

WILLIAMS v COURT OF AUDITORS

JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber)
10 December 1992*

In Case T-33/91,

Calvin E. Williams, an official of the Court of Auditors of the European Communities, residing in Luxembourg, represented by J.-P. Noesen, of the Luxembourg Bar, with an address for service at his Chambers, 18, Rue des Glacis,

applicant,

v

Court of Auditors of the European Communities, represented by Jean-Marie Stenier, of its Legal Service, acting as Agent, 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 the applicant's staff report for the period from 4 January 1988 to 31 December 1989,

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

composed of: R. García-Valdecasas, President, C. P. Briët and C. W. Bellamy, Judges,

Registrar: B. Pastor, Administrator,

having regard to the written procedure and further to the hearing on 5 May and 25 June 1992,

* Language of the case: French.

gives the following

Judgment

- 1 The applicant was employed in October 1974 by the Board of Auditors, an institution for financial control coming under the Council of the European Communities, as a member of the temporary staff in Grade A 7, then, by a decision of the Council of 16 December 1976, he was 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 at that grade to the Court of Auditors of the European Communities (hereinafter 'the Court of Auditors'), following its establishment. The applicant was subsequently promoted to Grade A 6 with effect from 1 May 1979.
- 2 Following an internal competition, No CC/A/17/82, and the judgment of the Court of Justice of the European Communities in Case 257/83 *Williams v Court of Auditors* [1984] ECR 3547, the applicant was appointed Principal Administrator at Grade A 5, step 3, with effect from 16 October 1984, by a decision of 18 October 1984 of the President of the Court of Auditors in his capacity as appointing authority.
- 3 On 12 February 1990 the applicant's staff report for the period from 4 January 1988 to 31 December 1989 was communicated to him by his head of division.
- 4 Pursuant to Article 7 of the General Provisions implementing Article 43 of the Staff Regulations of Officials of the European Communities (hereinafter 'the Staff Regulations', adopted by the Court of Auditors on the basis of Article 110 of the Staff Regulations by Decision 34/84 of 22 March 1984, the applicant sought an interview

with the assessor, which took place on 6 March 1990. In a memorandum of 30 March 1990 the assessor confirmed to the applicant that his initial assessment was being maintained.

- 5 On 30 April 1990 the applicant lodged an appeal against his staff report.
- 6 On 15 June 1990 the Joint Committee on Staff Reports issued the opinion provided for in Article 8 of the General Provisions, which it had adopted at its meeting on the previous day. In that opinion, after stating that it had heard the official assessed and the assessor separately and examined, *inter alia*, a 'voluminous file submitted by the assessor', it concluded that, regard being had to the existence of a number of breaches of procedure and the hostile atmosphere between the parties, 'the appeal assessor should try to arrange for the applicant's assessment to be subject to an in-depth review'.
- 7 After holding various interviews and receiving information of various kinds (see paragraphs 63 and 64, below), the appeal assessor adopted the revised staff report on 27 July 1990. It was communicated to the applicant on the same day, together with a memorandum from the appeal assessor, who explained that, whatever breaches of procedure there might have been, the applicant could not have been prejudiced by them. He went on to say that, 'having inspected the assessor's working papers', he was satisfied that the applicant had been treated in the same manner as other officials. He informed the applicant that he had therefore decided to confirm the marks allocated by the assessor but to amend some of the comments thereon.
- 8 On 26 October 1990 the applicant submitted a complaint under Article 90(2) of the Staff Regulations against that report. In a memorandum of 10 January 1991, received by the applicant on 6 February 1991, the Secretary General dismissed that complaint.
- 9 It was in those circumstances that the applicant brought these proceedings by an application lodged at the Registry of the Court of First Instance on 31 May 1991.

- 10 · The written procedure followed its normal course.
- 11 Upon hearing the report of the Judge-Rapporteur, the Court (Fourth Chamber) decided to open the oral procedure without any preparatory inquiry.
- 12 At the hearing on 5 May 1992 the parties submitted oral argument and their answers to the questions put by the Court. During the hearing the Court asked the defendant to state in writing whether the Joint Committee on Staff Reports had had access to the personal file held, pursuant to Article 26 of the Staff Regulations, by the administrative authorities of the Court of Auditors.
- 13 By order of 7 May 1992 the Court ordered the re-opening of the oral procedure. It ordered the defendant, first of all, to produce the file sent by the original assessor to the Joint Committee on Staff Reports; secondly, to explain what documents the appeal assessor had in mind when he wrote, in his memorandum of 27 July 1990 for the attention of Mr Williams, the sentence: 'Having inspected the assessor's working papers and carefully questioned him I am satisfied that he treated you in the same manner as the other auditors'; and, thirdly, to produce those working papers.
- 14 On 18 May 1992 the defendant lodged its answer to the question put at the hearing on 5 May 1992. On 20 May 1992 it lodged the papers which it had been asked to produce in the order of 7 May 1992 and also its answers to the questions put in that order.
- 15 The applicant did not submit any observations within the time allowed him for that purpose.

16 The parties were again heard at the new hearing which took place on 25 June 1992.

Forms of order sought by the parties

- 17 In his application, the applicant claims that the Court of First Instance should:
- annul the definitive assessment of 27 July 1990;
 - annul the decision dismissing his complaint of 26 October 1990;
 - refer the case back to the appointing authority of the Court of Auditors so that it might comply with the judgment to be given;
 - in any event, order the defendant to pay all the costs.
- 18 At the hearing the applicant did not pursue the third head of claim submitted in his application.
- 19 The Court of Auditors contends in its defence that the Court should:
- dismiss the application for the annulment of the staff report as unfounded;
 - dismiss, in so far as necessary, the alternative claims as inadmissible, or otherwise as unfounded;
 - order the parties to bear their own costs.

- 20 The applicant further claims in his reply that the Court should investigate the practices in force in the Court of Auditors regarding promotions. In its rejoinder, the Court of Auditors contends that the Court should declare the request for an investigation unfounded.

Admissibility

- 21 The defendant disputes the admissibility of the application in so far as it is directed against the decision of 10 January 1991 dismissing the applicant's complaint, on the ground that the dismissal of a complaint is purely confirmatory in nature and therefore does not constitute a measure open to challenge.
- 22 The applicant did not reply to that objection of inadmissibility.
- 23 The Court notes that the complaint through official channels and its rejection, whether express or implied, by the appointing authority constitute an integral part of a complex procedure. Consequently, the action before the Court, even if formally directed against the rejection of the official's complaint, has the effect of bringing before the Court the decision adversely affecting the applicant against which the complaint was submitted (Case 293/87 *Vainker v Parliament* [1989] ECR 23, at paragraph 8).
- 24 Consequently, the objection of inadmissibility put forward on this point by the Court of Auditors against the applicant's action must be rejected.

Substance

- 25 In support of his application, the applicant has put forward five submissions. The first alleges that the administration exceeded its power of assessment and misused its powers; the second alleges that Article 5(3) of the Staff Regulations has been infringed; the third alleges a manifest error of fact; the fourth alleges that Article

24a of the Staff Regulations has been infringed; and the fifth and final submission alleges that the assessment procedure was irregular.

The submission that the administration exceeded the limits of its power of assessment and misused its powers

Arguments of the parties

- 26 The applicant, who maintains that promotions in the Court of Auditors are made almost mathematically according to the number of marks awarded in the staff report, claims that his report was drawn up in such a way as to prevent him from subsequently being promoted by awarding him ludicrously low marks on the basis of assessment criteria which varied according to the officials being assessed. Taking the view that there was a great deal of objective, relevant and consistent evidence to that effect, he asked the Court, in his reply, to order, pursuant to Article 64 et seq. of its Rules of Procedure, an inquiry into:
- (a) the functioning of the Joint Committee on Staff Reports of the Court of Auditors;
 - (b) its internal rules and the way in which it has been possible for them to change over the years depending upon the persons to be promoted;
 - (c) — the criteria for assessment in marks;
 - the way in which those criteria have changed over the years depending upon the persons for whom promotion is really intended.

The applicant further claims that the Court of Auditors has systematically excluded him from competitions in which he was entitled to participate, referring to the alleged 'qualities' of the candidates selected. He claims that there is a practice at the

Court of Auditors of systematically promoting to A 4/A 5, in the ‘audit sectors’, persons without the slightest knowledge of accountancy. In order to do so, the Court of Auditors awards the assessment ‘excellent’ to officials who do not have the same qualifications or training as those he possesses. In that respect, he points out that he is a chartered accountant and has excellent training in accountancy, which fully corresponds with the profile to be expected in a Court of Auditors.

- ²⁷ The Court of Auditors claims that the applicant’s arguments contain no objective, relevant and consistent facts showing that the report at issue followed a purpose other than that normally assigned to it. It points out that the staff report constitutes only one of the factors taken into account in a promotion procedure. It dismisses as purely gratuitous the applicant’s claim that assessors used different criteria for assessment according to the officials being assessed. As for the competitions which the applicant applied to take part in, the Court of Auditors, referring to the independence enjoyed by selection boards as against the appointing authority, observes that it could not be the cause of the success or failure of the various candidates. With regard to the qualifications of other staff promoted within the institution, the Court of Auditors states that, regard being had to its duties, which are not confined to auditing accountancy matters but extend to establishing their legality and regularity, studies in areas other than accountancy may constitute equally useful training for the officials concerned in the audit sectors.

Findings of the Court

- ²⁸ The Court of First Instance notes at the outset that the concept of misuse of power has a precisely defined scope; it refers to cases in which an administrative authority has used its powers for a purpose other than that for which they were conferred on it (see, for example, Case 817/79 *Buyl v Commission* [1982] ECR 245, at paragraph 28). Moreover, it has consistently been 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 (see, for example, Case 69/83 *Lux v Court of Auditors* [1984] ECR 2447, at paragraph 30).

- 29 It should also be pointed out that, according to established case-law, the staff report referred to in Article 43 of the Staff Regulations is an internal document whose primary function is to provide the administration with periodic information on the performance of their duties by officials (Joined Cases 6 and 97/79 *Grassi v Council* [1980] ECR 2141, at paragraph 20).
- 30 The Court considers that the question whether, as the applicant claims, promotions in the Court of Auditors are effected almost mathematically according to the number of marks awarded in the staff report is extraneous to the subject-matter of the proceedings, which concern solely the conditions under which the applicant's staff report was drawn up. The Court therefore considers that there is no need to examine that question.
- 31 It follows that the applicant's request that the Court order an inquiry into, *inter alia*, the practices in force at the Court of Auditors in relation to promotion must be rejected. The Court of First instance, which has jurisdiction to assess the purpose of such a measure (see the judgment of the Court of First Instance in Case T-53/91 *Mergen v Commission* [1992] ECR II-2041) considers that the measure of inquiry requested serves no purpose for the outcome of the proceedings.
- 32 Furthermore, the Court finds that the evidence adduced by the applicant does not make it possible to establish that his staff report was not aimed at objectively assessing his proficiency and output during the reference period. Concerning the argument that the assessors employed different criteria for assessment according to the officials being assessed, the Court can only find that that argument, which is formulated in general terms, is not supported by any specific facts which would make it possible to check its accuracy. As to the other arguments put forward by the applicant with regard to previous procedures for competitions and promotions, the Court considers that the facts relied on, even supposing them to have been established, have no bearing on 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 the required impartiality.

- 33 It follows that this submission, like the associated request for an inquiry, must be rejected.

The submission relating to infringement of Article 5(3) of the Staff Regulations

Arguments of the parties

- 34 The applicant claims that he was not treated in the same manner as his colleagues in Grade A who, like himself, were responsible for auditing the accounts of the European Communities. He claims, by way of example, that another official received the assessment 'excellent' under the heading 'Training', even though he has no training whatsoever corresponding to the duties which he performs. The applicant observes that, in order to receive that assessment, he ought to have had a specific higher education diploma in accountancy. He states that, despite the opinion delivered by the Joint Committee on Staff Reports, to the effect that his report should be reviewed, the original report was essentially confirmed. The applicant regards that situation as flagrant discrimination against him.
- 35 The defendant considers that the applicant has not explained in what way his staff report is alleged to have been drawn up in breach of Article 5(3) of the Staff Regulations. The example quoted by the applicant is, according to the defendant, both irrelevant and inaccurate. First, it is irrelevant, since the applicant was assessed as 'excellent' under the heading in question. Secondly, it is inaccurate, since the heading in question is concerned, not with training, but with 'knowledge required for the post occupied'. With regard to the opinion of the Joint Committee on Staff Reports, the defendant claims that the appeal assessor had already explained to the applicant, in his memorandum of 27 July 1990 accompanying the revised staff report, why he had not been prejudiced by the defects of form or procedure noted in that opinion, namely because he had had full and timely knowledge of his report and had been able to rely on his rights in good time.

Findings of the Court

- 36 The Court notes that, according to the consistent case-law of the Community judicature, the general principle of equality is one of the fundamental principles of the

law of the Community civil service. That principle requires that comparable situations shall not be treated differently unless such differentiation is objectively justified (see, for example, Joined Cases 152, 158, 162, 166, 170, 173, 175, 177 to 179, 182 and 186/81 *Ferrario v Commission* [1983] ECR 2357).

- 37 With regard to the applicant's argument that another official occupying a post comparable to his own received the same assessment as he did under the heading 'Knowledge required for post occupied', even though, unlike the applicant, he had no specific training corresponding to the duties which he performed, the Court observes that, as is apparent from its actual wording, the heading in question calls for a specific assessment, taking account of all the actual knowledge of the official assessed, in particular of his specific knowledge corresponding to the post which he occupies, not an abstract assessment of the level of his training, purely in terms of his qualifications and diplomas. Accordingly, the situation to which the applicant refers, assuming it to be established, cannot, in the absence of other factors, constitute proof of discrimination against him.
- 38 With regard to the applicant's argument that, in spite of the opinion of the Joint Committee on Staff Reports, to the effect that his report should be reviewed, the original report was essentially confirmed, the Court observes that, according to the second paragraph of Article 9 of the general rules, 'the appeal assessor ... shall also take into consideration the opinion of the Joint Committee on Staff Reports. The appeal assessor has the option of confirming the original assessment or of improving it in whole or in part'. It follows that the appeal assessor is not obliged to follow the opinion of the Joint Committee and that he alone is responsible for drawing up the definitive report. In this case, it is apparent from the memorandum sent to the applicant by the appeal assessor on 27 July 1990 that he did take the opinion of the Joint Committee on Staff Reports into consideration. His decision not to amend the analytical assessments of the first assessor, taken in the exercise of his discretion, therefore does not make it possible to establish any discrimination in relation to the applicant.
- 39 It follows from the foregoing that this submission must be rejected.

The submission alleging a manifest error of fact

Arguments of the parties

- 40 The applicant claims that the definitive staff report contains a manifest error of fact in so far as he is criticized, in the general assessment, for not following, in the period 1988/1989, the working methods described in the Court of Auditors' audit manual, although it was adopted only in 1990. In his reply, he accepted that systems comparable to those described in the manual in question existed beforehand. However, referring in particular to a diagram taken from an audit memorandum of October 1983 and entitled 'Flowchart of the Court's systems-based audit approach', he contended that the Court of Auditors had not allowed him to apply those requirements.
- 41 At the hearing the applicant observed that whilst it might be true that the content of the audit manual was already recorded, in 1988/1989, in some twelve different memoranda and that no substantial change had occurred in the meantime, it none the less remains the fact that he was criticized for not following the working methods described in that manual shows how superficially his staff report was drawn up.
- 42 The defendant explains that between 1978 and 1985 it adopted twelve Audit Memoranda containing the concept and audit method of the Court of Auditors, and that those twelve decisions were subsequently reproduced and consolidated in a single document entitled 'Audit Manual — Part 1', which was adopted on 8 March 1990. The applicant's head of division had expressly asked him to draw up his work programme according to the methods described in the draft audit manual, which the applicant himself had even helped to draft. Those methods did not change following the adoption of the manual. According to the defendant, the appeal assessor, in his general assessment, clearly set out the essence of his criticism of the applicant, namely that he had not applied the working methods of the Court of Auditors,

which had been applicable for a number of years. The defendant considers that the appeal assessor intended to refer to the content of the manual, in other words to the procedures to be followed, as described in the twelve previous decisions referred to above, which were applicable in 1988/1989, and as subsequently reproduced in the audit manual. As regards the possibility of applying those requirements, in particular those resulting from the diagram annexed to the reply, the defendant claims that, in his work, the applicant never went beyond the first stage ('preliminary survey') and that, being unable to provide a consistent working and investigation plan ('audit planning memorandum'), he was not authorized to carry out audits *in situ* or to go any further in the procedure. In conclusion, the defendant does not see how the reference in the appeal assessor's general assessment to old audit methods familiar to the applicant could constitute a manifest error coming within the power of review of the Court of First Instance.

Findings of the Court

- 43 The Court considers that, according to settled case-law, it does not have the function of determining whether the assessment by the administration of the occupational ability of an official is well founded when such an assessment involves complex value judgments which, by their very nature, are not capable of objective proof. However, those cases concern only value judgments and the Court is required to carry out a review concerning any irregularities of form or procedure, manifest errors of fact vitiating the assessments made by the administration and any misuse of power (see, *inter alia*, Case 207/81 *Ditterich v Commission* [1983] ECR 1359 and Case T-63/89 *Latham v Commission* [1991] ECR II-19, at paragraph 19).
- 44 In this case, the appeal assessor made the following 'general assessment' under paragraph 17 of the staff report at issue:

'In the years during which Mr Williams has been employed at the Court of Auditors he has had ample opportunity to become familiar with the Court's working methods including those described in the Court's audit manual. He should endeavour to plan, execute and record work and to report thereon in accordance with the Court's procedures.'

- 45 The applicant has not disputed the statement made by the Court of Auditors during the proceedings before the Court of First Instance that the 'Audit Manual — Part I', which it adopted on 8 March 1990, consisted in the consolidation, in a single document, of twelve audit memoranda, defining its concepts and audit methods, which it had adopted in the form of various decisions between 1978 and 1985.
- 46 It follows from that statement that the appeal assessor's reference in the general assessment under paragraph 17 of the staff report to the 'Audit Manual' includes an inaccuracy.
- 47 However, that fact is not of such a kind as to have misled the applicant with regard to the meaning of the criticism made by the appeal assessor, namely that he had not applied the working methods in force for several years at the Court of Auditors. The applicant in fact admitted at the hearing that the adoption by the Court of Auditors of its 'Audit Manual' did not in any way alter the working methods previously used.
- 48 In those circumstances, the reference to the 'Audit Manual' in the applicant's staff report gives rise to no ambiguity as regards its meaning.
- 49 With regard to the applicant's argument that he was not allowed to apply the audit methods of the Court of Auditors, in particular the requirements in the diagram 'Flowchart of the Court's systems-based audit approach', the Court of First Instance observes that during both the written procedure and the oral procedure the defendant stated, without being contradicted by the applicant, that he had not been able to proceed past the first stage envisaged in that diagram, because he had been unable to provide a consistent working plan. In those circumstances, regard being had to the fact that the diagram in question sets out a logical chain of

interlinked steps, the explanation given by the defendant appears to be consistent and bears out the appeal assessor's remark under paragraph 17 of the staff report.

- 50 It follows from the foregoing that the applicant has not established to the requisite legal standard the existence of a manifest error of fact vitiating his assessors' assessment of him. It follows that this submission must be rejected.

The submission alleging infringement of Article 24a of the Staff Regulations

Arguments of the parties

- 51 The applicant claims that at the Court of Auditors only trade union officials receive poor reports. On the occasion of the last reporting period, the three officials with the worst reports were trade union officials. The applicant is of the opinion that the facts speak for themselves and suffice to establish an infringement of Article 24a of the Staff Regulations. He claims that the union movement, of which he is the driving force, is not greatly appreciated in administrative circles at the Court of Auditors.

- 52 The defendant replies that the applicant has not established any infringement of Article 24a of the Staff Regulations. It regards it as normal and inevitable that among the trade union officials there should be officials at the Court of Auditors who receive less good reports and that to assert the contrary would amount to claiming privileged treatment for them. The defendant claims that it would be possible to name several union officials or members of the Staff Committee whose staff reports are comparable to or better than the average for the institution.

Findings of the Court

- 53 The Court points out, first, that the freedom of trade union activity recognized under Article 24a of the Staff Regulations means not only that officials have the right without hindrance to form associations of their choosing, but also that these associations are free to do anything lawful to protect the interests of their members as employees, in particular by means of bringing court proceedings (judgment in

Case 175/73 *Union Syndicale, Massa and Kortner v Council* [1974] ECR 917, at paragraphs 14 and 15) and, secondly, that the Community institutions, and the bodies treated as such for the application of the Staff Regulations by virtue of Article 1 thereof, must refrain from doing anything which might impede the freedom of trade union activity recognized by Article 24a (judgment in Joined Cases C-193 and C-194/87 *Maurissen v Court of Auditors* [1990] ECR I-95, at paragraph 12).

- 54 However, the Court of First Instance considers that, even supposing it to be established that the three officials with the worst reports at the Court of Auditors were union officials, that fact could not in itself lead to the conclusion that only union officials receive poor reports and thus make it possible to establish an infringement of Article 24a of the Staff Regulations. Furthermore, the applicant did not dispute the defendant's answer that a number of union officials received a report comparable to or better than the average for the institution. Consequently, the Court considers that the applicant has not established to the requisite legal standard that his staff report was drawn up in such a way as to penalize his union activities, in breach of Article 24a of the Staff Regulations.
- 55 It follows from the foregoing that this submission must be rejected.

The submission alleging an irregularity in the reports procedure

Arguments of the parties

- 56 The applicant claims that, in addition to the personal file opened in respect of him in pursuance of Article 26 of the Staff Regulations, the administration kept a second file on him containing documents not included in the former. This second file was produced by the first assessor before the Joint Committee on Staff Reports, which mentioned it in its opinion. In his reply to the defence, he maintained that, even supposing this file to contain, as the defendant declared, examples of his work and correspondence exchanged, it would none the less have been capable of altering his administrative position, if only through any influence it might have had on the Joint Committee. The applicant considers that he has therefore been the victim of a parallel file.

- 57 At the hearing, after taking note of the documents produced by the defendant at the Court's request, the applicant maintained that the file kept by the first assessor certainly constitutes a second personal file within the meaning of Article 26 of the Staff Regulations, kept without his knowledge and parallel to his official personal file, concerning his efficiency and ability. The applicant considers that his right to defend himself was seriously impaired when he appealed against his original staff report, as that report had essentially been drawn up on the basis of a file of which he had no knowledge and on the basis of factors of which he was unaware. He wonders how he could have made valid use of his arguments not only before the Joint Committee on Staff Reports but also before the appeal assessor when he did not know the papers in the file on which the first assessor had based his firm opinion.
- 58 The defendant accepts that the first assessor produced a file on the applicant before the Joint Committee on Staff Reports but denies that it was a second personal file. The defendant contends that it was a file which the assessor holds on all staff under him and in which are kept examples of their work, correspondence relating to their daily work, in other words notes which enable him to make as objective a judgment as possible, based on actual documents and not relying solely on a distorted recollection or the last impression left by the official assessed and therefore running the risk of being subjective. Consequently, it was normal for that file, which contained only documents originating from the applicant or his head of division concerning him, to be sent to the Joint Committee on Staff Reports, since it had been used to draw up the report.
- 59 The defendant explained at the hearing that those documents, which it produced before the Court in compliance with its order of 7 May 1992, are of three types: first, examples of the applicant's work kept by the first assessor in order to assess at the end of the reference period the work provided by his subordinate and to draw up his report; secondly, correspondence between the applicant and the first assessor and also between the latter and his own immediate superior, and, thirdly, a summary note drawn up, after the original report, by the first assessor for the

information of the Joint Committee on Staff Reports and the appeal assessor to explain the content of the examples of the applicant's work supplied to them. According to the defendant, this 'collection' of documents contained no report concerning the applicant's ability, efficiency or conduct within the meaning of Article 26 of the Staff Regulations.

- 60 Even if the Court were to consider that some of those documents should have appeared in the applicant's personal file, such a breach of Article 26 of the Staff Regulations could not, according to the defendant, constitute a ground for the annulment of the staff report. The defendant considers that the report would have been distorted if the first assessor, the Joint Commission on Staff Reports or the appeal assessor had not been able to see important documents, which was not the case here, however, since those three authorities were fully informed.
- 61 The defendant further claims that the fact that the first assessor sent his file to the Joint Committee on Staff Reports by no means adversely affected the defendant's right to defend himself; it served merely to extend, in written form, the *ex parte* hearing of the first assessor by the committee in pursuance of the internal rules which it had adopted.

Findings of the Court

- 62 The Court considers it appropriate, before assessing this submission, to set out the sequence of events in the procedure which culminated in the staff report at issue.
- 63 In that respect, the Court finds that it follows from the papers before the Court, which have not been challenged, and the explanations provided by the parties at the hearing that the sequence of events in that procedure was as follows. During the reference period, the head of division, the applicants's first assessor, recorded, in a number of notes, his assessment of the way in which the applicant performed the tasks assigned to him. The first assessor assembled, *inter alia*, those notes, examples of the applicant's work and correspondence exchanged with the applicant,

in a file which he used to draw up the applicant's staff report on 12 February 1990. After the applicant had appealed against that report the Joint Committee on Staff Reports heard the applicant and the first assessor separately. The Joint Committee also studied the statement of appeal and the documents annexed thereto, together with the file which the first assessor had assembled and sent to the Joint Committee. A summary memorandum drawn up on 23 May 1990 by the first assessor had been added to that file, 'regarding the work assigned to Mr C. Williams during the 1989 financial year'. That memorandum, which was marked *confidential* and stated that it was 'intended to support the report drawn up with regard to Mr C. Williams', was set out in three parts: '(a) work entered in the working programme; (b) availability in respect of his activities in the EDF sector; (c) various activities; punctuality'. Neither the file nor the summary memorandum was communicated to the applicant. On 14 July 1990 the Joint Committee on Staff Reports adopted its opinion. It considered that the appeal assessor should try to arrange for the applicant's staff report to be subjected to an in-depth review. After reading the original staff report, the applicant's appeal and the opinion of the Joint Committee on Staff Reports, the appeal assessor heard the applicant on 11 July 1990. On that occasion and also during the following days the applicant sent him various documents and files, which the appeal assessor examined. The appeal assessor also examined the files of the audit tasks which had been assigned to the applicant in 1988 and 1989 and the time/work statements for those years. The appeal assessor also consulted first a member of the Court of Auditors, then the applicant's head of division during 1988, who had drawn up his previous staff report, and finally the applicant's head of division during 1989, who had drawn up the staff report under appeal.

- 64 Meanwhile the file and the summary memorandum of 23 May 1990 drawn up by the original assessor and communicated to the Joint Committee on Staff Reports had been sent to the appeal assessor. On 5 June 1990 the appeal assessor, after examining those documents, made a summary and prepared a list of questions which were submitted to the first assessor and which the latter answered in handwritten notes and also during a meeting with the appeal assessor. On 27 July 1990 the appeal assessor adopted the definitive staff report, which he sent to the applicant with a memorandum bearing the same date, explaining, first, what documents he had analysed and whom he had consulted and, secondly, the conclusion which he had reached, after reading the opinion of the Joint Committee on Staff Reports,

regarding the procedural defects noted. The appeal assessor ended that memorandum by informing the applicant that he had decided to confirm the valuations given him by the first assessor but to amend some of the accompanying comments.

65 In view of those findings of fact, the Court considers it appropriate to define the scope of this submission. In support of his application, which seeks the annulment of the definitive staff report drawn up by the appeal assessor on 27 July 1990, the applicant accuses the appeal assessor of contravening the appeal procedure as laid down in the General Provisions then applicable to the Court of Auditors by taking account of strictly personal notes drawn up by the first assessor and not communicated to the applicant regarding the manner in which the applicant had performed the tasks assigned to him during the reference period. The definitive staff report was therefore drawn up on the basis of documents and information against which the applicant was unable to exercise his right to defend himself. That constitutes, he states, an irregularity in respect of which the Community judicature is called upon to exercise its power of review.

66 The Court points out, first, that the second paragraph of Article 9 of the General Provisions provides that the appeal assessor, before adopting the definitive staff report, must hear the first assessor and the official assessed and that he must carry out any appropriate consultation and take into consideration the opinion of the Joint Committee on Staff Reports. Secondly, the Court points out that, under paragraph B.8.1, the Guide to Staff Reports (Article 43 of the Staff Regulations) of the Commission, which was applicable to the Court of Auditors at the material time and has the legal force of an internal directive (judgment of the Court of First Instance in Case T-63/89 *Latham v Commission*, cited above, paragraph 25) direct contact between the assessor and the official assessed constitutes an essential formality in the report procedure. The purpose of that contact is to permit a frank and thorough discussion between the assessor and the official assessed so that they may clearly see the nature, and the implications of any differences of opinion and come to a better mutual understanding and a more correct appreciation of the report. It should also be noted that, under paragraph B.9.3.1, the Guide provides that the appeal assessor should aim at moderating the conflict between the first assessor and the official assessed and alleviating points of dispute, that the appeal assessor must obtain the fullest information possible and that to that end he must, before reaching a decision, hear the original assessor and the official concerned and try to induce them to express themselves as frankly as possible.

- 67 The Court considers that it follows from those provisions that the official assessed must be put in a position to state his point of view effectively regarding all the information on the basis of which the appeal assessor is to adopt his final decision.
- 68 In this case, the Court finds that during the procedure preceding the drawing up of the final staff report at issue, first, the Joint Committee on Staff Reports and the appeal assessor received and read notes which until then had been strictly personal, on which the first assessor had recorded his assessment of the way in which the applicant had performed his tasks during the reference period, and also a confidential summary report drawn up by the first assessor and intended to support the original report; and, secondly, that those documents formed the subject-matter of a discussion between the first assessor and the appeal assessor. The Court also finds that the applicant was unaware of either the content or even the existence of those documents, and of the discussion regarding them between the first assessor and the appeal assessor.
- 69 It follows that during the appeal procedure the applicant was not aware of all the information on the basis of which the appeal assessor adopted his final decision and that he was therefore unable to make known his point of view regarding it.
- 70 The Court further finds that the file made up by the first assessor for the purpose of drawing up the original report, which was later communicated to the Joint Committee on Staff Reports and the appeal assessor, contains a number of documents, in particular the document entitled *Execution of the 'special loans' inquiry, EDF sector*, concerning work the performance of which extended not only over the reference period covered by the staff report but also over the period from January to April 1990. Article 5 of the General Provisions provides that the report must relate strictly to the reference period. Consequently, the Court cannot be certain that the final staff report, as drawn up by the appeal assessor, was not adopted by taking into consideration factors relating to a period later than the reference period, which was from January 1988 to December 1989.

- 71 It follows from all the foregoing that the appeal procedure was unlawful, that the contested staff report must therefore be annulled and that it is unnecessary to consider whether there was an infringement of Article 26 of the Staff Regulations in this case.
- 72 Pursuant to Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the defendant has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber)

hereby:

- 1. Annuls the decision of 27 July 1990 drawing up the applicant's revised staff report on appeal for the period from 4 January 1988 to 31 December 1989;**
- 2. Orders the Court of Auditors to pay the costs.**

García-Valdecasas

Briët

Bellamy

Delivered in open court in Luxembourg on 10 December 1992.

H. Jung,

R. García-Valdecasas

Registrar

President