JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)

10 June 2004 *

In Case T-307/01,

Jean-Paul François, an official of the Commission of the European Communities, residing in Wavre (Belgium), represented by A. Colson, lawyer, with an address for service in Luxembourg,

applicant,

v

Commission of the European Communities, represented by J. Currall, acting as Agent, assisted by B. Wägenbaur, lawyer, with an address for service in Luxembourg,

defendant,

APPLICATION, first, for annulment of the Commission's decision of 5 April 2001 imposing on the applicant the disciplinary measure of relegation in step and, second, for damages in compensation for the material and non-material harm which the applicant considers that he suffered,

* Language of the case: French.

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

composed of: P. Lindh, President, R. Garcia-Valdecasas and J.D. Cooke, Judges,

Registrar: I. Natsinas, Administrator,

having regard to the written procedure and further to the hearing on 2 December 2003,

gives the following

Judgment

Legal background

1 Article 68 of Commission Regulation 86/610/EEC, Euratom, ECSC of 11 December 1986 laying down detailed rules for the implementation of certain provisions of the Financial Regulation of 21 December 1977 (OJ 1986 L 360, p. 1, hereinafter 'the Regulation implementing the Financial Regulation'), which was in force at the material time (Regulation 86/610 was repealed and subsequently replaced by Commission Regulation (Euratom, ECSC, EC) No 3418/93 of 9 December 1993 (OJ 1993 L 315, p. 1)), provided:

'The Advisory Committee on Procurements and Contracts shall be required to give its opinion, in an advisory capacity, in accordance with the provisions of Articles 54, 55 and 94 of the Financial Regulation, on:

(a) all proposed contracts for works, supplies or services involving amounts exceeding those given in Articles 54 and 94 of the Financial Regulation and on proposed purchases of immovable property, irrespective of the amount involved;

(b) any proposed agreement supplementary to any contract as referred to in (a) whenever the effect of such supplementary agreement would be to alter the amount involved in the original contract;

...

(f) questions arising at the time of conclusion or in the course of performance of contracts (e.g. cancellation of orders, requests for remission of penalties for delay, departures from the specifications and general conditions of contract), should the matter be sufficiently serious to justify a request for an opinion);

...'

2 The first paragraph of Article 11 of the Staff Regulations of Officials of the European Communities (hereinafter 'the Staff Regulations') provides that an official must carry out his duties and conduct himself solely with the interests of the Communities in mind.

3 Article 21 of the Staff Regulations provides:

'An official, whatever his rank, shall assist and tender advice to his superiors; he shall be responsible for the performance of the duties assigned to him.

An official in charge of any branch of the service shall be responsible to his superiors in respect of the authority conferred on him and for the carrying out of instructions given by him. The responsibility of his subordinates shall in no way release him from his own responsibility.

An official who receives instructions which he considers to be irregular or likely to give rise to serious difficulties shall inform his immediate superior, if necessary in writing. If the official then receives written confirmation of the instructions from his superior, he shall carry them out unless they constitute a breach of criminal law or of the relevant safety standards.'

4 Article 86 of the Staff Regulations provides that any failure by an official or former official to comply with his obligations under the Staff Regulations, whether intentionally or through negligence on his part, is to make him liable to disciplinary action. The disciplinary measures provided for in Article 86(2) include that of relegation in step.

5 The fifth paragraph of Article 88 of the Staff Regulations provides:

'Where ... the official is prosecuted for those same acts, a final decision shall be taken only after a final verdict has been reached by the court hearing the case.'

Facts

6 The applicant is an official in Grade B 3 at the Commission. At the material time for the purposes of the disciplinary proceedings in question he was assigned to the Security Office of the Commission's Directorate-General for Personnel and Administration and managed the finance unit of the Security Office. The applicant's superiors at the time were Mr De Haan, director of the Security Office, and Mr Eveillard, the latter's assistant and head of the 'Brussels Protection' unit.

7 In 1991 the Commission published an invitation to tender for the guarding of its buildings in Brussels. In October 1992, the guarding contract, which involved an amount of ECU 75 000 000, was awarded to the company IMS/Group 4, taking effect on 1 November 1992 for a period of five years. As one of the duties of the post which he then occupied, the applicant was required to participate in the drawing up and performance of that contract.

8 Before signing the guarding contract, the successful tenderer asked to be given a guarantee against the risk of fluctuation of the exchange rate between the Belgian

franc and the ecu, the currency in which the contract had been denominated. In response to that request, an agreement supplementary to the contract (Annex 1) was adopted, amending the proposed contract which had already been submitted to the Advisory Committee on Procurement and Contracts (hereinafter 'the ACPC'), without further consulting the latter beforehand. That Annex 1 contained a clause providing for adjustment of the contract prices in line with variations in the value of the ecu vis-à-vis the Belgian franc and inserted other amendments into the guarding contract.

9 In November 1992, a consultation note relating to the supplementary agreement in question was drawn up for the attention of the ACPC. However, that correspondence became lost in the archives of the Security Office. When it was found, in January 1993, it was not forwarded to the ACPC.

10 In January 1993, Financial Control refused to countersign a payment order relating to the performance of the guarding contract, on the ground that the payments were denominated in Belgian francs and not in ecus, as is apparent from the administrative inquiry report of 14 July 1998 (page 13) drawn up by Mr Reichenbach, who at that time was Director-General of the Commission's Directorate-General for Health and Consumer Protection, at the request of Mr Trojan, Secretary-General of the Commission, from the report of 6 January 1999 (page 12) drawn up by Ms Flesch, Director-General of the Commission's Translation Service, for the appointing authority and, finally, from the appointing authority's report to the Disciplinary Board of 24 February 1999 (point 31).

11 Following that refusal of countersignature by Financial Control, an Annex 3 to the contract was signed on 27 January 1993 by Mr De Haan, Director of the Security Office, and Mr Alexandre, executive director of the company awarded the contract. That Annex 3 annulled, with effect from 1 February 1993, the provisions in Annex 1 concerning the adjustment clause relating to fluctuations in the exchange rate between the Belgian franc and the ecu.

12 On 17 February 1993, the Commission's Directorate-General for Financial Control began an audit of the Security Office's activities and, in particular, of the award of the guarding contract. Its final report was delivered on 7 July 1993. That report (pages 10, 11 and 12) makes reference, inter alia, to the amendments inserted by Annex 1 into the guarding contract after the ACPC had been consulted and to the negative financial consequences which stemmed from that annex.

13 Following the publication, on 18 August 1997, of an article in the *De Morgen* newspaper alleging improper personal involvement in the award of the guarding contract and raising the issue of the Commission's general responsibility as regards the supervision of the management of that contract, the Unit for the Coordination of Fraud Prevention (UCLAF) carried out an inquiry into that contract. UCLAF delivered its inquiry report on 12 March 1998, criticising alleged serious irregularities in the award and performance of the guarding contract in question. On 21 April 1998, Mr Trojan asked Mr Reichenbach to conduct an inquiry into the guarding contract awarded to IMS/Group 4. The report of that administrative inquiry was delivered on 14 July 1998.

Disciplinary proceedings

14 On 29 July 1998, the appointing authority decided to initiate disciplinary proceedings against the applicant. The appointing authority also initiated disciplinary proceedings against the applicant's superiors, Mr De Haan and Mr Eveillard.

15 On 29 July 1998, the appointing authority notified the applicant of the charges, which related to the existence on his part of 'professional [mis]conduct and grave negligence as regards compliance with the rules of financial management, in

particular in the drawing up and performance [of the guarding contract concluded with the company IMS/Group 4]' (hereinafter 'charge No 1'). By note of 23 September 1998, the appointing authority informed the applicant of the following six further charges:

'Charge No 2:

Tolerance of, or even involvement in, manipulation, after the closing date, of tenders received in connection with the award of the contract for guarding the [Commission's] buildings in 1992 (with an approximate value of ECU 75 000 000 over five years); that manipulation consisted in passing details of one or more tenders to one of the tendering firms (IMS/Group 4), in accepting a new tender from that firm, which incorporated a downward adjustment of the prices, and in replacing the original tender, with a view to influencing the award of that contract in favour of that firm, all this being done dishonestly, fraudulently and in contravention of the relevant rules, as well as, inter alia, of the provisions of the first paragraph of Article 17 of the Staff Regulations.

Charge No 3:

Involvement in drawing up an annex to the (proposed) guarding contract of 1992 after the approval by the ACPC of the proposal to award the contract to the firm IMS/Group 4 and of the terms of the proposed contract, either acting deliberately so as to enable the firm to [offset] the loss sustained [as a result of] the new tender, and therefore fraudulently, or through grave negligence, since the clauses of the annex were in part contrary to the terms of the invitation to tender and of the tender documents as approved by the ACPC, and [that] to the detriment of the Commission's financial interests.

Charge No 4:

[F]ollowing the preparation of the abovementioned annex, failure, whether deliberate ... or through grave negligence, to inform or consult the ACPC and/or Financial Control about the annex and the amendment to the contract resulting from it as compared with the proposed contract approved by the ACPC, either before or after the conclusion of the contract incorporating it.

Charge No 5:

Tolerance of, or even involvement in, abuse of the guarding contract thus drawn up, whereby it was systematically proposed to engage a large number of persons at the Security Office and in other departments in order to carry out administrative or other tasks, in return for the drawing up by the firm of contracts of engagement of employees, in breach of the clauses of the contract concluded by the Commission, of the procedures laid down for the engagement of staff and of the operative part of the relevant [budget] heading, without obtaining valid authorisation from, or informing, the departments responsible for those matters and in breach of the clauses of the contract relating to the payment of overtime connected with guarding duties.

Charge No 6:

More generally, that he failed to carry out [his] duties as head of the Security Office's finance unit solely with the interests of the Community in mind, contrary to the provisions of the first paragraph of Article 11 of the Staff Regulations.

Charge No 7:

That he should make good, in whole or in part, the damage suffered by the Communities as a result of serious misconduct (Article 22 of the Staff Regulations).'

16 On 6 October 1998, the applicant was heard, pursuant to Article 87 of the Staff Regulations, by Ms Flesch, Director-General of the Commission's Translation Service, who was appointed for that purpose by the appointing authority.

17 Ms Flesch submitted her report to the appointing authority on 6 January 1999. In it, she found, in so far as concerns the applicant, professional shortcomings, failures to comply with the rules governing public contracts, with the provisions of the Financial Regulation and with administrative and budgetary procedures, as well as infringements of the Staff Regulations. Following the submission of that document, the appointing authority submitted to the Disciplinary Board a report dated 24 February 1999, setting out the seven charges against the applicant.

18 In its reasoned opinion delivered on 9 March 2000, the Disciplinary Board took the view that charges Nos 1, 3, 4, 5 and 6 were established and rejected charges Nos 2 and 7. In its opinion, the Disciplinary Board recommended the imposition on the applicant of the disciplinary measure referred to in Article 86(2)(d) of the Staff Regulations, namely, relegation in step, proposing that the measure should, in this case, relate to two steps.

19 On 25 May 2000, the applicant was heard by the appointing authority and delivered a written pleading.

20 On 5 April 2001, the appointing authority adopted a decision pronouncing the disciplinary measure of relegation in step with effect from 1 May 2001. The appointing authority referred to the opinion of the Disciplinary Board in which it considered charges Nos 1, 3, 4, 5 and 6 to be established, and confirmed those charges. In the light of the wording of that disciplinary decision, the charges upheld against the applicant may be summarised as follows:

— professional misconduct and grave negligence as regards compliance with the rules of financial management, inter alia in the drawing up and performance of the guarding contract concluded in October 1992 between the Commission and the company IMS/Group 4, in particular on account of the applicant's involvement in the drawing up of an annex to that contract, the clauses of which proved to be contrary to the terms of the invitation to tender and the tender documents as approved by the ACPC and to the financial interests of the Commission (charges Nos 1 and 3);

— grave negligence consisting in failure to comply with the obligation to consult the ACPC on the annex in question, in contravention of Article 111 of the general implementing provisions of the Financial Regulation (charge No 4);

— abuse of the guarding contract for the purpose of engaging a large number of persons in the Security Office, other Commission departments and elsewhere, in order to carry out administrative or other tasks in return for the drawing up by the company IMS/Group 4 of contracts for the engagement of employees, and that in breach of the contract relating to the engagement of guards, of the procedures laid down for the engagement of staff and of the operative part of the relevant budget heading, without obtaining authorisation from, or informing, the departments responsible for those matters, in consideration of the payment of overtime envisaged for security tasks, with the extenuating circumstance that there was a chronic shortage of staff in the Security Office and that the practice in question was not unusual at the time (charge No 5);

— that he failed to carry out his duties solely with the interests of the Community in mind, contrary to the provisions of the first paragraph of Article 11 of the Staff Regulations (charge No 6).

21 With regard to charge No 2, the decision of 5 April 2001 provides:

'If necessary, it will be for the appointing authority to reopen the disciplinary proceedings on the basis of Article 11 of Annex IX to the Staff Regulations, in particular if the judicial investigation currently taking place ... establishes that there was manipulation of IMS/Group 4's tender after 28 August 1992 and before the file was submitted to the ACPC.'

22 The disciplinary proceedings initiated against Mr Eveillard also resulted in the adoption of a disciplinary measure. An action against that decision was brought before the Court of First Instance in Case T-258/01 *Eveillard* v *Commission*. However, there was no final decision in the case of Mr De Haan, who died on 30 August 2000, shortly after the opinion of the Disciplinary Board concerning him was delivered.

23 On 29 May 2001, the applicant lodged a complaint under Article 90(2) of the Staff Regulations against the appointing authority's decision of 5 April 2001.

24 By decision of 10 September 2001, the appointing authority rejected the applicant's complaint. In that decision, the appointing authority confirmed the charges upheld against the applicant, while at the same time adding a number of details in response to his contentions. Firstly, so far as concerns charges Nos 3 and 4, relating to the drawing up of the annex in question and to the failure to consult the ACPC, the appointing authority took the view that the culpable aspect lay in the fact that the

applicant had not informed his superiors, contrary to the requirement laid down in Article 21 of the Staff Regulations, of the obligation to consult the ACPC, and had not pointed out that the annex in question was contrary to the financial interests of the Commission. Secondly, as regards charge No 5, alleging abuse of the guarding contract, the appointing authority complained that the applicant had not informed his superiors of the irregularity, which, according to it, he knew about, of the fact that his colleague, Mr Burlet, was carrying out purely administrative tasks while being paid by the company which had successfully tendered for the guarding contract. Thirdly, in the case of charge No 6, relating to the fact that the applicant did not carry out his duties solely with the interests of the Community in mind, the appointing authority stated that the applicant had not informed his superiors, in contravention of the first paragraph of Article 11 of the Staff Regulations, of the consequences of failure to consult the ACPC, even though it would have been obvious to the head of a finance unit that the content of the annex created a distortion of competition.

25 By its decision of 10 September 2001, the appointing authority offered the applicant compensation of EUR 500 in respect of the non-material damage resulting from the prolonged uncertainty in which he may have found himself as a result of the fact that the period which elapsed between the final Disciplinary Board opinion delivered in the abovementioned disciplinary proceedings — namely, the opinion adopted on 4 July 2000 in the proceedings conducted against Mr Eveillard — and the appointing authority's decision had been nine months.

Criminal proceedings before the Belgian courts

26 On 23 April 1998, following the UCLAF inquiry report, the Commission lodged a complaint with the public prosecutor for Brussels in relation to the alleged irregularities in the award and performance of the guarding contract. That complaint, to which the UCLAF report of 12 March 1998 was attached, covered the conditions under which the contract was awarded, in particular the possible manipulation of the IMS/Group 4 tender, the drawing up of the annexes to the contract, the failure to consult the APAC, the question whether the services were actually provided and the propriety of the procedures by which persons receiving salaries under the contract were engaged.

27 On 1 March 2001, the European Community, represented by the Commission, claimed damages as a civil party in the criminal proceedings brought before the Belgian courts against the applicant, against Mr Eveillard and against Mr Alexandre, the latter being the executive director of the company awarded the contract.

28 On 27 March 2001, the public prosecutor for Brussels made an application for the dismissal of proceedings after indictment.

29 On 4 May 2001, the Commission lodged an application with the investigating judge for further measures of investigation to be carried out, which was rejected by order of 31 May 2001.

30 On 15 June 2001, the Commission appealed against that order. By judgment of 6 August 2001, the Chamber for Indictments of the Cour d'appel de Bruxelles (Court of Appeal, Brussels) declared the Commission's appeal unfounded.

31 On 19 March 2002, the Tribunal de première instance de Bruxelles (Court of First Instance, Brussels), sitting in chambers, made an order dismissing the submissions lodged by the Commission at the hearing on 12 March 2002. The court sitting in chambers held that the lodging of that document out of time was in no way justified and that there was no incriminating evidence in respect of the ingredients of the offences referred to.

32 On 2 April 2002, the Commission appealed against that order before the Cour d'appel de Bruxelles.

33 On 30 April 2002, the public prosecutor at the Cour d'appel de Bruxelles made an application for a declaration by the Chamber for Indictments of that court that the Commission's appeal was unfounded, on the ground that there was no incriminating evidence against the accused.

34 On 28 May 2002, the Chamber for Indictments of the Cour d'appel de Bruxelles gave a judgment declaring the Commission's appeal unfounded. In its judgment, the Cour d'appel de Bruxelles held that there was no incriminating evidence against the accused in respect of the charges relating, in particular, to the alteration of the tender, to the adoption of the annex in question and to the invoicing, under the guarding contract, of services unconnected with the performance of that contract. The Cour d'appel de Bruxelles further held that the Commission had not shown that it had suffered damage. Since the Commission has lodged no appeal in cassation against that judgment, that judicial decision has, accordingly, become final.

Procedure and forms of order sought by the parties

35 By application lodged at the Registry of the Court of First Instance on 10 December 2001, the applicant brought the present action.

36 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Fifth Chamber) decided to open the oral procedure. By way of measures of organisation of procedure, the Court requested the parties to produce certain documents and to reply in writing to certain questions. In particular, the Court requested the Commission to produce the applicant's disciplinary file. The parties complied with those requests within the prescribed period.

37 The parties presented oral argument and their replies to the Court's questions at the hearing in open court on 2 December 2003.

38 At the hearing, the applicant made it clear, in reply to a question from the Court, that the amount sought in compensation for the material and non-material damage which he claims to have suffered was EUR 37 500. The Commission, also in reply to a question from the Court, withdrew its arguments to the effect that the head of claim relating to the alleged material damage suffered by the applicant was inadmissible on the ground that it was put forward for the first time at the stage of the reply.

39 The applicant claims that the Court should:

— annul the appointing authority's decision of 5 April 2001;

— order the defendant to pay the sum of EUR 37 500 in compensation for the material and non-material damage suffered;

— order the defendant to pay the costs in their entirety.

40 The Commission contends that the Court should:

— dismiss the application;

— make an appropriate order as to costs.

Law

I — *The claim for annulment*

41 The applicant relies, in support of his claim for annulment, in the first place, on a plea in law alleging infringement of the procedural rules and of the rights of the defence in the disciplinary proceedings; in the second place, on a plea in law alleging manifest error of assessment of the facts alleged against him; in the third place, on a plea in law alleging breach of the principle of non-discrimination and, in the fourth place, on a plea in law alleging breach of the principle of the protection of legitimate expectations and good faith.

A — *The first plea in law, alleging infringement of the procedural rules and of the rights of the defence in the disciplinary proceedings*

42 The applicant maintains that the disciplinary proceedings were vitiated by procedural irregularities arising, in his view, from infringement by the appointing authority of the provisions of the Staff Regulations governing the organisation of those proceedings, and from infringement of the rights of the defence. The applicant makes, in particular, the following complaints: undue delay in the adoption of the disciplinary measure; failure to suspend the disciplinary proceedings notwithstanding the existence of criminal proceedings; belated and incomplete access to the file; failure to incorporate in the file and to make available important documents and failure to hear important witnesses.

1. Delay in the adoption of the disciplinary measure

Arguments of the parties

43 The applicant points out that the disciplinary measure imposed on him was adopted more than eight years after the facts alleged against him, even though, in the meantime, he continued to discharge his duties and to run his unit without any comment on the part of the administration.

44 The Commission notes that the provisions of the Staff Regulations concerning the disciplinary system applicable to officials do not lay down any limitation period with regard to the initiation of disciplinary proceedings.

Findings of the Court

45 In Articles 86 to 89 and in Annex IX, which concern the disciplinary system applicable to Community officials, the Staff Regulations do not provide for any limitation period with regard to the initiation of disciplinary proceedings against an official accused of having failed to fulfil one of his obligations under the Regulations. It is important to note, in that regard, that, in order to fulfil its function of ensuring legal certainty, a limitation period must be fixed in advance by the Community legislature (judgments in Case T-26/89 *de Compte* v *Parliament* [1991] ECR II-781, paragraph 68, and Case T-197/00 *Onidi* v *Commission* [2002] ECR-SC I-A-69 and II-325, paragraph 88).

46 None the less, it must be recalled that, in order to overcome the adverse consequences which may result from the absence of a limitation period with regard to the exercise by the administration of its powers, the Court has held that, in the absence of any such period, the fundamental requirement of legal certainty has the effect of preventing the Commission from indefinitely delaying the exercise of its powers, and that, therefore, the Community judicature, when examining a complaint alleging that the Commission's action was too late, must not merely find that no limitation period exists, but must satisfy itself that the Commission did not act with unreasonable delay (judgments of the Court of Justice in Case 52/69 *Geigy* v *Commission* [1972] ECR 787, paragraph 21, concerning the Commission's power to impose fines for infringement of the competition rules, and Joined Cases C-74/00 P and C-75/00 P *Falck and Acciaierie di Bolzano* v *Commission* [2002] ECR I-7869, paragraph 140, concerning the review of aid granted under the ECSC Treaty).

47 With regard, more specifically, to the disciplinary system applicable to Community officials, it should be noted as a preliminary point that, while the Staff Regulations do not lay down a limitation period within which disciplinary proceedings must be initiated, Annex IX to those regulations, and in particular Article 7, none the less sets strict time-limits for the conduct of disciplinary proceedings. It is settled case-law that, although those time-limits are not mandatory, they do constitute rules of sound administration the purpose of which is to avoid, in the interests both of the administration and of officials, unjustified delay in adopting the decision terminating the disciplinary proceedings (judgments of the Court of Justice in Case 13/69 *Van Eick* v *Commission* [1970] ECR 3; Case 228/83 *F.* v *Commission* [1985] ECR 275; Joined Cases 175/86 and 209/86 *M.* v *Council* [1988] ECR 1891; and *de Compte* v *Parliament*, cited above, paragraph 88). It follows from the importance attached by the Community legislature to sound administration that disciplinary authorities are under an obligation to conduct disciplinary proceedings with due diligence and to ensure that each procedural step is taken within a reasonable period following the previous step (judgments in Case T-549/93 *D* v *Commission* [1995] ECR-SC I-A-13 and II-43, paragraph 25, and *Onidi* v *Commission*, cited above, paragraph 91). Failure to observe such a period, which can be assessed only in the light of the specific circumstances of the case, may result in the measure adopted after the expiry of the period being declared void (judgments in *D* v *Commission*, cited above, paragraph 25, and *de Compte* v *Parliament*, paragraph 88).

48 That duty of diligence and of observance of a reasonable period is also essential with regard to the initiation of disciplinary proceedings, in particular where and from the time when the administration becomes aware of facts and conduct which are liable to constitute breaches of an official's obligations under the Staff Regulations. Even in the absence of a limitation period, disciplinary authorities are under an obligation to ensure that proceedings intended to result in a disciplinary measure are initiated within a reasonable period (judgment in Case T-78/02 *Voigt* v *ECB* [2003] ECR-SC I-A-165 and II-839, paragraph 64). Failure to observe a reasonable period for initiating disciplinary proceedings, which here again depends on the specific circumstances of the case, may render any disciplinary proceedings initiated with undue delay by the administration unlawful and, accordingly, may result in the annulment of the disciplinary measure adopted at the conclusion of those proceedings (see, by analogy, judgment of the Court of Justice in Case C-270/99 P *Z* v *Parliament* [2001] ECR I-9197, paragraphs 43 and 44; judgments in *D* v *Commission*, paragraph 25, and *de Compte* v *Parliament*, paragraph 88).

49 It is important also to point out that the principle of legal certainty is undermined if the administration delays unduly the initiation of disciplinary proceedings. Both the assessment by the administration of the facts and conduct liable to constitute a disciplinary offence and the exercise by the official of his rights as the defendant may prove particularly difficult if a substantial period of time has elapsed between the time when those facts and that conduct took place and the start of the disciplinary inquiry. On the one hand, important witnesses and documents — whether in the defendant's favour or otherwise — may have disappeared and, on the other, it becomes difficult for everyone concerned, including witnesses, to reconstruct faithfully their memories of the facts of the case and the circumstances in which they arose. Consequently, it is important to bear in mind, by way of example, that, in this case, Mr De Haan, who, as stated previously, headed the Security Office at the material time, died on 30 August 2000, that is to say, well after the facts alleged against the applicant in this case, but before the conclusion of the disciplinary proceedings concerning him.

50 Consequently, the Court is unable in this case to limit its examination of the validity of this complaint to a finding that no limitation period existed in the context under consideration. It must therefore be ascertained whether the Commission acted with undue delay.

51 It must be borne in mind that the guarding contract, the conclusion and performance of which underlie the disciplinary proceedings brought against the applicant, was signed in October 1992. The preparation and conclusion of the annex at issue, in which the applicant participated and which constitute charge No 3 against him, took place in October 1992. The consultation note concerning that annex, the failure to forward which justifies, in the appointing authority's view, charge No 4, was found in January 1993 and should, in the Commission's view, have been forwarded to the ACPC then at the latest. With regard to the facts covered by charge No 5, regarding breach by the applicant of the duty to inform his superiors of the fact that his colleague, Mr Burlet, was performing administrative duties even though he was paid under the guarding contract, it should be noted that Mr Burlet, who had already worked in the Security Office from 15 July 1992 to 15 March 1993 in an acting capacity, was engaged by IMS/Group 4 on 16 March 1993 as an administrative employee responsible for administrative tasks at the Commission, but that he nevertheless only worked in the Security Office in that capacity until 16 May 1993, thereafter being granted successive periods of unpaid leave by IMS/Group 4.

52 It is apparent from the file that the Commission had become aware of the alleged irregularities concerning the conclusion and performance of the guarding contract well before the date of initiation of disciplinary proceedings. The administrative inquiry report of 14 July 1998 (page 13), drawn up by Mr Reichenbach, shows that the Cabinet of the President of the Commission had been informed at the beginning of 1993 of the alleged irregularities concerning the guarding contract. In January 1993, Financial Control refused its countersignature on the ground that the payments were to be made in Belgian francs and not in ecus (see paragraph 10 above). That refusal to countersign led to the partial annulment of the annex at issue by supplementary agreement signed on 27 January 1993 (see paragraph 11 above). On 17 February 1993, the Commission's Directorate-General for Financial Control began an audit of the Security Office's activities and of the award of the guarding contract. The final report by the Directorate-General for Financial Control dates from 7 July 1993 and mentions breaches of the procedures for the control and approval of financial operations and contracts and deals, more specifically, with the amendments inserted in the guarding contract submitted to the ACPC, which, that report points out, had not been approved by that body, were contrary to the terms and conditions of the contract and involved an increase in the cost of the services

provided and a distortion of competition. The administrative inquiry report of 14 July 1998 refers to that audit of July 1993, while pointing out that it had mentioned 'substantial problems', but that no administrative or disciplinary action had followed, apart from the fact that Mr Eveillard had ceased to be entrusted with the duties of head of the 'Brussels Protection' unit.

53 However, it was only on 29 July 1998 that the appointing authority initiated disciplinary proceedings against the applicant. The initiation of disciplinary proceedings therefore took place almost six years after the facts alleged occurred. The disciplinary measure was in turn adopted only on 5 April 2001, almost three years after the initiation of disciplinary proceedings.

54 Consequently, and having regard to the circumstances of the case, the Court is of the view that, since the facts alleged against the applicant date from October 1992 and since the Commission became aware of the alleged irregularities in question between January and July 1993 at the latest, that institution acted with undue delay by not initiating disciplinary proceedings against the applicant until 29 July 1998. That failure on the part of the Commission to observe a reasonable period for initiating disciplinary proceedings constitutes a flagrant breach of the principle of legal certainty and sound administration and a breach of the applicant's rights as defendant and, accordingly, renders those disciplinary proceedings unlawful.

55 It follows from the foregoing that this ground of challenge is well founded.

2. Failure to suspend the disciplinary proceedings pending the conclusion of the judicial proceedings

Arguments of the parties

56 The applicant raises the point that the appointing authority did not accede to his repeated requests for suspension of the disciplinary proceedings pending the conclusion of the criminal proceedings brought against him before the Belgian courts. The applicant submits that it was obvious that those proceedings were going to culminate in dismissal.

57 The Commission points out that disciplinary proceedings and criminal proceedings do not have the same purpose, since the former concern possible infringements of the criminal code, whereas disciplinary proceedings concern breaches of certain obligations laid down by the Staff Regulations of Officials which, by definition, are not criminal in nature since, moreover, disciplinary measures can concern only the employment relationship between the person concerned and his employer. The Commission recalls that proceedings concerning disciplinary measures against officials are administrative, rather than judicial (order in Case C-252/97 P *N* v *Commission* [1998] ECR I-4871, paragraph 52).

58 At the hearing, in reply to a question from the Court, the Commission contended that, in this case, there had been no overlap between the criminal proceedings and the disciplinary proceedings, since the facts and their legal characterisations in the two sets of proceedings were different. The purpose of the criminal proceedings was, in particular, to bring to light any offences of forgery, uttering and fraud, whereas the disciplinary proceedings imposed sanctions for negligence and omissions constituting breaches of the applicant's professional obligations. It was for that reason, the

Commission contends, that the appointing authority decided, in the disciplinary proceedings, to separate the disciplinary aspect from the criminal aspect. The Commission maintains, finally, that suspension of the disciplinary proceedings pending the conclusion of the criminal proceedings would have delayed substantially the conduct of the disciplinary proceedings.

Findings of the Court

59 The fifth paragraph of Article 88 of the Staff Regulations provides that '[w]here ... the official is prosecuted for those same acts, a final decision shall be taken only after a final verdict has been reached by the court hearing the case'. It is clear from that provision that the appointing authority is precluded from giving a final decision on the disciplinary aspect of the case involving the official concerned by adjudicating on facts which are at the same time in issue in criminal proceedings, so long as the decision given by the criminal court seised has not become final (judgment in Case T-166/02 *Pessoa e Costa* v *Commission* [2003] ECR-SC I-A-89 and II-471, paragraph 45). The fifth paragraph of Article 88 of the Staff Regulations does not, therefore, confer any discretion on the appointing authority responsible for taking the final decision in the case of an official in relation to whom disciplinary proceedings have been initiated, unlike the second paragraph of Article 7 of Annex IX to the Staff Regulations, under which, in the event of criminal proceedings, the Disciplinary Board may decide not to deliver its opinion until after the Court has given its decision (judgment in Case T-74/96 *Tzoanos* v *Commission* [1998] ECR-SC I-A-129 and II-343, paragraphs 32 and 33).

60 It is important to note first of all, as is apparent from his disciplinary file, that, by letter of 8 April 1999, the applicant informed the chairman of the Disciplinary Board that the disciplinary proceedings which had been initiated against him manifestly called, beforehand, for a verdict on the validity of the criminal charges brought against him before the judicial authorities of Belgium and he applied, on the basis of the fifth paragraph of Article 88 of the Staff Regulations, for suspension of the disciplinary proceedings pending the conclusion of the criminal investigation. In

response to that letter, on 23 April 1999, the chairman of the Disciplinary Board asked the Commission's Directorate-General for Personnel and Administration for information on the existence, scope and progress of the criminal proceedings in question. The staff of that directorate-general then requested information from UCLAF by letter of 4 May 1999. UCLAF replied by letter of 28 May 1999, confirming that the referral of the case to the public prosecutor for Brussels by the Secretariat-General of the Commission on 23 April 1998 had given rise to the commencement of investigation proceedings before the Belgian investigating judge, Mr Van Espen, on 19 May 1998. It is important to note, finally, that, in his written statement of 25 May 2000 to the appointing authority, the applicant reiterated his request for suspension of the disciplinary proceedings pending the conclusion of the criminal proceedings.

61 The criminal proceedings brought against the applicant ended with the judgment of 28 May 2002 of the Chamber for Indictments of the Cour d'appel de Bruxelles. Accordingly, in the absence of any appeal in cassation by the Commission, that judgment constitutes the final verdict of the Belgian courts in relation to the applicant for the purposes of the fifth paragraph of Article 88 of the Staff Regulations.

62 It must be pointed out in that regard that the disciplinary proceedings concerning the applicant were concluded before 28 May 2002, the date of delivery of the judgment of the Chamber for Indictments of the Cour d'appel de Bruxelles. The appointing authority adopted the decision imposing a disciplinary measure on the applicant on 5 April 2001. On 10 September 2001, the appointing authority rejected the complaint submitted on 29 May 2001 by the applicant under Article 90(2) of the Staff Regulations, thus confirming that decision.

63 The Commission nevertheless contends that there was no overlap in this case between the criminal proceedings and the administrative proceedings and that, therefore, it was not obliged to await the conclusion of the criminal proceedings before giving its final decision in the disciplinary proceedings concerning the

applicant. It is therefore necessary to ascertain whether or not the offences which formed the subject-matter of the criminal proceedings were the same as those sanctioned in the disciplinary proceedings (judgment in *Tzoanos* v *Commission*, cited above, paragraph 35 and *Onidi* v *Commission*, cited above, paragraph 81).

64 Consequently, it must be pointed out that, on 23 April 1998, the Commission lodged with the public prosecutor for Brussels a complaint relating to the alleged irregularities in the award and performance of the guarding contract (see paragraph 26 above). That complaint, to which the UCLAF report of 12 March 1998 was attached, covered the conditions under which the contract was awarded, in particular the possible manipulation of the IMS/Group 4 tender, the drafting of the annexes to the contract and the failure to consult the ACPC, as well as the issue of whether the services were actually provided and the lawfulness of the procedures for engaging persons in receipt of salaries under the contract.

65 Following that complaint and the measures required by the investigating judge, the Office central pour la répression de la corruption (Central Bureau for the Suppression of Corruption) of the Brussels criminal investigation department drew up a summary report dated 21 June 2000 containing the results of the in-depth inquiry conducted in the case in question. In that report, the detective superintendent of the Brussels police, Mr L., took the view, in the first place, that it had not been proved that the IMS/Group 4 tender had been altered; in the second place, that an annex materially amending the contract had been signed, but that, although the prior control procedure had not been fully complied with, Financial Control had nevertheless been informed of that annex before it was signed and, in the third place, that certain employees of the IMS/Group 4 company, whose services had been invoiced under the guarding contract, had performed for the Commission duties which had nothing to do with that contract, but that the Commission was fully aware of that abuse, which was widespread at the time.

66 In its notice of 1 March 1001 claiming damages as a civil party before the investigating judge, the Commission alleged that it had suffered harm as a result of a

forgery of documents committed in connection with the invitation to tender, and as a result of the invoicing of services provided by persons who had not performed any tasks under the guarding contract.

67 In his application of 27 March 2001 for dismissal after indictment, the public prosecutor for Brussels concluded that there was insufficient evidence against the applicant and the other defendants, Mr Eveillard and Mr Alexandre, with regard, firstly, to the commission of forgery of public or private documents, secondly, to manipulations in connection with the invitation to tender, and, thirdly, to the existence of staff not assigned to perform the guarding contract, while nevertheless paid under that contract.

68 In its judgment of 6 August 2001, the Chamber for Indictments of the Cour d'appel de Bruxelles held, firstly, that the financial operations in question had in part been approved by the ACPC and that, moreover, they had received the agreement of Financial Control and, secondly, that the practices relating to the abuse of the guarding contract had taken place with the full knowledge of the Commission, whose agencies had organised and endorsed those practices.

69 In its order of 19 March 2002, the Tribunal de première instance de Bruxelles, sitting in chambers, held that there was no incriminating evidence for the constituent elements of the offences charged and that, in particular, the file did not contain the slightest evidence to suggest that the applicant, Mr Eveillard and Mr Alexandre had acted with any intent to defraud.

70 Finally, on 28 May 2002, the Chamber for Indictments of the Cour d'appel de Bruxelles gave a judgment declaring the appeal brought by the Commission on 2 April 2002 against the order of 19 March 2002 unfounded. In its judgment, the Cour d'appel de Bruxelles held that there was no incriminating evidence against the accused in respect of the charges relating to alteration of the tender, the adoption of the annex in question and the invoicing, under the guarding contract, of services unconnected with the performance of that contract.

71 It follows from all the foregoing that the conduct which was the subject-matter of the criminal proceedings can be classified into three distinct groups: first, the conditions under which the guarding contract was awarded, and in particular the alleged manipulation of the tender which was ultimately successful; second, the drafting and conclusion of the annex amending the content of the contract and the failure to consult the ACPC in that regard and, third, the existence of persons paid under the guarding contract for services which were not connected with the tasks provided for in that contract.

72 The first of those groups of facts, relating to the alleged manipulation of the tender, coincided with the subject-matter of charge No 2 made against the applicant by the appointing authority by note of 23 September 1998. However, that charge was not subsequently upheld by the Disciplinary Board, which rejected it in its opinion of 9 March 2000. The second group of facts, relating to the conclusion of the annex in question and to the failure to consult the ACPC, was the subject-matter of charges Nos 3 and 4, which were upheld against the applicant by the appointing authority in its decision imposing a disciplinary measure on 5 April 2001 and confirmed by the decision of 10 September 2001 rejecting the complaint made through official channels. Likewise, the third group of facts formed the basis of charge No 5, which was also upheld by the appointing authority against the applicant.

73 Consequently, it must be stated that the disciplinary proceedings brought against the applicant concerned the same facts as those which were the subject-matter of the

criminal proceedings. Since the conditions for the application of the fifth paragraph of Article 88 of the Staff Regulations were fulfilled, the Commission was therefore precluded from taking a final decision in the disciplinary proceedings concerning the official so long as no final verdict had been reached by the criminal courts.

74 That conclusion cannot be invalidated by the Commission's argument that, on the one hand, the respective legal characterisations of the facts in question were different in the criminal proceedings and in the disciplinary proceedings and that, on the other hand, the negligence and omissions specifically alleged against the applicant in the disciplinary proceedings did not constitute a criminal offence for which punishment could be imposed in criminal proceedings brought before the Belgian courts.

75 The Commission's view is based on a misreading of the fifth paragraph of Article 88 of the Staff Regulations. It should be pointed out that that provision has a twofold rationale. Firstly, that article is intended to ensure that the position of the official in question is not affected in any criminal proceedings instituted against him on the basis of facts which are also the subject-matter of disciplinary proceedings within his institution (judgment in *Tzoanos* v *Commission*, paragraph 34). Secondly, suspension of the disciplinary proceedings pending the conclusion of the criminal proceedings makes it possible to take into consideration, in those disciplinary proceedings, the findings of fact made by the criminal court when its verdict has become final. It must be borne in mind, for that purpose, that the fifth paragraph of Article 88 of the Staff Regulations establishes the principle that disciplinary proceedings arising out of a criminal offence must await the outcome of the criminal trial, a rule which is justified, in particular, by the fact that the national criminal courts have greater investigative powers than the appointing authority (judgment in Case T-23/00 *A* v *Commission* [2000] ECR-SC I-A-263 and II-1211, paragraph 37). Consequently, where the same facts may constitute both a criminal offence and a breach of the official's obligations under the Staff Regulations, the administration is bound by the findings of fact made by the criminal court in the criminal proceedings. Once that court has established the existence of the facts in the case, the administration can then undertake their legal characterisation in the light of the

concept of a disciplinary offence, ascertaining, in particular, whether they constitute breaches of obligations under the Staff Regulations (see, to that effect, judgment in *A* v *Commission*, cited above, paragraph 35).

76 Finally, the Commission's argument that suspension of the disciplinary proceedings would have considerably delayed their progress, and therefore the final decision in the applicant's case, cannot be accepted. Since the Commission waited more than five and a half years before initiating disciplinary proceedings against the applicant, it could not rely on the risk of a possible delay in order to justify its decision not to await the conclusion of the judicial proceedings before taking its final decision in the applicant's case from the disciplinary point of view. Moreover, the applicant did in fact, on several occasions, request suspension of the disciplinary proceedings. Since the verdicts of the Belgian criminal courts were favourable to dismissal in the applicant's favour, those requests for suspension were by no means attributable to delaying tactics on the part of the applicant, who had every interest in ensuring that the disciplinary proceedings took account of any final verdict of the criminal court which declared that the charges brought against him were unfounded.

77 It must therefore be held that the Commission infringed the fifth paragraph of Article 88 of the Staff Regulations by adopting a disciplinary measure against the applicant without awaiting the final verdict of the criminal court, and the applicant's ground of challenge must accordingly be upheld.

78 It follows from all the foregoing that the Commission infringed the procedural rules, the rights of the defence and principles of legal certainty and sound administration. Accordingly, the first plea in law must be declared well founded, without there being any need to examine the other grounds of challenge put forward by the applicant.

B — *The second plea in law, alleging manifest error of assessment of the facts alleged against the applicant*

1. Charge No 4: failure to consult the ACPC

Arguments of the parties

79 The applicant submits that it is not disputed that he did prepare the consultation note relating to the annex in question and addressed to the ACPC, and that that note was initialled by Mr Eveillard and signed by Mr De Haan. That note became lost in the Security Office's archives and therefore, for reasons completely beyond the applicant's control, did not reach its addressee. Once that note was found, the applicant informed his superiors of the need to send it, even belatedly; it was with full knowledge of the facts that his superiors did not see fit to send that note to the ACPC and it was not for the applicant to act against their decisions.

80 The Commission contends that it is established that the annex in question was not submitted to the ACPC for an opinion, that the applicant has not shown that he informed his superiors in an appropriate manner of the obligation to consult the ACPC and that he should have confirmed his warnings in writing. With regard to the applicant's assertions that it was not for him to act against the decisions of his superiors, the Commission recalls the wording of the third paragraph of Article 21 of the Staff Regulations and points out that the case-law concerning that article confirms that an official may not rely on the possible responsibility of his superiors in order to evade his own (judgment in *Tzoanos* v *Commission*, paragraphs 188 et seq.).

Findings of the Court

81 Under Article 68 of the Regulation implementing the Financial Regulation, prior consultation of the ACPC on the annex in question was mandatory in this case, since that annex amended substantively the financial conditions of the guarding contract. It should be noted, in that regard, that the specific charge against the applicant was that he failed to inform his superiors in an appropriate manner of the obligation to consult the ACPC.

82 It must be observed that Mr Eveillard, the applicant's superior, confirmed before the Disciplinary Board that he had been informed by the applicant that it was necessary to consult the ACPC on the agreement supplementary to the guarding contract. Likewise, the Commission does not dispute the fact that, in November 1992, the applicant prepared a consultation note relating to the annex to the contract, for the attention of the ACPC, and that that note was initialled by Mr Eveillard and signed by Mr De Haan. It is also common ground that that note became lost in the Security Office's archives. Nor is it disputed that the decision not to send that consultation note to the ACPC, once the note was found, was taken by Mr De Haan and Mr Eveillard, the applicant's superiors.

83 In the light of the foregoing, the Commission's argument that the applicant should have put his warnings in writing and that, having not done so, he shared his superiors' responsibility for not consulting the ACPC cannot be upheld in the circumstances of this case. Since the applicant informed his superiors by word of mouth of the obligation to consult, forwarded the contract together with its annexes to Financial Control and prepared the consultation note addressed to the ACPC, the charge that he failed to inform his superiors in an appropriate manner, based on the mere fact that he did not do so in writing, cannot be upheld against him.

84 Moreover, as regards the failure to consult the ACPC retrospectively at the time when the consultation note was found, in January 1993, it must be observed that the practical effect of such a belated consultation would have been no more than limited. Not only was the guarding contract already being performed, but, on 27 January 1993, following Financial Control's refusal to countersign a payment order, Annex 3 to the contract had been signed, annulling, with effect from 1 February 1993, the provisions of Annex 1 concerning the adjustment clause relating to fluctuations in the exchange rate of the ecu against the Belgian franc.

85 Consequently, charge No 4, concerning failure to forward to the ACPC the consultation note relating to the supplementary agreement in question, is unfounded.

2. Charge No 5: abuse of the security contract

Arguments of the parties

86 With regard to charge No 5, concerning abuse of the guarding contract, in particular so far as concerns the engagement of Mr Burlet to carry out administrative duties even though he was paid by the company awarded the contract, the applicant submits that that practice was common at the time, that the Commission hierarchy was aware of it and that, in the final analysis, it was organised and endorsed by the Commission itself. The applicant had not in any way taken on responsibility for engaging Mr Burlet, which in any case was not part of his duties, which were limited to drawing up the documents for settling the invoices of the company awarded the contract.

87 The Commission points out that the applicant is criticised for his tolerance of, or even involvement in, abuse of the guarding contract, a circumstance which the applicant has not disputed, and not for being responsible for engaging staff, including Mr Burlet. It is that knowledge of the facts, coupled with the failure to report them and to distance himself from them in appropriate ways, which is the subject-matter of charge No 5. With regard to the applicant's argument concerning the absence of any direct involvement on his part in the management of the guarding contract, the Commission contends that his job as head of the Security Office's finance unit did not relieve him of any responsibility in that regard and that, on the contrary, he was, on that basis, all the more obliged to inform his superiors of the abuse of that contract. The fact that such practices were 'common' at the time, which the Commission disputes, neither rids the conduct in question of its illegal character nor exempts the applicant from his specific responsibility in that regard.

Findings of the Court

88 It must be stated at the outset that the practices in question did not consist in using the guarding contract in order to remunerate fraudulently persons who had not provided any service for the Commission, but in engaging, under that contract, persons required to carry out real tasks within the Commission, those tasks being different, however, from those provided for in the guarding contract.

89 The various documents in the file show that the engagement of staff to carry out administrative tasks in connection with the performance of the guarding contract was a common practice at the time and that it was generally known about within the Commission. The decision adopting the disciplinary measure thus considered the circumstance that 'the Security Office's practice at the time was not unusual' to be extenuating with regard to the applicant. The summary report drawn up on 21 June 2000 by the detective superintendent of the Central Bureau for the Suppression of Corruption of the Brussels criminal investigation department, Mr L., following the

inquiry conducted by the Brussels criminal investigation department, noted in that regard (page 10) that '[that alleged abuse of the contract] was apparently carried on with the full knowledge of everyone, and even to general satisfaction' and that '[i]t was therefore the European Commission's agencies themselves which organised and endorsed that practice'. The successive decisions of the Belgian criminal courts also proved that that practice had been organised and endorsed by the agencies of the Commission.

90 The existence and general acceptance of such a practice within the Commission are also confirmed by the letter of 5 October 1987 from Mr Hay, the Commission's Director-General for Personnel and Administration at the time, to Mr De Haan. The subject of that letter was the division of responsibilities between the Security Office and the Directorate-General for Personnel and Administration and it made reference to a meeting of the Security Board on 23 July 1987. That letter stated: 'The Security Board [had] adopted the principle that "Intergarde staff undertaking guarding or security duties or mixed duties [would] be placed under the authority and management of the Security Office. Only staff having purely administrative duties would come under the [Directorate-General for Personnel and Administration]. A separate contract could, if necessary, be considered for that category of staff". In that regard, Mr Hay, after noting that 'almost all guarding staff [were undertaking] administrative and security duties [at the time], although the proportion [was] variable depending on the posting and/or building', and that, on the other hand, 'staff with purely administrative duties were very few in number', pointed out that 'it [seemed to him] inappropriate to draw up separate contracts which would make budgetary management more cumbersome and could, in the long term, be a source of demarcation disputes if the duties of one or other of those employees were to change, becoming more administrative or supervisory in nature'.

91 It is clear from the foregoing that the practice of engaging staff to carry out administrative duties under the guarding contract was not only known to the Commission and not unusual, as the decision of 5 April 2001 points out, but had been organised and endorsed by the relevant directorates-general of the

Commission and was part of their personnel management policy, designed to overcome the chronic shortage of in-house staff assigned to them, in order to fulfil the functions allocated to the various Commission departments.

92 It is unreasonable to accuse an official in category B, whose duties, according to Article 5(1) of the Staff Regulations, are executive duties, and not administrative duties, which correspond to those assigned to officials in category A, of failing to comply with his obligations under the Staff Regulations merely by virtue of not having reported that a colleague was being paid by the company awarded the guarding contract, a practice which had been organised by the various Commission departments, was widespread, had been instigated by the hierarchy of the institution and which, although irregular, was not inherently fraudulent.

93 In the light of those circumstances, and in particular of the fact that the applicant did not participate directly in the implementation of such a practice or in the engagement of Mr Burlet, it must be concluded that the appointing authority cannot uphold against the applicant a charge based on the mere fact of not having reported that Mr Burlet, his colleague, had performed purely administrative duties for three months while being paid by the company awarded the guarding contract, or of not having distanced himself from that practice in the appropriate ways.

94 Consequently, charge No 5, concerning abuse of the guarding contract, is unfounded.

3. Charge No 1: professional misconduct consisting of grave negligence as regards compliance with the rules of financial management

Arguments of the parties

95 The applicant points out that the audit report by Mr De Moor established that only certain errors arising from defective management were noteworthy. The applicant asserts that he never had to suffer the slightest critical remark from his superiors and that, on the contrary, they congratulated him on numerous occasions, as is attested by the periodic staff reports on him.

96 The Commission contends that the applicant has not disputed the truth of charge No 1. The staff reports cited by the applicant were not intended to assess or characterise the facts forming the basis of the disciplinary proceedings.

Findings of the Court

97 Charge No 1, concerning professional misconduct and grave negligence as regards compliance with the rules of financial management, in particular in the drawing up and performance of the guarding contract with IMS/Group 4, is not a separate charge and refers to the applicant's involvement in drawing up the annex in question and in failing to consult the ACPC. Consequently, it must be concluded that the considerations put forward in support of that charge have no separate existence independent of those upon which charges Nos 3 and 4 are based.

4. Charge No 6: infringement by the applicant of the first paragraph of Article 11 of the Staff Regulations, by virtue of not having carried out his duties solely with the interests of the Community in mind

Arguments of the parties

98 The applicant disputes the appointing authority's argument that he did not carry out his duties solely with the interests of the Communities in mind, inasmuch as he did not warn his superiors of the consequences of failure to consult the ACPC.

99 The Commission contends that the agreement supplementary to the guarding contract harmed the interests of the Communities and that the applicant does not dispute that circumstance.

Findings of the Court

100 This charge makes reference to the same conduct as that covered by charges Nos 1, 3 and 4 and, in particular, to the consequences of the irregularities alleged to have been committed by the applicant, notably the drawing up of the annex in question and the failure to consult the ACPC. Consequently, this charge is not self-contained and independent of charges Nos 1, 3 et 4.

101 It follows from all the foregoing that the second plea in law must also be declared unfounded, without there being any need to rule on the merits of charge No 3 since the disciplinary measure contained in the contested decision is single and indivisible

and the measure is based on the charges upheld in that decision, taken as a whole (see, to that effect, judgments in Case T-21/01 *Zavvos* v *Commission* [2002] ECR-SC I-A-101 and II-483, paragraph 316, and Case T-89/01 *Willeme* v *Commission* [2002] ECR-SC I-A-153 and II-803, paragraph 83).

102 Accordingly, without there being any need to rule on the other pleas in law relied on by the applicant, the present action must be declared well founded and the contested decision must be annulled.

II — *Claim for compensation*

Arguments of the parties

103 The applicant claims to have suffered considerable non-material damage on account of the development of this case, in particular as a result of the harassment which he suffered from 1992 onwards from certain investigators and as a result of the serious accusations made against him, which were circulated both inside and outside the institution, undermining his reputation and honour. The climate of suspicion thus created by the authority, he claims, disrupted his social and family life. He also experienced health problems resulting from the stress caused by that situation. Despite the thorough inquiries carried out by the Brussels prosecuting authorities, the Commission did not hesitate to act in a dilatory manner in order to delay the outcome of the criminal proceedings, which subsequently cleared the applicant completely.

104 With regard to the quantification of that damage, the applicant proposes an amount assessed on an equitable basis at EUR 37 500. The applicant also refers to the error

made by the Commission in imposing a disciplinary measure on him and to the fact that he was obliged to lodge a complaint under Article 90(2) of the Staff Regulations against the decision refusing to promote him to Grade B 2. He points out that, in connection with the various proceedings, he has had to pay lawyer's fees provisionally estimated at EUR 7 736.81.

105 In that regard, the Commission denies, in essence, that the inquiry conducted in this case can be described as harassment and contends that the alleged defamation of the applicant and his health problems stem, assuming they are proved, from the fact that, by not complying with his obligations under the Staff Regulations he ran the risk of disciplinary proceedings. As to the complaint lodged by the applicant against the decision refusing him promotion, the Commission submits that those proceedings have no bearing on the present case. Finally, the Commission concludes that the damage is not established and that there are no grounds for compensation. So far as the duration of the inquiry is concerned, the Commission points out that the Staff Regulations do not provide for any limitation period for the initiation of disciplinary proceedings and that, although, at the start of disciplinary proceedings, the appointing authority must presume that the person concerned is innocent, it may abandon that presumption once the facts alleged against him have been established.

106 In any event, the Commission states that it abides by its compensation offer of EUR 500 for non-material damage, in order to make up for the prolonged uncertainty which the applicant experienced between the date of the last Disciplinary Board opinion and the date of the final disciplinary decision.

Findings of the Court

107 According to settled case-law, for the Communities to be rendered liable it must be proved that the alleged conduct of the institution is illegal, that the damage is genuine and that there is a causal link between the conduct in question and the

damage alleged (judgments in Case T-3/92 *Latham* v *Commission* [1994] ECR-SC I-A-23 and II-83, paragraph 63; Case T-589/93 *Ryan-Sheridan* v *EFILWC* [1996] ECR-SC I-A-27 and II-77, paragraph 141; Case T-140/97 *Hautem* v *EIB* [1999] ECR-SC I-A-171 and II-897, paragraph 83, and *Willeme* v *Commission*, cited above, paragraph 94).

108 With regard to the first condition — the illegality of the institution's conduct — the Court has held in this case that the Commission committed several infringements of the Staff Regulations and breaches of the principles governing disciplinary proceedings, which were manifested in the disputed decision of 5 April 2001. That conduct on the part of the Commission appears to constitute an administrative fault of such a kind as to render it liable. Consequently, at this stage, it is necessary to examine whether the damage alleged is genuine and whether there is a causal link between the alleged conduct of the Commission and that damage.

109 With regard, in the first place, to the material damage, the applicant did not specify either its content or its extent in his pleadings. He merely made reference to the lawyer's fees borne by him in connection with the various proceedings, to the misapplication of the disciplinary measure and to the fact that he was obliged to lodge a complaint against a decision refusing him promotion. So far as the lawyer's fees are concerned, the fees relate to the conduct of the criminal proceedings and cannot be reimbursed in the present case in the absence of a causal link between that alleged damage and the fault committed by the Commission. As regards, in general, the financial consequences of applying the disciplinary measure, and in particular the loss of income inherent in the decision imposing relegation in step, it is sufficient to point out that, under Article 233 EC, the Commission is required to take the necessary measures to comply with this judgment. Finally, with regard to the damage alleged by the applicant in connection with the refusal of promotion, it is not relevant to the present proceedings.

110 So far as the non-material damage is concerned, it is settled case-law that, save in special circumstances, the annulment of the decision contested by an official is in itself appropriate and, in principle, adequate compensation for the non-material damage suffered by the applicant (judgments in Case T-165/89 *Plug* v *Commission* [1992] ECR II-367, paragraph 118; *Hautem* v *EIB*, cited above, paragraph 82, and *Willeme* v *Commission*, paragraph 97). Nevertheless, it must be pointed out that in this case the various administrative decisions and opinions forming part of the disciplinary proceedings made accusations against the applicant which proved to be incorrect. Moreover, the Commission initiated the disciplinary proceedings in breach of the principle that a reasonable period should be observed, the disciplinary proceedings having, furthermore, continued for a period of almost three years until the measure was adopted. Finally, the Commission did not suspend the disciplinary proceedings pending the conclusion of the criminal proceedings against the applicant. That set of circumstances caused injury to the applicant's reputation, disrupted his private life and placed him in a state of prolonged uncertainty. Those circumstances constitute non-material damage for which compensation must be made. In that regard, that damage cannot be considered to be adequately compensated for by the annulment of the contested decision. That annulment cannot have the effect, in the particular circumstances of this case, of nullifying retroactively the non-material damage suffered by the applicant.

111 Consequently, the Commission must be ordered to pay to the applicant compensation for the non-material damage suffered by him. The Court considers that the amount of EUR 500 offered to the applicant by the Commission is not sufficient to compensate appropriately for the non-material damage suffered. In the light of the circumstances of the case, the Court hereby fixes the amount of that compensation, on an equitable basis, at EUR 8 000.

Costs

112 Under 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 Commission has been unsuccessful, it must, in accordance with the form of order to that effect sought by the applicant, be ordered to bear all the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

1. **Annuls the Commission's decision of 5 April 2001 imposing on the applicant the disciplinary measure of relegation in step;**

2. **Orders the Commission to pay to the applicant an amount of EUR 8 000 by way of compensation for the non-material damage suffered by him;**

3. **Orders the Commission to bear all the costs.**

Lindh García-Valdecasas Cooke

Delivered in open court in Luxembourg on 10 June 2004.

H. Jung P. Lindh

Registrar President