

Case T-166/02

José Pedro Pessoa e Costa
v
Commission of the European Communities

(Officials – Decision to institute disciplinary proceedings –
Decision rejecting a request for transfer
to the European Monitoring Centre for Drugs and Drug Addiction)

Full text in French II - 471

Application for: annulment, first, of the decision of the Commission of 3 July 2001 to institute disciplinary proceedings against the applicant and, second, of its decision of 23 July 2001 rejecting the request of the Director of the European Monitoring Centre for Drugs and Drug Addiction that the applicant be transferred to that body.

Held: The decision of the Commission of 23 July 2001 rejecting the request of the Director of the European Monitoring Centre for Drugs and Drug Addiction that the applicant be transferred to that body is annulled. The remainder of the application is dismissed as inadmissible. The Commission is ordered to bear, in addition to its own costs, half of the costs incurred by the applicant. The applicant is ordered to bear half of his costs.

Summary

1. *Officials – Actions – Act adversely affecting an official – Definition – Preparatory act – Initiation of disciplinary proceedings – Inadmissible (Staff Regulations, Art. 91)*

2. *Officials – Disciplinary measures – Disciplinary proceedings – Concurrent criminal proceedings – Effect on the initiation of disciplinary proceedings relating to the same matters – None (Staff Regulations, Art. 88, fifth para.)*

3. *Officials – Disciplinary measures – Disciplinary proceedings – Rights of the defence must be observed – Initiation of disciplinary proceedings in relation to matters which are the subject of charges in criminal proceedings brought by the public prosecutor in a Member State – Breach of the principle of the presumption of innocence – None (Staff Regulations, Art. 87, second para.)*

4. *Officials – Disciplinary rules – Disciplinary proceedings – Hearing of the official concerned by the appointing authority – Hearing prior to notification of the official concerned of the appointing authority's decision to institute proceedings against him – Obligation – None (Staff Regulations, Art. 87, second para; Annex IX, Art. 4, second para.)*

5. *Officials – Principle of sound administration – Duty of the administration to have regard for the welfare of officials – Initiation of disciplinary proceedings against an official who is the subject in a Member State of criminal proceedings calling into question his integrity – Breach – None*

6. *Officials – Decision adversely affecting an official – Obligation to state reasons – Scope (Staff Regulations, Art. 25, second para.)*

1. Only acts or decisions producing binding legal consequences likely directly and immediately to affect the applicant's interests by significantly changing his legal situation constitute acts adversely affecting an official within the meaning of Article 91 of the Staff Regulations and may be the subject of an action for annulment. Such is not the position as regards a decision instituting disciplinary proceedings against an official. The decision of the appointing authority is only a preparatory procedural stage. It does not prejudice the administration's final position and cannot, therefore, be regarded as an act adversely affecting an official within the meaning of Article 91 of the Staff Regulations. Consequently, it cannot be contested indirectly in an action against a final disciplinary decision adversely affecting the official, or in an action against an act adversely affecting the official which is based on that decision.

(see paras 35-37)

See: T-29/93 *Calvo Alonso-Cortès v Commission* [1993] ECR II-1389, para. 43; T-586/93 *Kotzonis v ESC* [1995] ECR II-665, paras 28 and 29; T-562/93 *Obst v Commission* [1995] ECR-SC I-A-247 and II-737, para. 23

2. The fifth paragraph of Article 88 of the Staff Regulations prevents the appointing authority from definitively settling the disciplinary position of an official who is the subject of criminal proceedings for the same matters by adjudicating on those matters, as long as the decision handed down by the criminal court has not become final. However, the existence of criminal proceedings at national level does not prevent the appointing authority from instituting concurrent disciplinary proceedings relating to the same matters.

(see paras 45-46)

See: T-74/96 *Tzoanos v Commission* [1998] ECR-SC I-A-129 and II-343, para. 34

3. The principle of the presumption of innocence, which any person may rely on so long as his guilt has not been proven, cannot be considered to have been breached simply because the appointing authority has decided to institute disciplinary proceedings relating to the same matters as those of which the official is accused in criminal proceedings brought by the public prosecutor in a Member State. That principle could be held to have been breached only where there is evidence to show that the authority had decided, from the very outset of the disciplinary proceedings, to impose a disciplinary sanction on the official in any event, regardless of the explanations he provides and the outcome of the criminal proceedings pending in the Member State.

(see paras 55-56)

See: T-21/01 *Zavvos v Commission* [2002] ECR-SC I-A-101 and II-483, para. 341

4. Under Article 87 of the Staff Regulations an official is to be heard before the appointing authority imposes a written warning or a reprimand, or, where the appointing authority is minded to impose a more serious measure, before it initiates the disciplinary procedure provided for in Annex IX to the Staff Regulations by submitting a report to the Disciplinary Board. However, the requirement that an official must be heard before the appointing authority decides to initiate disciplinary proceedings against him cannot be inferred from the wording of Article 87 of the Staff Regulations or from the fundamental right to be heard by the Community institutions enjoyed by every person during proceedings brought against him which are likely to result in an act adversely affecting him.

(see para. 58)

See: T-183/96 *E v ESC* [1998] ECR-SC I-A-67 and II-159, para. 27

5. Where the appointing authority, having been informed that criminal proceedings which are likely to cast doubt on his integrity have been brought against an official in a Member State, decides to initiate disciplinary proceedings against him, it breaches neither the principle of sound administration nor its duty to have regard for the welfare of officials.

From the time when it receives that information, the authority has a duty to initiate such proceedings, since it is required in the interest of the Communities to take the necessary steps to satisfy itself of the irreproachable nature of the official's professional conduct, despite the fact that the initiation of disciplinary proceedings places the official in a situation of apprehension and uncertainty, particularly as to his professional future.

(see paras 64, 66)

6. The requirement to give a statement of the reasons on which a decision is based is intended, first, to provide the person concerned with the necessary information to allow him to ascertain whether or not the decision is well founded and, second, to enable the Community judicature to review the legality of the decision. In a matter where the appointing authority has a wide discretion, the statement of reasons must state the main considerations which influenced the administration's decision, in order to enable the person concerned to ascertain the matters relied upon to justify the measure adopted and to enable the Community judicature to review that decision.

This is why, where the administration takes a decision refusing to grant an application for transfer by an official, it must state the main considerations justifying its refusal and, on that basis, show how it has balanced the interests involved, as it is required to do when taking such a measure, so that it can be ascertained whether,

in weighing that balance, it remained within proper limits and did not use its discretion in a manifestly wrong way.

(see paras 74-75, 77)

See: 176/82 *Nebe v Commission* [1983] ECR 2475, para. 21; T-13/95 *Kyrpitsis v ESC* [1996] ECR-SC I-A-167 and II-503, para. 74; T-86/97 *Apostolidis v Court of Justice* [1998] ECR-SC I-A-167 and II-521, para. 73