JUDGMENT OF THE COURT (First Chamber)
20 November 1997 *

In Case C-188/96 P,

Commission of the European Communities, represented by Ana Maria Alves Vieira, of its Legal Service, acting as Agent, assisted by Denis Waelbroeck, of the Brussels Bar, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

appellant,

APPEAL against the judgment of the Court of First Instance of the European Communities (Fifth Chamber) in Case T-40/95 of 28 March 1996 *V* v *Commission* [1996] ECR-SC II-461, seeking to have that judgment set aside,

the other party to the proceedings being:

V, a former official of the Commission of the European Communities, represented by Jean-Noël Louis, Thierry Demaseure, Véronique Leclercq and Ariane Tornel, of the Brussels Bar, with an address for service in Luxembourg at the offices of Fiduciaire Myson, 30 Rue de Cessange,

* Language of the case: French.

THE COURT (First Chamber),

composed of: L. Sevón, acting for the President of the First Chamber, D. A. O. Edward and P. Jann (Rapporteur), Judges,

Advocate General: M. B. Elmer,
Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 29 May 1997,

gives the following

Judgment

1 By an application lodged at the Court Registry on 31 May 1996 the Commission of the European Communities brought an appeal, pursuant to Article 49 of the EC Statute and the corresponding provisions of the ECSC and Euratom Statutes of the Court of Justice, against the judgment of the Court of First Instance of 28 March 1996 in Case T-40/95 *V* v *Commission* [1996] ECR-SC II-461 (hereinafter 'the judgment appealed against') annulling the Commission Decision of 18 January 1995 (hereinafter 'the contested decision') imposing on Mr V the disciplinary sanction of removal from post without loss or reduction of entitlement to retirement pension provided for in Article 86(2)(f) of the Staff Regulations of Officials of the European Communities (hereinafter 'the Staff Regulations').

2 The judgment appealed against shows that in February 1992 disciplinary proceedings were initiated by the Commission against Mr V, an official in Grade C 3 in the Directorate-General for Credits and Investments (DG XVIII) (paragraphs 1 to 3).

3 Initially the complaint against Mr V was that he communicated with two other candidates, namely his wife, Mrs G-G, and his colleague, Mr K, during accountancy and auditing tests organized jointly by the Commission and the Court of Auditors, and that he had advance knowledge of the questions and/or of the model answers (paragraphs 3 to 7).

4 In June 1993 the Disciplinary Board gave a first opinion on this complaint, recommending the appointing authority to impose on Mr V the sanction provided for in Article 86(2)(b) of the Staff Regulations, that is to say, a reprimand (paragraph 8).

5 At a subsequent hearing Mr K stated that he had been informed by Mr V that the latter had been in possession of the test questions which were to be set and that he had obtained them from a network existing within the Security Office in Luxembourg (paragraph 9).

6 In light of these new facts the appointing authority reopened the proceedings before the Disciplinary Board against Mr V. On 11 October 1994 the Disciplinary Board delivered a further opinion in which it recommended that Mr V should be downgraded to Grade C 4, the disciplinary measure provided for in Article 86(2)(e) of the Staff Regulations, but that he should retain his seniority in step (paragraphs 11 to 15). It is apparent from the documents before the Court that in its opinion the Disciplinary Board took into consideration as mitigating circumstances, in particular, the six years of irreproachable service completed by Mr V and his previous staff reports.

7 After again hearing Mr V the appointing authority on 18 January 1995 decided to impose on him the disciplinary measure provided for in Article 86(2)(f) of the Staff Regulations, namely removal from post, with effect from 1 March 1995.

8 The statement of the reasons on which that decision was based is couched in the following terms:

'The allegations against Mr V are that he:

— colluded, during the written accountancy and auditing tests in Open Competition EUR/B/21 in Luxembourg, with two other candidates, namely his wife, Mrs G-G, and Mr K, an official in the Security Office in Luxembourg, temporarily assigned to the Publications Office, in regard to subsection I of accountancy test A1, and with one of those two candidates as regards most of the remaining questions, and

— had advance knowledge of the model answers to the accountancy questions and perhaps to the auditing questions, namely either of the wording of those questions or some of them, or of both the model answers and the questions.

One of the examiners of the written tests in Open Competition EUR/B/21 pointed out in a letter of 10 July 1991 to the Selection Board that two of the candidates had in all likelihood communicated with each other during the tests since certain of their answers were identical and others bore strong similarities. It also appeared that a third candidate had communicated, to a lesser extent, with the other two.

It appeared from the numbers under the anonymity procedure that the two candidates referred to were Mr V and Mr K and that the third person was Mrs G-G.

It is clear both from the reports of the hearing of Mr V and from the opinions of the Disciplinary Board that Mr V admitted handing drafts to Mr K during the

written tests in response to signals made by Mr K. The statements made by Mr V show that "during the tests Mr K managed to tell him that he felt unable to solve certain of the accounting exercises."

Mr V's conduct is aggravated in the light of the circumstances described below.

Mr K's papers show that his answer to Question A1 in the parts concerning pure accountancy is very similar to Mr V's answer.

As shown in the table appended hereto at page 4, Mr K's answer to subsection 2, point 2, of Question A1 — analyse and comment on the result obtained at point 1 — reveals certain similarities to Mr V's answer (see Annex 2 for Mr K's answer on this point and Annex 3 for Mr V's answer). However, Mr K's answer (Annex 2) reproduces almost verbatim the part of the model answer to Question A1, subsection 2, point 2, which had previously been drawn up by the Selection Board (see Annex 4).

It is clear from the file that the answers could not have been taken from the auditing manual of the Court of Auditors the relevant part of which is appended hereto (Annex 5).

In his statements Mr V indicated that Mr K managed to tell him during the tests that he felt unable to solve certain of the accounting exercises, and that it was as a result of that appeal that Mr V supplied Mr K with what he has termed his draft answers. It is therefore evident that, prior to the help received from Mr V, Mr K had no knowledge of the elements of the answer which he used. Those elements are as close to Mr V's answer as to the model answer in regard to the abovementioned point. It is therefore established that Mr V had available to him the model

answer for the point in question, of necessity before entering the examination room. He thus took advantage of a leak.

Mr V thus knowingly attempted to distort the results of the open competition in breach of the principle that candidates for posts in the European Civil Service must be on an equal footing in regard to the tests in such competitions.

Such conduct thus entailed a serious risk that candidates who did not in reality possess the requisite professional knowledge would be successful in the tests in that open competition, which would have had the effect of prejudicing both the other candidates and the interests of the institution.

By refusing to give any indication as to the provenance of the model answer in question, Mr V has failed to fulfil his duty to cooperate in the search for the truth, in the interests of the institution.

Mr V, a former inspector in the Belgian police force and formerly an official in the Security Office, first in Luxembourg and then in Ispra, performed important duties involving responsibility and trust.

The institution is entitled to expect of its officials, and in particular of a former official of the Security Office, by the very nature of the duties performed, a level of integrity beyond reproach.

Mr V's conduct is extremely serious inasmuch as he abused the trust which should prevail between an official and his institution.

For those reasons, and in light of all the circumstances of the case, it is necessary and justified to apply to Mr V a more severe disciplinary measure than that recommended by the Disciplinary Board.'

9 For a more detailed account of the facts of the case reference is made to paragraphs 1 to 16 of the judgment appealed against.

10 By application lodged at the Registry of the Court of First Instance on 17 February 1995 Mr V brought an action for annulment of the contested decision.

11 In support of his action Mr V relied on five pleas in law, the first alleging infringement of Article 6 of the European Convention on Human Rights and Fundamental Freedoms and of Article 7 of Annex IX to the Staff Regulations, the second, breach of the rights of the defence, the third, abuse of power on the part of the appointing authority, the fourth, manifest error of assessment and the fifth, breach of the principle of proportionality and inadequacy of the statement of reasons on which the contested decision was based.

The judgment appealed against

12 The Court of First Instance considered it appropriate to examine first the second limb of the last plea in law.

13 At paragraph 36 of the judgment appealed against the Court of First Instance first pointed out that the statement of the reasons for the appointing authority's decision must specifically state the charges made against the official and the considerations which led the appointing authority to impose the sanction chosen. It also pointed out that where, as in the present case, the sanction imposed by the appointing authority is more severe than that recommended by the Disciplinary Board, the decision must specify in detail the reasons which led the appointing authority to depart from the opinion issued by the Disciplinary Board.

14 At paragraphs 37 to 41 of the judgment appealed against the Court of First Instance examined whether the appointing authority had precisely indicated the facts and circumstances justifying the imposition in its decision of a more severe sanction than that recommended in the opinion of the Disciplinary Board. It found that the appointing authority had taken a more serious view of Mr V's conduct than the Disciplinary Board, in particular as regards the alleged fact that Mr V had obtained possession of the model answer before the tests, but that it had not given detailed reasons for its decision to depart from the Disciplinary Board's opinion.

15 At paragraph 42 of the judgment appealed against the Court of First Instance added that it did not consider the similarity of the answers given by Mr K to those of the model answer to be such as to constitute sufficient proof that Mr V had obtained possession of the model answer before the tests.

16 At paragraphs 43 to 50 the Court of First Instance went on to examine whether the three aggravating circumstances mentioned by the appointing authority were capable of justifying the sanction of removal from post rather than that of downgrading recommended by the Disciplinary Board.

17 At paragraph 51 of the judgment appealed against the Court of First Instance criticized the appointing authority for not having given detailed reasons for its decision and for not mentioning the grounds which could justify its refusal to take into consideration the mitigating circumstances which had led the Disciplinary Board to choose the sanction which it recommended, namely six years' irreproachable service completed by Mr V and his staff reports.

18 Accordingly the Court of First Instance held at paragraph 52 that the contested decision contained no ground adequately specifying the reasons for which the appointing authority had imposed on Mr V a significantly heavier sanction than that advocated by the Disciplinary Board. It therefore annulled the contested decision for inadequacy of the statement of the reasons on which it was based.

The appeal

19 In its appeal the Commission submits that, by annulling the contested decision for inadequacy of the statement of the reasons on which it was based, the Court of First Instance infringed Community law. In that connection, it relies on three pleas in law: first, the Court of First Instance erred in its assessment of the extent of the obligation to state reasons; second, on the one hand, it erred in its legal characterization of the matters held by the appointing authority to constitute aggravating factors by holding that those factors did not warrant the imposition of a more severe sanction than that recommended by the Disciplinary Board and, on the other hand, it was wrong in holding that, for it to be regarded as adequately reasoned, the contested decision should have mentioned the mitigating circumstances noted by the Disciplinary Board. Finally, the Court of First Instance erred in its assessment of the degree of proof required to establish a disciplinary fault.

The first plea and the second limb of the second plea on appeal

20 In its first plea and the second limb of its second plea, which it is appropriate to examine together, the Commission submits that the Court of First Instance infringed Community law by erroneously assessing the extent of the obligation to state reasons. Contrary to the findings of the Court of First Instance at paragraph 52 of the judgment appealed against, the contested decision expressly mentions the grounds on which the appointing authority decided to impose on Mr V a heavier sanction than that advocated by the Disciplinary Board. Thus, the contested decision provided the respondent with the information which he needed in order to know, on the one hand, whether or not it was well founded and, on the other, whether it was amenable to judicial review.

21 The Commission states that, whilst criticizing the inadequacy of the statement of the reasons for the contested decision, the Court of First Instance itself found that it was appropriate to 'inquire whether the three aggravating circumstances mentioned by the appointing authority are capable of justifying the imposition of a heavier sanction ...'. Thus, the Court of First Instance in fact confused the allegation of lack of reasons or inadequacy of the reasons given with the allegation which might have been made that the reasons in fact given to justify the sanction imposed were unfounded. In so doing, the Court of First Instance substituted its assessment for that of the appointing authority as to the choice of the appropriate disciplinary measure.

22 In regard to the mitigating circumstances, the Commission submits that the appointing authority duly took them into consideration but did not mention them since the extreme seriousness of the matters alleged against Mr V had the effect of negating those mitigating circumstances, *a fortiori* since the omission to mention them in the contested decision is justified by their obvious nature, namely the fact that the Commission is entitled to expect irreproachable service from every official.

23 Mr V claims that those pleas are inadmissible. Through its arguments, he contends, the Commission is seeking to obtain a fresh assessment of the facts by the Court of Justice, which is prohibited by Article 51 of the EC Statute of the Court of Justice. As to the substance, he considers that the Court of First Instance correctly found that there had been a breach by the appointing authority of its duty to state reasons.

Admissibility

24 In that connection, it should be pointed out that the extent of the obligation to state reasons is a question of law reviewable by the Court on appeal (Case C-166/95 P *Commission* v *Daffix* [1997] ECR I-983). As the Advocate General rightly pointed out at paragraph 12 of his Opinion, review by the Court of Justice, in that context, of the legality of a decision must of necessity take into

consideration the facts on which the Court of First Instance based itself in reaching its conclusion as to the adequacy or inadequacy of the statement of reasons.

25 The objection of inadmissibility raised by Mr V must therefore be rejected.

Substance

26 On the question of the obligation to state reasons, it should be recalled that, in accordance with settled case-law, the statement of the reasons for a decision adversely affecting the person concerned must enable the Community judicature to exercise its review of legality and to provide that person with the information which he needs in order to know whether the decision is well founded (see in particular Case 195/80 *Michel* v *Parliament* [1981] ECR 2861, paragraph 22, and *Commission* v *Daffix*, cited above, paragraph 23).

27 In that connection, it should be pointed out, as the Advocate General has done at paragraph 22 of his Opinion, that the appointing authority expressly based itself on six reasons in order to justify the imposition of a more severe sanction than that advocated by the Disciplinary Board, namely:

— Mr V, a former inspector in the Belgian police force and formerly an official in the Security Office, performed important duties involving responsibility and trust;

— the institution was entitled to expect a level of integrity beyond reproach from its officials and in particular from a former official of the Security Office;

— Mr V had knowingly attempted to distort the results of the open competition in breach of the principle that candidates for posts in the European Civil Service must be on an equal footing in regard to the tests in such competitions;

— such conduct entailed a serious risk that candidates not possessing the requisite professional knowledge would be successful in the tests in that open competition, which would have prejudiced both the other candidates and the interests of the institution;

— by refusing to give any indication as to the provenance of the model answer in question, Mr V had failed to fulfil his duty to cooperate in the search for the truth, in the interests of the institution;

— Mr V thus abused the trust which should prevail between an official and his institution.

28 The six grounds relied on by the appointing authority, analysed in light of all the circumstances of the case before the appointing authority — including the factors invoked by the Disciplinary Board, namely six years' irreproachable service and previous staff reports — constituted a statement of reasons that was adequate for the purpose of enabling the Court of First Instance to exercise judicial review of the question whether the decision was substantively well founded.

29 Under those circumstances, it must be found that, contrary to what was held by the Court of First Instance at paragraphs 41 and 52 of the judgment appealed

against, the contested decision gave a sufficiently precise indication of the reasons for which the appointing authority decided to impose on Mr V a heavier sanction than that advocated by the Disciplinary Board. The Court of First Instance thus erred in law.

30 The first plea and the second limb of the second plea raised on appeal by the Commission are therefore well founded.

31 Without there being any need to examine the other pleas relied on in support of the appeal, the judgment appealed against must be set aside to the extent to which, on the one hand, it annulled the contested decision for inadequacy of the statement of the reasons on which it was based and, on the other hand, ordered the Commission to pay the costs, including those relating to the earlier interlocutory proceedings.

Referral of the case back to the Court of First Instance

32 Under Article 54(1) of the EC Statute of the Court of Justice, 'if the appeal is well founded, the Court of Justice shall quash the decision of the Court of First Instance. It may itself give judgment in the matter, where the state of the proceedings so permits, or refer the case back to the Court of First Instance for judgment.'

33 In the present case the Court considers that it is not in a position to give final judgment in the case since it may be that findings of fact will have to be made in order to adjudicate on the other pleas raised at first instance. The case must therefore be referred back to the Court of First Instance for judgment on the merits after examination of the other pleas raised by Mr V at first instance.

On those grounds,

THE COURT (First Chamber)

hereby:

1. **Sets aside the judgment of the Court of First Instance of 28 March 1996 in Case T-40/95 *V* v *Commission* to the extent to which, on the one hand, it annulled for inadequacy of the statement of the reasons on which it was based the Commission's decision of 18 January 1995 removing Mr V from his post and, on the other hand, ordered the Commission to pay the costs, including those relating to the earlier interlocutory proceedings;**

2. **Refers the case back to the Court of First Instance for it to adjudicate on the pleas raised by Mr V at first instance;**

3. **Reserves the costs.**

Edward Jann Sevón

Delivered in open court in Luxembourg on 20 November 1997.

R. Grass M. Wathelet

Registrar President of the First Chamber