

JUDGMENT OF THE COURT (SECOND CHAMBER)

7 MAY 1969¹

X v Audit Board of the European Communities

Case 12/68

Summary

1. *Procedure — Application — Requirements of form — Submissions made — Mistake in designation of relevant provision — Admissibility*
(Protocol on the Statute of the Court, Article 19; Rules of Procedure of the Court, Article 38)
 2. *Disciplinary Procedure — Rights of the defence — Limits*
(Staff Regulations of Officials, Annex IX, Article 7)
 1. A mistake made by the applicant in designating the relevant provision cannot lead to the inadmissibility of the submission put forward.
 2. The disciplinary authority does not
- prejudice the rights of the defence by imposing a disciplinary sanction in the absence of the official concerned, when that absence is attributable exclusively to the behaviour of the latter.

In Case 12/68

X, a former official of the Audit Board of the European Communities, residing at Brussels, represented in the written procedure by Marcel Slusny and, in the oral procedure by Henri Rolin, both advocates at the Cour d'Appel, Brussels, with an address for service at the Chambers of Ernest Arendt, avocat-avoué, Centre Louvigny, 34/B/IV rue Philippe-II,

applicant,

v

AUDIT BOARD OF THE EUROPEAN COMMUNITIES, represented by Alex Bonn, advocate at the Cour Supérieure de Justice of the Grand Duchy of Luxembourg, acting as Agent, with an address for service in Luxembourg at the Chambers of Mr Bonn, 22 Côte-d'Eich,

defendant,

Application for annulment of the decision taken by the Audit Board on 26 March 1968, to remove the applicant from his post, as well as for damages;

¹ — Language of the Case: French.

THE COURT (Second Chamber)

composed of: A. Trabucchi, President of Chamber, W. Strauß and P. Pescatore (Rapporteur), Judges,

Advocate-General: J. Gand

Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Facts

Mr X entered the service of the Audit Board of the European Communities as an auxiliary servant on 15 March 1962. He was appointed as a probationary official on 15 March 1963, and was established in the post of assistant in Grade B 3, on 15 September 1963.

On 5 May 1967, the Audit Board decided to institute preliminary inquiries with a view to disciplinary proceedings against Mr X. He had a preliminary hearing on 12 June 1967 and the Board on 26 September decided to set disciplinary proceedings in motion against him and to put the matter before the Disciplinary Board. Mr X was informed of this on 29 September.

The report made by the Audit Board was sent to the President of the Disciplinary Board on 5 October and to Mr X. This report sets out the actions of which Mr X is accused and the circumstances in which he is said to have committed them. These consisted essentially in a theft from a display stand in a store in November 1964, in the theft of numerous documents from various offices of the Audit Board in August 1965 and in writing an anonymous note in November 1965 containing malicious material concerning many members and officials of the Board.

The Disciplinary Board met on 25, 26 and 30 October 1967. It heard Mr X and numerous witnesses. On 31 October 1967 it delivered its reasoned opinion in

which it found unanimously:

- that the theft from the display stand was not disputed;
- that the contents of numerous conversations held on his own initiative by Mr X with his immediate superiors and various notes which he had sent to them was evidence of malicious conduct towards his colleagues which was inexcusable and utterly deplorable;
- although there was no irrefutable proof that Mr X was responsible for the theft of documents and was the author of the anonymous note, his presence among the staff of the Audit Board constituted a factor causing mistrust and discord which was highly prejudicial to the proper functioning of the service.

The Disciplinary Board, in consequence, requested the application of Article 86(2)(f) of the Staff Regulations, that is to say, the removal of Mr X from his post without reduction of entitlement to retirement pension. The reasoned opinion of the Disciplinary Board was sent on 2 November 1967 to the President of the Audit Board and to Mr X.

The Board called upon Mr X to appear before it to be heard, successively on 25 November 1967, 19 January, 27 February and 26 March 1968. Mr X did not appear following the three first summonses for various reasons (health reasons, and through the inability of his counsel to attend); the Board therefore decided that it was not possible to grant

a further postponement and during the course of its meeting of 26 March 1968 in the absence of the person concerned took the decision which is the subject of the present case.

By that measure, which was communicated to the applicant on 27 March 1968, the Board

'came to the unanimous conclusion that the responsibility for the acts of which Mr X was accused must properly be attributed to him and that these acts which are very serious from a disciplinary point of view are evidence of moral confusion and flagrant misconduct which present an obstacle to the continuing presence of this official in the service.'

The Board therefore unanimously decided to remove Mr X from his post with effect from 1 April 1968 but that measure did not include either the reduction of withdrawal of any right he might have to a retirement pension. Mr X disputed that decision by an application made on 20 June 1968.

II — Procedure

The written procedure followed the normal course. By an Order of 24 October 1968, the Court (Second Chamber) granted the applicant free legal aid.

The Court (Second Chamber) upon reading the preliminary report of the Judge-Rapporteur and hearing the views of the Advocate-General, decided to open the oral procedure without any preparatory inquiry.

The oral submissions of the parties were presented at the hearing on 25.2.1969.

The Advocate-General delivered his opinion at the hearing on 13.3.1969.

III — Conclusions of the parties

The *applicant* in the written procedure submits that the Court should:

- (a) declare and hold that the removal from post of 26 March 1968 is null and void;

- (b) order the opposite party to pay him for material damage, the sum of BF 100 000 and for non-material damage a further sum of BF 100 000, subject to the reservation by the applicant of the right to adjust these figures during the proceedings;

- (c) order the Audit Board to pay the costs.

At the hearing on 25 February 1969 the applicant put forward additional conclusions in which he asked that the Court should:

- (a) take notice that he will give up his employment within the Audit Board at the date on which the decision to remove him from his post is annulled by a judgment;

- (b) allow him to prove by all legal means, including witnesses, certain facts concerning his failure to appear in response to the two last summonses from the Audit Board.

The *defendant* contends that the Court should:

- (a) hold the application to be unfounded and dismiss it in its entirety;
- (b) make an appropriate order as to costs.

It asks the Court to reject the additional conclusions of the applicant as inadmissible.

IV — Submissions and arguments of the parties

The submissions and arguments of the parties may be summarized as follows:

A — *The application for annulment*

1. The submission based on Article 87 of the Staff Regulations and the last paragraph of Article 7 of Annex IX to the Staff Regulations

The *applicant* complains that the Audit Board took the disputed decision without having previously heard him as was required by Article 87 of the Staff Regulations.

He admits that his hearing was adjourned several times. Valid reasons, how-

ever, justified his absences whether they concerned the state of his health which prevented him from complying with the summons or the fact that his advocate, who himself was prevented from attending, and asked for the adjournment of his hearing, or the fact that he was insufficiently informed of the exact intentions of the Board. There had not been on his part any ill will or *a fortiori* any wrongful omission.

Furthermore, since the Audit Board had agreed that the applicant should be defended by an advocate—a step which was necessary both because of the mental condition of Mr X and because of the gravity of the proposed measure—it should have taken account of the fact that the applicant's counsel had informed it that he would not be available on the date stated in its last summons. By accepting the presence of an advocate, but fixing the meeting at a date on which the latter was not free, the Board took away with one hand what it had given with the other.

Although accepting that the Board did not deliberately refrain from carrying out its obligation to hear him, the applicant states nevertheless that it did not comply with that essential procedural requirement although many dates had been proposed to it which were close to the one prescribed in its summons.

The *defendant* by way of introduction mentions that the originating application wrongly relies on an alleged infringement of Article 87 of the Regulations, in that the applicant was not heard before the decision of the Disciplinary Board was taken. That submission lacks a factual basis. It is furthermore inadmissible: clearly it is the last paragraph of Article 7 of Annex IX to the Regulations which the applicant should have relied upon; he has therefore not complied with the requirement that he should describe clearly the alleged illegality of the measure adversely affecting him.

The *applicant* on this point replies that the defendant perfectly understood the

exact meaning of the submission and has replied to it. Furthermore, there is a direct link between Article 87 of the Staff Regulations and Annex IX. The submission is therefore admissible.

The *defendant*, in respect of the substance of the case and arguing in the alternative, considers that it must be stated that although Mr X was not heard by the appointing authority after the opinion of the Disciplinary Board and before the disciplinary decision, it is because he twice refused to appear whilst he was medically able to do so and because his hearing had been repeatedly adjourned. He cannot complain that the Audit Board did not comply with a formal requirement which he himself prevented it from fulfilling. Mr X had the opportunity of being assisted in his defence by counsel of his choice. The Board cannot accept the criticisms which are made of it by an official who tried to hold back the disciplinary proceedings by delaying tactics and even to make those proceedings impossible.

2. Submission based on Article 110 of the Staff Regulations

The *applicant* maintains that respect for the rights of the defence requires that an official who has been found guilty without having been heard may appeal against a disciplinary measure thus taken in default. Although Article 110 provides that general provisions for giving effect to the regulations shall be adopted by each institution, the exercise of the right to appeal against these is not provided for.

The *defendant* replies, in the first place, that as the regulations make no provision for appeal against a disciplinary decision given in default, it is not possible to allege the infringement of a provision in the Regulations which does not exist.

In the second place, the submission based on the infringement of Article 110 is inadmissible. That provision states only that general provisions for giving

effect to the Regulations shall be adopted in the form provided for. Furthermore, the submission is directed to an alleged gap in the regulations. Lastly the duty to lay down general provisions for giving effect to the regulations exists only in those cases where the provisions of the regulations are not themselves sufficiently explicit.

The *applicant* agrees that this submission is based more on a gap in the regulations than on the infringement of one of its 'directly operative' provisions and may be relied upon against a grave defect of the regulations. Such is the case in respect of the fundamental right recognized by the Convention for the Protection of Human Rights and Fundamental Freedoms to oppose a decision given in default of appearance. On this point, the provisions of the regulations are not themselves sufficiently explicit.

The *defendant* complains that the applicant appears not to know that it is not possible by general provisions for giving effect to the Staff Regulations to introduce appeals through channels which have not been provided for by the regulations.

3. Submission based upon Article 86 of the Staff Regulations

The *applicant* points out that according to the wording of Article 86, an official can bring a disciplinary measure upon himself only because of failures to comply with his obligations whether intentionally or through negligence on his part. In the present case the failures of which he is accused may be attributed only to his state of ill health which excludes any wrongful act or omission in the disciplinary sense.

The actions complained of in respect of the applicant are clearly of a pathological nature. They cannot be the subject of any disciplinary action since the conduct of their author is solely attributable to his psychological instability.

The contested decision fails to recognize that whilst the acts charged may be

attributable to him he is not necessarily guilty of them. The concept of guilt is coupled with liability which presupposes that the failure to comply with his obligation, of which the applicant was accused, was that of a man responsible for his actions acting with full knowledge of the situation. The simple causal link between a material fact and its author is not sufficient to justify a measure taken pursuant to Article 86 of the Staff Regulations.

Furthermore the theft from the display stand was, at the time, the subject of an order that the matter lie on the file, and gave rise to no disciplinary measure. It cannot therefore, several years later, be raised against the applicant.

Lastly it is in no way established that the applicant was responsible for the theft of documents and for the anonymous note. In this respect the accused must have the benefit of the doubt.

The Audit Board confuses the undesirability of retaining Mr X in its service, because of relationships which he has had with other members of the staff, with a disciplinary measure which it can impose upon him only in respect of matters for which it is proved that he is actually guilty and responsible.

The *defendant* points out that the application in the present case is not one in which the Court has unlimited jurisdiction but is one concerned with legality in connexion with which the Court cannot check the evaluation of fact which led to the contested decision. Its examination has to be confined to the complaints of illegality, that is to say, any failure to comply with the requirements of the Staff Regulations, without its being able to deal with the substance of the case.

The competent authority decided, with full knowledge of all the facts of the case and taking account of all the facts which came to light during the preparatory inquiry, on the shortcomings attributable to Mr X and on his responsibility from the disciplinary point of

view. Article 86 was thus not infringed. As a subsidiary matter the defendant points out on the one hand that Mr X did not himself put forward at his hearing the excuse that he was not responsible for his actions by reason of a nervous disorder, and on the other hand that his work and dedication for many years, his medical history, the acts of which he is accused and the care which he took with regard to the details of their performance disclose nothing to indicate such a lack of responsibility. It was only in November 1967, after the procedure before the Disciplinary Board, that Mr X was admitted to a clinic for nervous illnesses. The doctor treating him considered, furthermore, in February 1968, that he could by appearing be-

fore the Audit Board take part in the final phase of the proceedings commenced against him.

B — *The claim for damages*

The *applicant* relies both on material damage consisting of the non-payment of his salary and ancillary benefits as well as non-material damage. Both are said to be due to the unlawful act or omission for which the Audit Board has made itself liable.

The *defendant* is of the opinion that the claim for damages is unfounded, the Audit Board having only followed disciplinary procedure in the strictest accordance with the forms laid down in the Staff Regulations.

Grounds of judgment

- ¹ The application is for the annulment of the decision taken on 26 March 1968 by the Audit Board to remove the applicant from his post following disciplinary proceedings.
- ² The applicant further asks that the Audit Board be ordered to pay him a sum of BF 100 000 for material damage and a similar sum for non-material damage.
- ³ At the oral proceedings before the Court the applicant put forward additional conclusions in which he asked the Court, among other things, to take note that he would give up his employment with the Audit Board on the date on which the judgment annulling the decision to remove him from his post was given.
- ⁴ This head of the conclusions is not admissible since it is irrelevant to the subject-matter of the proceedings.

A — *The application for annulment*

1. *Submission based on Article 87 of the Staff Regulations and on the last paragraph of Article 7 of Annex IX to the said Regulations*

- ⁵ The applicant complains that on 26 March 1968 the Audit Board decided to remove him from his post without having previously heard him in accordance with the provisions governing disciplinary proceedings.

- 6 The Audit Board has disputed the admissibility of this submission, which is based on Article 87 of the Staff Regulations, since the relevant provision is the last paragraph of Article 7 of Annex IX to the said Regulations.
- 7 A mistake made by the applicant in designating the relevant provision cannot however lead to the inadmissibility of the submission put forward.
- 8 It is not disputed that the disciplinary proceedings against the applicant were properly initiated and pursued as regards the stages prior to the meeting of 26 March 1968 during which the Audit Board took the decision which is the subject of the application.
- 9 The dispute is solely concerned with the fact that the Audit Board took a decision without having heard the person concerned as is required by Article 7 of Annex IX to the Regulations.
- 10 Before the meeting of 26 March 1968 the Audit Board three times adjourned the hearing of the applicant, twice in view of his state of health, and the third time, although the applicant had been found medically fit to answer this summons, because counsel whom he had asked to be allowed to accompany him was not available.
- 11 On being summoned for the fourth time to attend, on 26 March 1968, the applicant failed to appear before the Audit Board.
- 12 In view of these circumstances the reasons put forward in the last instance by the applicant to explain his absence cannot be regarded as amounting to a valid excuse.
- 13 After trying several times to secure the appearance of the applicant, the Audit Board was entitled to continue even in his absence.
- 14 The evidence tendered by the applicant, for the purpose of proving his allegations in the conclusions presented at the oral proceedings must, consequently, be rejected without its being necessary to consider their admissibility in the light of the Rules of Procedure.
- 15 In those circumstances the Audit Board was entitled to adopt the disciplinary measure in the absence of the applicant.
- 16 That method of proceeding is all the more justified because the Audit Board, by the successive adjournment to which it had consented had amply taken account of the state of health of the applicant and of his wish to be assisted by counsel.
- 17 It appears from the whole of the foregoing that the disciplinary authority both during the preliminary stages of the proceedings and by its conduct at the time of the meeting of 26 March 1968, respected the rights of the defence, the failure to hear the applicant being attributable exclusively to the behaviour of the latter.

18 The first submission must therefore be rejected.

2. Submission based on Article 110 of the Staff Regulations

- 19 The applicant maintains that respect for the rights of the defence required that an official, who has been found guilty without having been heard, may appeal against a disciplinary measure taken against him in default of his appearance.
- 20 This complaint is based on Article 110 of the Staff Regulations concerning the 'general provisions for giving effect to these Staff Regulations'.
- 21 The expression 'appeal' (*opposition*) means, in procedural law, the remedy which enables a defaulting party to bring the case again before the court which gave judgment in default.
- 22 Such a remedy is not provided for by the Staff Regulations which have secured the legal protection of officials in disciplinary matters by the institution of an appeal to the Court of Justice.
- 23 There does not exist, further, any general principle of law from which it would be possible to infer the existence of the type of remedy to which the applicant refers.
- 24 Consequently Article 110 of the Staff Regulations is, in the present case, irrelevant and the submission must be rejected.

3. Submission based on Article 86 of the Staff Regulations

- 25 The applicant complains that the Audit Board charged him with misconduct which he denies having committed, or for which at least, if he did so, he denies that he was responsible in law.
- 26 Furthermore he states that one of the matters considered by the Audit Board had already been the subject of previous disciplinary proceedings.

(a) Proof of the facts:

- 27 The dispute in respect of the proof of the facts concerns only the third piece of misconduct taken into account by the disciplinary authority—theft of documents and dissemination of an anonymous note.
- 28 Although it is true that certain doubts still existed during the preparatory stage of the disciplinary proceedings, the Audit Board, in the decision which adversely affects the applicant, states expressly that it had no hesitation in finding that the facts alleged against the applicant had been proved.
- 29 The applicant has not put before the Court anything which might raise doubts whether the finding of the Audit Board was in accordance with the truth of the matter.

(b) The earlier disciplinary proceedings:

- ³⁰ The applicant points out that the first of the complaints accepted as proved by the Disciplinary Board—theft from the display stand—gave rise at the time to proceedings within the Audit Board which did not however end in a disciplinary measure.
- ³¹ Furthermore a judicial inquiry opened in respect of the same facts ended an order that the matter lie on the file.
- ³² In view of these facts which are not disputed, the Audit Board in fact decided on 12 April 1965 not to commence disciplinary proceedings, although warning the applicant that a repetition of actions of the same type would inevitably leave him open to disciplinary measures.
- ³³ As the Board refrained from taking action subject to such an express condition, it was in a position to take the same facts lawfully into account in disciplinary proceedings brought in respect of later facts.

(c) Responsibility for the acts complained of:

- ³⁴ The applicant claims that because of his abnormal psychological state, he cannot be regarded as responsible from a disciplinary point of view for the acts of which he is accused.
- ³⁵ Under Article 86 of the Staff Regulations, a failure by an official to comply with his obligations under the regulations may give rise to disciplinary action only if such failure was intentional or through negligence on his part.
- ³⁶ The file transmitted by the Audit Board includes certain material which, without allowing definite conclusions to be drawn, nevertheless raises doubts concerning the mental balance of the applicant at the time of the conduct in question and consequently the voluntary nature of the acts of which he is accused.
- ³⁷ These circumstances, although not raised by the applicant during the disciplinary proceedings, were known by the Disciplinary Board and the Audit Board.
- ³⁸ At least the medical certificates put forward by the applicant in the final stage of that procedure would have justified an investigation into his mental state at the time of the conduct in question.
- ³⁹ In the decision which is the subject of the application, the Audit Board held the acts complained of to be attributable to the person concerned and that he was responsible for them.

- ⁴⁰ Nevertheless neither the terms of the decision nor the information provided by the defendant make it possible, as things stand, to evaluate the justification of the contested decision in respect of the applicant's responsibility for the conduct in question.
- ⁴¹ There is therefore reason to call for an expert's report in order to establish whether at the time of the acts which gave rise to the disciplinary decision, the applicant was mentally disturbed to such an extent as to exclude responsibility for his conduct.

4. *The submission as a whole*

- ⁴² The applicant has failed in respect of the application for annulment in his first two submissions, and in his third submission subject to the question concerning responsibility for the acts complained of.
- ⁴³ The last question will only be decided on the basis of the conclusions which the Court may draw from the expert's report which is to be ordered.

B — The claim for damages

- ⁴⁴ The claim for damages is based upon material damage and non-material damage suffered by the applicant because of his removal from his post.
- ⁴⁵ Any decision on that claim depends upon the decision to be made on the application for annulment.

C — Costs

- ⁴⁶ It is appropriate to reserve the costs until the decision bringing the proceedings to a close.

Upon reading the pleadings;
Upon hearing the parties;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the opinion of the Advocate-General;
Having regard to the Staff Regulations of Officials, especially Articles 86, 87 and 110, as well as Article 7 of Annex IX thereto;
Having regard to the Protocols on the Statute of the Court of Justice annexed to the Treaties establishing the European Economic Community and the European Atomic Energy Community;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities;

THE COURT (Second Chamber)

hereby rules:

1. The Court shall by order designate an expert with the duty of establishing whether, at the time of the acts which gave rise to the disciplinary decision adopted on 26 March 1968 against the applicant by the Audit Board, the mental state of the applicant was such that the acts which have been attributed to him could not have been intentional;
2. The costs are reserved.

Trabucchi

Strauß

Pescatore

Delivered in open court in Luxembourg on 7 May 1969.

A. Van Houtte
Registrar

A. Trabucchi
President of the Second Chamber

OPINION OF MR ADVOCATE-GENERAL GAND
DELIVERED ON 13 MARCH 1969¹

*Mr President,
Members of the Court,*

Mr X who entered the service of the Audit Board of the European Communities on 15 March 1962 as an auxiliary, was established in a post of assistant in Grade B 3 as from 15 September 1963.

Following several incidents to which I must return, the institution to which he belonged commenced disciplinary proceedings against him in 1967 in the circumstances provided for by Article 87 of the Regulations. These proceedings first followed their normal course and the Disciplinary Board, after hearing Mr X and various witnesses, by a reasoned opinion of 31 October 1967 unanimously proposed that he be removed from his post without reduction of his right to retirement pension. It remained, according to the wording of the third paragraph of Article 7 of Annex IX, for the

Audit Board to take its decision '... within one month; it shall first hear the official concerned'. In fact, for reasons which I shall mention in a moment, because they are the basis of the first submission raised in support of the application, that hearing was not held and, by a decision of 26 March 1968, the Audit Board removed Mr X from his post with effect from 1 April 1968, that measure involving neither reduction nor withdrawal of any right which he had to a pension.

Mr X asks you to annul that decision and to order the opposite party to pay him a sum of BF 200 000 by way of material and non-material damages.

In the oral proceedings he put forward conclusions asking you to take note that should a judgment be delivered annulling the decision he would give up his employment with the Board on the date of such judgment. Such conclusions appear to me to be entirely irrelevant to the

¹ — Translated from the French.