

Article 86(2) of the Staff Regulations or to close the disciplinary proceedings without ordering a disciplinary measure, regardless of the opinion of the Disciplinary Board, which in any event is not binding on the appointing authority.

3. When, under Articles 90 and 91 of the Staff Regulations, the question of the admissibility of an action for damages is being examined, a distinction must be drawn between two types of cases. Where the claims for damages are closely linked to an action for annulment, the inadmissibility of the latter entails the inadmissibility of the action for damages. If there is no close link between the two actions, the admissibility of the claims for damages must be assessed separately from that of the action for annulment and is subject, in particular, to the pre-litigation procedure

provided for under Articles 90 and 91 having been properly carried out.

In that connection, where an action for damages is seeking redress for harm suffered as a result of an act which adversely affected the official, it is for the person concerned to lodge, within the prescribed period, a prior administrative complaint against that act, and then to bring an action within a period of three months from the date on which the complaint is rejected. Conversely, if the alleged harm has resulted from conduct which, since it had no legal effects, cannot be characterized as acts adversely affecting the official, the pre-litigation procedure must begin with a request for compensation. Only an express or implied rejection of that request constitutes a decision adversely affecting the official against which a complaint may be directed, and it is only after a decision rejecting, expressly or impliedly, that complaint that an action for damages may be brought before the Court of First Instance.

## ORDER OF THE COURT OF FIRST INSTANCE (Fifth Chamber)

18 December 1992 \*

In Case T-8/92,

**Tiziano Di Rocco**, an official of the Economic and Social Committee, residing in Kraainem (Belgium), represented by Jean-Noël Louis, of the Brussels Bar, with an address for service in Luxembourg at the office of Fiduciaire Myson SARL, 1 Rue Glesener,

applicant,

\* Language of the case: French.

in support of whom an application to intervene is made by

**Union Syndicale-Bruxelles**, represented by Gérard Collin, of the Brussels Bar, with an address for service in Luxembourg at the office of Fiduciaire Myson SARL, 1 Rue Glesener,

applicant to intervene,

v

**Economic and Social Committee of the European Communities**, represented by Moises Bermejo Garde, acting as Agent, assisted by Denis Waelbroeck, of the Brussels Bar, with an address for service in Luxembourg at the office of Roberto Hayder, of the Commission's Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for annulment of the decision of the Secretary-General of the Economic and Social Committee of 21 June 1991 closing the disciplinary proceedings against the applicant without further action and for an order that the Economic and Social Committee pay the applicant the sum of ECU 1 in respect of non-material damage,

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

composed of: D. P. M. Barrington, President, R. Schintgen and A. Kalogeropoulos, Judges,

Registrar: H. Jung,

makes the following

## Order

### Facts, procedure and forms of order sought

- 1 By application lodged at the Registry of the Court of First Instance on 5 February 1992, the applicant, an official of the Economic and Social Committee (hereinafter 'ESC'), brought an action for annulment of the decision of the Secretary-General of the Economic and Social Committee of 21 June 1991 closing the disciplinary proceedings initiated against him on 6 November 1990 without further action in so far as the decision did not reinstate him in his rights and for an order that the ESC pay him the sum of ECU 1 in respect of the non-material damage which he considered he had suffered.
- 2 The facts giving rise to the action date back to 20 September 1990 when, at the end of a cocktail party organized in the ESC's premises, incidents involving certain officials led to the intervention of the police. On the subsequent arrest of an official of the ESC, the applicant had a dispute with a plain-clothes policeman at whom he made a gesture. The Public Prosecutor, Brussels, opened an investigation into the incident.
- 3 A report of an inquiry drawn up on 6 November 1990 by the Director for Administration and Personnel of the ESC found the applicant guilty of making a gesture with his hand at the police officer concerned. By decision of the same day, supplemented by a memorandum of 7 January 1991, the Secretary-General of the ESC initiated disciplinary proceedings against him and three other officials of the ESC. According to the memorandum referring the case to the Disciplinary Board, the applicant was guilty of misconduct and indiscipline under Articles 12, 86 and 87 of the Staff Regulations of Officials of the European Communities ('the Staff Regulations').
- 4 On 6 March 1991 the Disciplinary Board delivered its opinion concluding that, although he admitted that he had made a gesture at a police officer, the applicant was not guilty of misconduct or indiscipline. This opinion was based on the grounds that the applicant's gesture had not been intentional and that he had intervened in an incident in which the police officer concerned had displayed a rather aggressive attitude. In addition the applicant, who claimed that he was trying to help a colleague, said that he acted with the object of calming the situation in order

that the incident should not degenerate. Finally, the Disciplinary Board took account of the fact that no proceedings had so far been initiated by the Public Prosecutor against the applicant. For those reasons the Disciplinary Board, which also took the view that the applicant had already been punished since a decision not to promote him had been taken on the ground that disciplinary proceedings were in progress, concluded that the applicant did not deserve to be punished, but that he was to be congratulated on the positive role he had played.

5 By letter of 20 March 1991 the applicant wrote to the Secretary-General of the ESC to ask him, following the opinion of the Disciplinary Board, to review the decision of the Appointing Authority of 1 October 1990 rejecting his application for a post of Grade D1, which in his view was based on the 'recent events' leading to the disciplinary proceedings against him.

6 On 2 May 1991 the Director of Administration and Personnel of the ESC informed the applicant that, following contacts which he had had with the Belgian Ministry of Foreign Affairs after the Disciplinary Board's opinion had been given, he had been informed that a decision on the action to be taken by the Belgian judicial authorities with regard to the case concerning him was expected at the beginning of May and that, in those circumstances, the Secretary-General reserved his own decision on the outcome of the disciplinary proceedings.

7 By letter to the applicant of 6 May 1991, the Secretary-General of the ESC confirmed these statements and added that the decision of 1 October 1990 rejecting his application was based on the results of a comparative review of the merits of the candidates. The only reference to the events leading to the disciplinary proceedings against him was made in a confidential internal memorandum of 28 September 1990 which was not in the nature of a decision and did not constitute a definitive position.

8 By letter of 16 May 1991 the applicant requested the ESC to grant him technical and financial assistance in order to enable him effectively to protect his interests. This request was based on the duty of the institutions to have regard to the interests of staff, and on the opinion of the Disciplinary Board which had found that he was to be congratulated for his part in the matter in question. In the same letter the applicant stated that he considered that any disciplinary measure which might in future be ordered against him would be unlawful. He argued in that respect that, as the Disciplinary Board had not decided to stay the proceedings until a ruling had been given by a criminal court, and as the Disciplinary Board actually delivered its opinion on 6 March 1991, the Appointing Authority had from that date a period of only one month to adopt its own decision in accordance with the fourth paragraph of Article 7 of Annex IX to the Staff Regulations. Since that period had expired on 6 April 1991, the Appointing Authority could no longer, in the applicant's view, adopt a decision ordering a disciplinary measure against him.

9 On 31 May 1991 the Secretary-General of the ESC informed the applicant that the Public Prosecutor, Brussels, had decided to close the file on him without further action and that in those circumstances the Secretary-General had decided to adopt the conclusions proposed by the Disciplinary Board in its opinion of 6 March 1991.

10 On 21 June 1991 the Secretary-General of the ESC adopted the following decision:

“The Secretary-General

...

having regard to the reasoned opinion of the Disciplinary Board of 6 March 1991,

...

it being apparent from the disciplinary proceedings that Mr Di Rocco has committed no breach of the obligations incumbent upon an official;

the Public Prosecutor, Brussels, having decided in May to close "without further action" the file opened concerning the person in question following the events of 20 September 1990,

...

decides

to close without further action the disciplinary proceedings against Mr Di Rocco.'

- 11 The decision of 21 June 1991 was notified to the applicant on 1 July 1991.
- 12 After informing the Secretary-General of the ESC by letters dated 5 July and 29 August 1991 of his intention to initiate precontentious and contentious proceedings, on 1 October 1991 the applicant lodged a complaint through his immediate superior and directly with the Secretary-General of the ESC, by fax and by normal letter registered at the Secretariat of the ESC on 4 October 1991. In his complaint he objected that the Appointing Authority had adopted the decision of 21 June 1991 in breach of the duty to have regard to the interests of staff and requested that it be withdrawn and replaced by a decision which, pursuant to the duty to have regard to the interests of staff, would safeguard his rights.
- 13 The applicant gave as reasons for his complaint the fact that the decision of 21 June 1991 did not show the positive role which he had played in the events of

20 September 1990 or the unjust nature of the disciplinary proceedings against him. In the applicant's view, the decision adversely affected him all the more in that it made no reference in the operative part or in the statement of reasons to the opinion of the Disciplinary Board to the effect that he was to be congratulated, especially as the opinion was not intended to be included in his personal file.

14 On 4 November 1991 the Secretary-General of the ESC rejected the applicant's complaint on the ground that it was out of time because it had been received and registered at the ESC on 4 October 1991, that is after the expiry of the three-month period laid down in Article 90(2) of the Staff Regulations.

15 In those circumstances, by application lodged at the Registry of the Court of First Instance on 5 February 1992, the applicant brought the present action.

16 In a statement dated 9 April 1992 the ESC objected that the application was inadmissible under Article 114 of the Rules of Procedure of the Court of First Instance and requested that judgment be given on that objection without examining the substance of the case. The applicant submitted his observations concerning the objection of inadmissibility on 12 June 1992.

17 By application of 17 April 1992 Union Syndicale-Bruxelles sought leave to intervene in support of the form of order sought by the applicant pursuant to Article 115 et seq. of the Rules of Procedure of the Court of First Instance.

18 In pleadings of 7 May and 11 May 1992 the applicant and the ESC respectively submitted their observations on the application to intervene by Union Syndicale-Bruxelles.

19 In the proceedings on the objection of inadmissibility the ESC claims that the Court should:

- allow the objection of inadmissibility without examining the substance of the case;
- declare the action inadmissible;
- order the applicant to pay the costs pursuant to Articles 87(2) and 88 of the Rules of Procedure.

20 The applicant contends that the Court should:

- dismiss the objection of inadmissibility and declare the action admissible;
- consequently set a time-limit for lodging the defence;
- alternatively, reserve a decision on the objection for the final judgment.

21 Under Article 114(3) of the Rules of Procedure of the Court of First Instance, unless the Court otherwise decides, the remainder of the proceedings on an objection are to be oral. The Court (Fifth Chamber) considers that in the present case it has sufficient information from the documents and that it is not necessary to open an oral procedure.

## Admissibility

### *The claim for annulment*

### *Arguments of the parties*

- 22 The ESC maintains that the action is inadmissible because the applicant cannot show a right of action, as he is in no way adversely affected by the decision of 21 June 1991.
- 23 The ESC emphasizes that the filing of the contested decision in the applicant's personal file is not capable of adversely affecting him because the express reason given for closing the disciplinary proceedings against him without further action was that the proceedings '... showed that the applicant has committed no breach of the obligations incumbent upon an official' and that the Public Prosecutor, Brussels, had also decided to close 'without further action' the file opened concerning him following the events of 20 September 1990.
- 24 According to the ESC, the applicant's complaint that the Appointing Authority's decision of 21 June 1991 did not follow the opinion of the Disciplinary Board, which concluded that he was to be congratulated, amounted to blaming the Appointing Authority for not congratulating him. In this respect the ESC maintains that the opinions of the Disciplinary Board are not binding on the Appointing Authority which, furthermore, has the power only to impose or not to impose penalties on officials who are the subject of disciplinary proceedings and has no power to congratulate them.
- 25 Finally, the ESC observes that the applicant cannot blame it for failing to show in the contested decision the allegedly unjustified nature of the disciplinary proceedings against him, as he admitted before the Disciplinary Board that he had made a gesture at a police officer during the events of 20 September 1990 and it is common ground that his conduct gave rise to an investigation by the Public Prosecutor, Brussels.

26 The applicant maintains in substance that the contested decision does not reinstate him in his rights, honour and dignity. He considers that, by confining itself to closing the disciplinary proceedings against him without following the opinion of the Disciplinary Board that he should be congratulated, the Appointing Authority acted in breach of its duty to have regard to the interests of staff and refused to make good the damage caused to him by disciplinary proceedings, which were shown to be unjustified by the fact that the Public Prosecutor, Brussels, closed the file and by the evidence obtained by the Disciplinary Board. In the applicant's view, by not following the opinion of the Disciplinary Board, which had also found that the Appointing Authority had justified its refusal to promote him on the grounds of the disciplinary proceedings pending against him, the decision of 21 June 1991 ordered an unlawful disciplinary measure against him in so far as it is not expressly provided for in Article 86(2) of the Staff Regulations. The applicant thus considers that the contested decision adversely affects him and should therefore be annulled.

### *Findings of the Court*

27 The Court of Justice and the Court of First Instance have consistently held (see most recently the judgment of the Court of First Instance in Case T-138/89 *NBV and NVB v Commission* [1992] ECR II-2181, paragraphs 31 and 32) that an action for annulment can be brought only against an act having adverse effects, that is an act capable of affecting a given legal position, and that only the operative part of the act is capable of producing legal effects and, as a consequence, of adversely affecting a person. In the present case it is apparent from the operative part of the contested decision that the Secretary-General of the ESC decided to close without further action the disciplinary proceedings against the applicant, that is without taking a disciplinary measure against him. The operative part of the contested decision therefore does not alter the applicant's legal situation and thus does not adversely affect him. Consequently the applicant has no interest in challenging the legality of the contested measure from that point of view.

28 It is clear from Article 86 of the Staff Regulations that the powers of the Appointing Authority in disciplinary matters permit it only to order one of the measures provided for in Article 86(2) or to close the disciplinary proceedings without ordering a disciplinary measure, regardless of the opinion of the Disciplinary Board, which in any event is not binding on the Appointing Authority. Hence, although the Disciplinary Board, to which the matter was referred in connection with the disciplinary proceedings against him, concluded that he should be congratulated,

the applicant could not legitimately expect the Appointing Authority to adopt a decision which would close the disciplinary proceedings by following the opinion of the Disciplinary Board in that respect. Consequently the applicant cannot establish the existence of adverse effects by citing the fact that the Appointing Authority omitted to congratulate him in the contested decision.

29 The Court also finds that the grounds, like the operative part of the contested decision which they support, contain nothing to show that the applicant has an interest in challenging the legality of the decision. In addition to a reference to the opinion given by the Disciplinary Board on 6 March 1991, the grounds of the decision of 21 June 1991 contain the express finding that it follows from the disciplinary proceedings as a whole that the applicant has not failed to fulfil the obligations incumbent on an official and that the Public Prosecutor, Brussels, closed the file concerning him without further action.

30 In addition to the contested decision of 21 June 1991, the applicant also challenges the legality of the Appointing Authority's decision to initiate disciplinary proceedings against him on the ground that recourse to that procedure was unjustified. In so far as the alleged illegality of that decision must be considered as a plea in law based on the unlawfulness of a preparatory measure in support of the application for annulment of the subsequent definitive decision of 21 June 1991, the admissibility of such a plea in law depends on the admissibility of the action against the contested decision. In the absence of an interest in challenging the decision of 21 June 1991 which closed the disciplinary proceedings against him, it is not open to the applicant to cite the illegality which is alleged to have vitiated the decision which initiated those proceedings. On the other hand, inasmuch as that illegality must be considered as a plea in law in support of an application for annulment of

the decision of the Appointing Authority to initiate disciplinary proceedings, in so far as such decision may constitute an act adversely affecting him and thus be an actionable measure, officials who are the subject of such a decision must initiate the procedure provided for in Article 90 of the Staff Regulations against it in order subsequently to be able to bring an action to challenge its legality. It is, however, common ground that the applicant did not lodge a complaint against the decision by which the Secretary-General of the ESC initiated the disciplinary proceedings in question against him. In the context of the present action, therefore, a claim that that decision is illegal is not admissible.

- 31 In those circumstances, the applications for the annulment of the decision of 21 June 1991 by which the Secretary-General of the ESC closed without further action the disciplinary proceedings against the applicant must be dismissed as inadmissible, and it is unnecessary to rule on whether the complaint lodged by the applicant against the said decision was lodged in the proper form within the time prescribed.

*The claim for damages*

*Arguments of the parties*  
(omissis)

*Findings of the Court*  
(omissis)

Costs

(omissis)

On those grounds,

**THE COURT OF FIRST INSTANCE (Fifth Chamber)**

hereby orders:

- 1. The application is dismissed as inadmissible.**
  
- 2. It is unnecessary to give a decision on the application by the Union-Syndicale-Bruxelles to intervene.**
  
- 3. The parties, including the applicant to intervene, shall bear their own costs.**

Luxembourg, 18 December 1992.

H. Jung

Registrar

D. P. M. Barrington

President of Chamber