

JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)  
13 December 1990 \*

In Case T-29/89,

**Heinz-Jörg Moritz**, an official of the European Communities, residing at Bridel (Luxembourg), represented by Victor Biel, assisted by Aloyse May, both of the Luxembourg Bar, with an address for service in Luxembourg at the Chambers of Mr Biel, 18 A, rue des Glacis,

applicant,

v

**Commission of the European Communities**, represented initially by Christine Berardis-Kayser, a member of its Legal Department, then by Henri Étienne, also a member of its Legal Department, acting as Agent, assisted by Barbara Rapp-Jung, avocat, Brussels, with an address for service in Luxembourg at the office of Guido Berardis, a member of its Legal Department, Wagner Centre, Kirchberg,

defendant,

APPLICATION for the annulment of the applicant's periodic report for the period 1983-85,

THE COURT OF FIRST INSTANCE (Fifth Chamber),

composed of: H. Kirschner, President, C. P. Briët and J. Biancarelli, Judges,

Registrar: B. Pastor, Administrator,

having regard to the written procedure and further to the hearing on 8 May 1990, gives the following

\* Language of the case: German.

## Judgment

### Facts, procedure and conclusions of the parties

- 1 Until the end of January 1990, when he entered retirement, the applicant was an official in Grade A 3 at the Commission of the European Communities where he occupied a post of Head of Division in Directorate-General XVIII (Credit and Investments).
- 2 On 31 July 1986, Mr van Goethem, the applicant's immediate superior, acting as assessor, proposed to the applicant that his periodic report for the period 1981-83 should be extended to cover the period from 1 July 1983 to 30 June 1985.
- 3 By a memorandum of 26 November 1986 the applicant refused to consent to the extension of his periodic report.
- 4 On 16 January 1987 the applicant received a draft periodic report for the period 1983-85 and on 6 February 1987 he discussed this matter with the assessor. On 10 February 1987 the assessor sent him a new draft periodic report.
- 5 On 3 March 1987, the applicant requested a revised report, which was drawn up on 7 April 1987 by Mr Cioffi, the Director-General. From the applicant's personal file the Court has been able to ascertain that the revised report was notified to the applicant on 7 April 1987. At the hearing, the parties confirmed that notification of that report did take place on 7 April 1987.
- 6 By a complaint of 13 August 1987, the applicant sought the rectification of the periodic report for the period 1983-85 and the resumption of the procedure for the revision of his periodic report. That complaint was rejected by decision of 9 December 1987, contained in a letter of 17 December 1987.

- 7 By an application lodged at the Court Registry on 18 March 1988, the applicant brought this action against the Commission seeking the annulment of his periodic report for the period 1983-85.
  
- 8 The written procedure took place entirely before the Court of Justice. By order of 15 November 1989, the Court of Justice referred the case to the Court of First Instance pursuant to Article 14 of the Council Decision of 24 October 1988 establishing a Court of First Instance of the European Communities.
  
- 9 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance decided to open the oral procedure without any preparatory inquiry.
  
- 10 The hearing took place on 8 May 1990. The representatives of the parties presented oral argument and gave answers to the questions put by the Court of First Instance.
  
- 11 The applicant claims that the Court of First Instance should:
  - (a) declare the application admissible;
  - (b) declare it well founded and, consequently,
  - (c) annul the decision upon the complaint of 17 December 1987;
  - (d) declare the periodic report unlawful and that it must be annulled on those grounds;
  - (e) declare that the periodic report was drawn up with undue delay, entailing damage to the applicant equivalent to two months' salary or, alternatively,
  - (f) determine the damages *ex aequo et bono*;

(g) alternatively, hear the Director-General, Mr Cioffi, as witness;

(h) in any event, order the Commission to pay all the costs.

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

(a) dismiss the application as unfounded;

(b) order the applicant to pay the costs.

#### **The admissibility of the claim for annulment**

13 Although the question of the admissibility of this action was not raised by the parties in their conclusions, the Court must examine, of its own motion, whether it was brought within the prescribed period. Since time-limits are mandatory and form an absolute bar, the Court must ascertain, even of its own motion, whether they have been complied with (see, in particular, the judgment of the Court in Case 108/79 *Belfiore v Commission* [1980] ECR 1769).

14 Under Article 91(2) of the Regulations of Officials of the European Communities (hereinafter referred to as 'the Staff Regulations'), an action brought before the Court is admissible only if the appointing authority has previously received a complaint within the meaning of Article 90(2) within the period of three months and that complaint has been rejected by express or implied decision.

15 The making of a formal complaint, within the meaning of Article 90 of the Staff Regulations, is not a necessary pre-condition for bringing an action if the action concerns a periodic report (see, in particular, the judgment of the Court of Justice in Joined Cases 6/79 and 97/79 *Grassi v Council* [1980] ECR 2141). In that case, the three-month period for bringing an action, laid down in Article 91(3) of the Staff Regulations, begins to run from the day on which the periodic report that may be regarded as final was notified to the official concerned.

- 16 It appears from the applicant's personal file, which was forwarded to the Court pursuant to Article 26 of the Staff Regulations, that the final revised report was notified to the applicant on 7 April 1987. An action against that revised report therefore lay as from that date, without any prior complaint or prior express or implied rejection of a complaint within the meaning of Article 90 of the Staff Regulations being necessary. The applicant's first reaction, subsequent to the date of 7 April 1987, was to make a complaint, within the meaning of Article 90(2) of the Staff Regulations, on 13 August 1987. That complaint, which was strictly speaking superfluous but which was not answered, was therefore made not only outside the three-month limit laid down in Article 90(2) but also outside the time-limit for bringing an action laid down in Article 91(3) of the Staff Regulations.
- 17 The Court of Justice has consistently held that the strict application of Community rules on procedural time-limits serves the requirement of legal certainty and the need to avoid any discrimination or arbitrary treatment in the administration of justice (see, in particular, the judgment of the Court of Justice in Case 209/83 *Valsabbia v Commission* [1984] ECR 3089, in Case 42/85 *Cockerill-Sambre SA v Commission* [1985] ECR 3749 and in Case 152/85 *Misset v Council* [1987] ECR 223).
- 18 The second paragraph of Article 42 of the Statute of the Court of Justice of the European Communities, applicable to the procedure before the Court of First Instance pursuant to Article 46 of that Statute, provides that no right is to be prejudiced in consequence of the expiry of a time-limit if the party concerned proves the existence of unforeseeable circumstances or of *force majeure*. However, the applicant has not submitted, either in his written pleadings or at the hearing, that circumstances exist constituting such a case.
- 19 It follows from the foregoing that claim for annulment submitted by the applicant must in any event be considered out of time and consequently dismissed as inadmissible.

### **The claims for compensation**

- 20 Should it be possible to consider that the claims for compensation for non-material damage allegedly suffered owing to the delay in the drawing up of the periodic report are sufficiently distinct and separable from the aforementioned inadmissible

claims for annulment, they must in any event be dismissed as unfounded for the following reasons.

- 21 Article 43 of the Staff Regulations provides for a periodic report to be drawn up at least every two years on the ability, efficiency and conduct in the service of each official. That document must be compulsorily drawn up for the good administration and rationalization of the services of the Community and in order to safeguard the interests of officials. One of the bounden duties of the administration is therefore to ensure that the reports are drawn up periodically on the date laid down by the Staff Regulations and that they are drawn up in proper form (judgment of the Court of Justice in Joined Cases 156/79 and 51/80 *Gratreau v Commission* [1980] ECR 3943). The administration has a reasonable period at its disposal in which to do this and any failure to act within that period must be justified by the existence of special circumstances (judgment of the Court of Justice in Case 207/81 *Ditterich v Commission* [1983] ECR 1359).
- 22 Moreover, all officials have a general duty of loyalty and cooperation which they owe to the authority to which they belong, particularly in the procedure for drawing up periodic reports (judgment of the Court in Case 3/66 *Alfieri v Parliament* [1966] ECR 437). Therefore an official cannot complain of delay in the drawing up of his periodic report if that delay is attributable to him, at least in part, or if he contributed considerably to the delay.
- 23 Finally, as the Court of Justice has repeatedly held, delays in the drawing up of staff reports may in themselves be prejudicial to officials for the simple reason that their career progress may be affected by the absence of such reports at a time when decisions concerning them must be taken (judgment of the Court of Justice in Joined Cases 173/82, 157/83 and 186/84 *Castille v Commission* [1986] ECR 497).
- 24 In the present case, the delay in the assessment procedure for the period 1983-85 was due not only to the late date — 31 July 1986 — on which the applicant's immediate superior proposed to the applicant that his periodic report for the period 1981-83 should be extended to cover the period 1983-85 but also to the dilatory response of the applicant who waited until 26 November 1986 before replying to that proposal.

- 25 The applicant was bound by the aforementioned duty of loyalty and cooperation to respond within a reasonable period of time to his immediate superior's proposal to extend his periodic report and he was in breach of that duty by waiting for nearly four months before replying to that proposal. He thus contributed considerably to the lateness with which his periodic report was drawn up and to the delay of which he complains.
- 26 In those circumstances, the alleged delay cannot, in the circumstances of this case, amount to non-material damage, although the period of eight months taken by the applicant's immediate superior to propose the extension of his periodic report is in itself at the limit of what may be considered a reasonable period.
- 27 Consequently, the claims for compensation for non-material damage must be dismissed, it being unnecessary to decide whether they are admissible.
- 28 The alternative claims for the hearing of witnesses must accordingly be dismissed.
- 29 It follows from all the foregoing considerations that the application must be dismissed.

### Costs

- 30 Under Article 69 of the Rules of Procedure of the Court, applicable *mutatis mutandis* to the Court of First Instance by virtue of the third paragraph of Article 11 of the Council Decision of 24 October 1988, cited above, the unsuccessful party must be ordered to pay the costs if these have been asked for in the successful party's pleadings. However, according to Article 70 of those rules, the costs incurred by the institutions in actions brought by officials or other servants of the Communities are to be borne by those institutions. Each of the parties must therefore be ordered to bear their own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

- (1) Dismisses the application;**
- (2) Orders the parties to bear their own costs.**

Kirschner

Briët

Biancarelli

Delivered in open court in Luxembourg on 13 December 1990.

H. Jung  
Registrar

C. P. Briët  
President