witnesses in all cases. Moreover, even if that fact had been liable to influence the statement of the witness in question, it was for the Disciplinary Board to adopt the requisite critical approach in appraising it.

45 This plea must therefore be dismissed.

*The plea that the Disciplinary Board's opinion was out of time*

46 The applicant maintains that the Disciplinary Board's opinion was manifestly issued out of time, since the appointing authority's report was submitted to the board on 13 October 1988 and it was not until 17 January 1989 that the latter gave its opinion, backdated to 16 January 1989. There was therefore an infringement of Article 7 of Annex IX to the Staff Regulations, according to which the Disciplinary Board is to deliver its opinion within one month of the date on which the matter was referred to it.

47 The defendant replies that where the board gives instructions for an inquiry to be held the time-limit is extended to three months and that, in the present case, the Disciplinary Board did arrange for an inquiry to be carried out. Moreover, the appointing authority's report referred to in Article 1 of Annex IX to the Staff Regulations, dated 13 October 1988 (a Thursday), was forwarded to the Chairman of the Disciplinary Board on 17 October 1988 (a Monday) and consequently, even if the opinion was in fact delivered on 17 January 1989, that date was still within the time-limit laid down by the Staff Regulations.

48 This plea is manifestly unfounded. The Disciplinary Board issued its opinion within the time-limit laid down by Article 7 of Annex IX to the Staff Regulations. In view of the fact that the board gave instructions for an inquiry to be held, the time-limit was three months. As stated in the preamble to the opinion, the appointing authority's report was forwarded to the Chairman of the Disciplinary Board on 17 October 1988, the time taken thus being reasonable, having regard to the explanations given by the defendant. The three-month period therefore expired on 17 January 1989, on which date, according to the applicant, the opinion was delivered.

49 Moreover, it must be pointed out that the Court of Justice has consistently held that the time-limits laid down in Article 7 of Annex IX to the Staff Regulations are not mandatory time-limits such that measures adopted after their expiry are void but reflect rules of sound administration. The Court of Justice expressly recognized that the Disciplinary Board may require a longer period in order to undertake an inquiry which is sufficiently complete and which affords the person concerned all the guarantees intended by the Staff Regulations (judgments in Joined Cases 175 and 209/86, cited above, paragraph 16, and Case 228/83, cited above, paragraph 30).

50 It follows that this plea must be dismissed.

*The plea as to breach of the principle that authorities exercising judicial powers must be independent and impartial*

51 According to the applicant, the role of Mr Mart, the President of the Court of Auditors at the material time, in his capacity of appointing authority, was fourfold:

— he was the alleged victim of one of the acts for which the applicant was censured, namely the reference to the telex of 3 February 1987;

— he was the 'accuser' who brought the matter before the Disciplinary Board;

— he was the authority that took the disciplinary decision;

— he was a judge at first instance on the basis of Article 90 of the Staff Regulations.

52 The applicant, without wishing to go so far as to challenge the validity of the disciplinary procedure as provided for in the Staff Regulations and conceding that disciplinary proceedings are not criminal proceedings within the meaning of Article 6 of the European Convention for the Protection of Human Rights, considers that that overlapping of roles contravenes one of the general principles of law laid down by that convention — which applies to disciplinary cases — whereby courts must be independent and impartial.

53 The defendant states in reply that the overlapping of the functions of appointing authority, the party taking the initiative to commence disciplinary proceedings and the authority who takes the disciplinary decision is intended by the Staff Regu-

lations and, moreover, it is a characteristic feature of the law governing the international civil service that the disciplinary authority should be one of the authorities within the hierarchical structure. The defendant also states that, whilst it is true that in this case the person exercising the powers vested in the appointing authority was also the person against whom the applicant's 'attacks' were directed, the applicant is particularly badly placed to draw any inferences from that twofold involvement of the President of the Court of Auditors since he himself saw fit to involve the appointing authority in his attacks and therefore created the overlapping which he purports to criticize.

54 In his rejoinder, the applicant submits that the appointing authority should have had the decency to make a deputy appointing authority responsible for dealing with disciplinary proceedings and that the quadruple role to which attention was drawn in the application initiating the proceedings is certainly not 'intended by the Staff Regulations'.

55 The defendant observes that, in any event, a plea of breach of the principle that a judicial authority must be independent and impartial must be regarded as a fresh submission in so far as it does not appear in the preliminary complaint and must therefore be declared inadmissible.

56 It must be stated, as the defendant has correctly pointed out, that the present plea was not relied on in the administrative complaint and that the applicant put it forward for the first time only in the written procedure before the Court. It has been consistently held that 'an official may not submit to the Court conclusions with a subject-matter other than those raised 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' (judgments of the Court of Justice in Case 242/85 *Geist* v *Commission* [1987] ECR 2181, paragraph 9; Case 224/87 *Koutchoumoff* v *Commission* [1989] ECR 99, paragraph 10; and Case 133/88 *Casto del Amo Martínez* v *Parliament* [1989] ECR 689, paragraph 10; see also the judgment in Case 52/85 *Rihoux and Others* v *Commission* [1986] ECR 1555, paragraph 13).

57 In that regard, it must be stated that, in the present case, the administrative complaint not only does not refer to that plea but contains nothing from which the defendant could have inferred, even on an extensive interpretation of the terms of the complaint, that the applicant sought to allege any breach of the principle that courts must be independent and impartial.

58 Accordingly, this plea must be dismissed as inadmissible.

59 Furthermore, it must be pointed out that the Staff Regulations expressly provide that the appointing authority is to have overlapping functions. Article 87 of the Staff Regulations and Article 1 of Annex IX thereto provide that it is the appointing authority who must submit to the Disciplinary Board the report which initiates the disciplinary procedure; Article 87 of the Staff Regulations and the third paragraph of Article 7 of Annex IX provide that it is the appointing authority which is to take the decision to impose the penalty and, finally, Article 90(2) of the Staff Regulations states that it is the appointing authority that must reply to the complaint. In the present case, it happens that the person discharging the duties required of the appointing authority was also the person against whom the remarks for which Mr Williams is criticized were directed, but it must be pointed out that he was not the only person concerned by those remarks, since they deprecated the Court of Auditors as an institution, its Members and the heads of their private offices, its Secretary-General and certain of its officials. It follows that the applicant cannot criticize the appointing authority for exercising the powers vested in it by the Staff Regulations and that the appointing authority acted correctly by retaining the entirety of its functions.

*The plea as to breach of the principle* non bis in idem

60 The applicant complains that the decision of 13 February 1989 was taken in breach of the principle *non bis in idem*, in so far as it penalizes him a second time for conduct relating to the telex of 3 February 1987, whereas the Disciplinary Board, in its opinion, refused to hold him liable for his references to that telex.

61 According to the defendant, the specific charge against the applicant is that he claimed that he took an excellent initiative on 3 February 1987 with a view to saving 'our moribund institution from total moral bankruptcy', namely by endorsing that telex in his memorandum of 24 August 1988 and in his staff report, where he mentioned it under the heading 'Publications'. According to the defendant, the principle *non bis in idem* is not applicable to the present case since the conduct criticized is clearly different from that which prompted the previous disciplinary procedure.

62 The defendant also contends that the plea as to breach of the principle *non bis in idem* was not mentioned in the preliminary complaint but only, for the first time, in the application to the Court. Accordingly, in the defendant's view, that plea must be declared inadmissible.

63 It must be pointed out, as the defendant correctly stated, that, in the present case, the administrative complaint not only does not refer to infringement of the principle *non bis in idem* but contains nothing from which the defendant could have inferred, even on a broad interpretation of the terms of the complaint, that the applicant sought to invoke such a breach, which he did for the first time only at the stage of the written procedure before the Court of First Instance.

64 It follows that, for the same reasons as those set out above (paragraph 56), this plea must be declared inadmissible.

65 Furthermore, the Court of First Instance considers that the reference made by the applicant, both in his memorandum of 24 August 1988 and in his staff report, to the telex of 3 February 1987 in itself constitutes an act which is clearly separate from the sending of the telex in question, since the applicant, in full awareness and responsibility, again fully confirmed its content; consequently, there was no infringement in the present case of the principle *non bis in idem*.

*The plea as to improper classification of the facts by reference to criminal law*

66 The applicant considers that, in the appointing authority's report, the opinion of the Disciplinary Board and the contested decision, care was taken to classify the circumstances by reference to criminal law, from which the terminology was borrowed (defamation, threats, blackmail). The applicant emphasizes that the authorities concerned thus arrogated to themselves a role which, in principle, belongs to the criminal courts of the Member State in which the contested acts occurred or, in certain cases, those of the Member State from which the perpetrator thereof originated, if the criminal law of that State grants jurisdiction to its courts for offences committed by its nationals abroad. In his view, it was open to the appointing authority to make the acts of which he was accused the subject of proceedings before the criminal courts of Luxembourg. In his view, the Disciplinary Board and the appointing authority acted incorrectly by taking the view that a criminal offence *ipso facto* constituted a disciplinary infringement.

67 The defendant contends that it was out of concern to clarify the conduct imputed to the person concerned that it referred to concepts borrowed from the criminal law of a Member State and that the statement of the reasons on which the contested decision was based does not seek to establish any infringement of the Luxembourg Criminal Code but, rather, an infringement of Articles 12 and 21 of the Staff Regulations.

68 It need only be borne in mind that the Court of Justice has held that 'Nothing prevents the disciplinary authorities from using approximations to the concepts of criminal law for the purpose of defining and possibly qualifying the facts submitted for their consideration. In the light of the basic separation between the disciplinary system and the criminal procedure there therefore exists no risk of confusion to the prejudice of an official who is the subject of a disciplinary procedure' (judgment in Case 46/72 *De Greef* v *Commission* [1973] ECR 543, paragraphs 30 and 31).

69 This plea cannot therefore be upheld.

*The plea as to incorrect legal classification of the circumstances of the case having regard to Articles 12 and 21 of the Staff Regulations*

70 The applicant denies that he failed to discharge the obligations imposed upon him by Article 21 of the Staff Regulations. In his view, there is nothing in the documents before the Court to show that he failed to assist or tender advice to his superiors or that he did not carry out the tasks entrusted to him. According to the applicant, the obligation of loyalty and cooperation incumbent upon every official is an obligation linked specifically with the performance of his tasks and is an obligation towards the institution; the duty to provide assistance is not an obligation to show servility to his superiors as individuals. He considers that an official cannot be reproached for any lack of loyalty towards his institution for taking initiatives intended to save it from utter moral bankruptcy.

71 The defendant submits that the obligation to assist superiors laid down in Article 21 of the Staff Regulations is merely a specific expression of the general duty of loyalty attaching to every official and that the Court of Justice properly described it as a fundamental duty of loyalty and cooperation incumbent upon every official vis-à-vis the authority to which he is subject. It is of the opinion that the contested decision properly criticizes the applicant for failing to fulfil that obligation of loyalty by making, in a manner wholly unconnected with and separable from the subject-matter of the documents in which they were contained, injurious remarks concerning Members of the Court of Auditors and in particular a former President thereof, for example by describing their conduct as 'shady, disgusting and criminal'.

72 The Court of First Instance considers that the terms of the three memoranda written by the applicant and of the telex of 3 February 1987, which deprecate the institution, its Members and certain named officials thereof, by their very nature constitute a serious breach of the fundamental duty of loyalty and cooperation which all officials owe to the institution to which they belong, and to their superiors (judgment of the Court of Justice in Case 3/66 *Alfieri* v *Parliament* [1966] ECR 437, at p. 448), of which Article 21 of the Staff Regulations is a particular manifestation. Observance of that duty of loyalty is required not only in the performance of specific tasks entrusted to an official but extends to the whole relationship between the official and the institution and, by virtue of that duty, the official must, in general, refrain from conduct detrimental to the dignity and respect due to the institution and its authorities. In those circumstances, the Court of First Instance considers that the appointing authority was justified in taking the

view that the applicant's conduct constituted a breach of Article 21 of the Staff Regulations.

73 This complaint cannot therefore be upheld.

74 The applicant also denies having failed to fulfil his obligations under Article 12 of the Staff Regulations since the expression of his views did not meet the requirement of publicity laid down by that article as a precondition for establishing an infringement thereof. He considers that the circulation of a complaint amongst the officials responsible for dealing with it does not constitute publication of it. It would be wrong to regard a confidential document as a public expression of opinion where the author thereof was merely exercising his right of appeal.

75 The defendant points out that Article 12 of the Staff Regulations provides, in its first paragraph, that 'An official shall abstain from any action and, in particular, any public expression of opinion which may reflect on his position'. That provision shows that the applicant is incorrect to plead, in denying any infringement of that provision, that there was no publication. That provision refers in general to 'any action . . . which may reflect on his position' and refers in particular only to the 'public' expression of opinions. The defendant considers that the applicant's arguments concerning the concept of publication are thus shown to be unfounded, that the distribution of the memoranda in question is an established fact and that Mr Williams' remarks were not necessary, having regard to the subject-matter of his requests, and can be separated from them without the memoranda in question being deprived of their meaning.

76 The Court of First Instance notes that Article 12 of the Staff Regulations prohibits in general any act which may reflect on an official's position and, in particular, any public expression of opinion which might likewise reflect on his position. In the present case, the applicant's three memoranda are, by their nature, acts which reflect upon his position, and it is unnecessary to consider the extent to which they were made public. Moreover, it is beyond doubt that the applicant's three

memoranda were made public. The fact that the memoranda in question embody administrative appeals does not mean that they were confidential. In the present case, the memoranda were dealt with in accordance with the normal administrative procedure and, as was recognized in the opinion of the Disciplinary Board, it was established that they had been distributed within the institution and could be very seriously damaging and injurious to the institution and to the persons named in them. The same applies to the remarks made in public regarding Mr Ruppert, the making of which was confirmed by those who heard them.

77 Accordingly, this complaint cannot be upheld.

78 The applicant objects to the description of his remarks as defamatory and injurious, maintaining that they certainly cannot constitute defamation since they are true.

79 The Court of Auditors considers that the infringements for which the applicant was criticized consist not in having made inaccurate statements in writing or orally but, by insulting a number of people, in having failed to observe his duty of loyalty and his duty to uphold his position.

80 This complaint must also be rejected. The opinions expressed by the applicant indeed contain statements which are at the very least injurious and in themselves constitute a breach of the duties required of every official by the first paragraphs of Article 12 and of Article 21 of the Staff Regulations. If the applicant was of the opinion that certain measures taken by the Court of Auditors offended against provisions of the Treaties, he was free to have recourse to all the legal remedies available to him or to take the appropriate action, but only in compliance with the principles laid down in the Staff Regulations, that is to say in observance, in both his written and oral utterances, of the obligation of reserve and moderation incumbent on every official.

*The plea as to breach of the principle of proportionality*

81 The applicant claims that there is a flagrant lack of proportionality between the conduct for which the Disciplinary Board found him liable and the penalty proposed by the latter and imposed by the appointing authority. He considers that the penalty imposed amounts, in financial terms, to approximately LFR 6 543 150. According to the criteria applied by the criminal law of Luxembourg, that amount corresponds to 6 543 days in prison, that is to say 17 years, 11 months and 34 days.

82 The defendant replies that the deferment of advancement to the next step ranks third in Article 86 of the Staff Regulations, on a scale which contains only seven types of penalty, and ranks first among the five penalties which may be imposed by the appointing authority only after obtaining the opinion of the Disciplinary Board. Under the Staff Regulations, it is amongst the lightest penalties applicable to serious misconduct. However, the seriousness of the misconduct of the applicant and the fact that he holds the rank of principal administrator meant that the lighter penalties, namely a written warning and a reprimand, were inappropriate and insufficient.

83 It must be borne in mind that, as the Court of Justice has held, once the truth of the allegations against the official has been established, it is for the appointing authority to choose the appropriate penalty save in cases of manifest error or misuse of powers (judgments in Case 228/83, *supra*, paragraph 34 and Case 46/72, *supra*, paragraphs 44 to 46). As regards, more particularly, the question whether the penalty imposed on the applicant is disproportionate in relation to the seriousness of the conduct attributed to him, it must be emphasized that the Court of Justice has also held that determination of the penalty to be imposed in each individual case is based on a comprehensive appraisal of all the particular facts and circumstances peculiar to each individual case, since Articles 86 to 89 of the Staff Regulations do not specify any fixed relationship between the measures provided for and the various sorts of failure by officials to comply with their obligations (judgment in Case 403/85 *F* v *Commission* [1987] ECR 645, paragraph 26). In the present case, the Court of First Instance has already held (paragraphs 72 and 76 above) that the conduct established in the decision, the fact of which is not disputed, involves serious breaches of fundamental obligations that are incumbent on all officials. Accordingly, the Court does not consider itself to be in a position

to describe the deferment of advancement to a higher step imposed on the applicant as a manifestly disproportionate penalty.

84 This plea must therefore be rejected.

*The plea of misuse of powers*

85 The applicant considers that the question must be asked whether in the present case the intent of the appointing authority was really limited to seeking to punish an official and whether the enormity of the penalty which it imposed on him is not, rather, a manifestation of other motives which it would find difficult to acknowledge. He emphasizes that, although his advancement to higher steps will resume normally at the end of the period of deferment, the penalty will impede subsequent progression of his career to Grade A 5.

86 The defendant replies that the applicant has produced no evidence to support his accusation of misuse of powers. Nor has he produced any objective, relevant and consistent evidence to show that the penalty imposed is enormous, having regard to the complaints upheld against him, or that it in itself constitutes a misuse of powers.

87 It must be borne in mind that the concept of misuse of powers has a precisely defined scope and refers to cases where an administrative authority has used its powers for a purpose other than that for which they were conferred on it (see judgment of the Court of Justice in Case 817/79 *Buyl* v *Commission* [1982] ECR 245, paragraph 28, and the judgment of the Court of First Instance in Case T-108/89 *Scheuer* v *Commission* [1990] ECR II-411, paragraph 49).

88 Moreover, it has been consistently held that a decision may amount to a misuse of powers only if it appears, on the basis of objective, relevant and consistent

evidence, to have been taken for purposes other than those stated (judgment of the Court of Justice in Case 69/83 *Lux* v *Court of Auditors* [1984] ECR 2447, and judgment of the Court of First Instance in Case T-108/89 *Scheuer* v *Commission*, *supra*, paragraph 50).

89 In that regard, it must first be pointed out that the applicant puts forward in support of the present plea essentially the same arguments as those advanced to support his plea of breach of the principle of proportionality, which the Court has already dismissed. For the rest, the applicant's suppositions, in imprecise and general terms, do not constitute evidence that the appointing authority, by imposing on him the penalty at issue, pursued any aim other than that of safeguarding the internal order of the Community civil service.

90 It follows from the foregoing that this plea cannot be upheld.

91 In view of all the foregoing considerations, the application must be dismissed in its entirety.

## Costs

92 Under Article 69(2) of the rules of procedure of the Court, which apply *mutatis mutandis* to proceedings before the Court of First Instance, the unsuccessful party is to be ordered to pay the costs. However, Article 70 of those rules provides that institutions are to bear their own costs in proceedings brought by servants of the Communities.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber)

hereby:

1. **Dismisses the application;**

2. **Orders the parties to bear their own costs.**

Schintgen Edward García-Valdecasas

Delivered in open court in Luxembourg on 26 November 1991.

H. Jung
Registrar

R. García-Valdecasas
President