

JUDGMENT OF THE COURT (Fifth Chamber)

20 February 1997 *

In Case C-166/95 P,

Commission of the European Communities, represented by Dimitrios Gouloussis, of its Legal Service, acting as Agent, and by Benoît Cambier, 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 (Third Chamber) in Case T-12/94 of 28 March 1995 *Daffix v Commission* [1995] ECR-SC II-233, seeking to have that judgment set aside,

the other party to the proceedings being:

Frédéric Daffix, an official of the Commission of the European Communities, residing in Brussels, represented by Georges Vandersanden and Laure Levi, of the Brussels Bar, with an address for service in Luxembourg at the office of Fiduciaire Myson SARL, 1 Rue Glesener,

* Language of the case: French.

THE COURT (Fifth Chamber),

composed of: J. C. Moitinho de Almeida, President of the Chamber, L. Sevón, D. A. O. Edward, P. Jann (Rapporteur) and M. Wathelet, Judges,

Advocate General: A. La Pergola,
Registrar: D. Louterman-Hubeau, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 4 July 1996,

after hearing the Opinion of the Advocate General at the sitting on 19 September 1996,

gives the following

Judgment

- 1 By application lodged at the Court Registry on 30 May 1995, the Commission of the European Communities brought an appeal pursuant to Article 49 of the EC Statute of the Court of Justice and the corresponding provisions of the ECSC and Euratom Statutes against the judgment of 28 March 1995 in Case T-12/94 *Daffix v Commission* [1995] ECR-SC II-233, in which the Court of First Instance annulled the Commission's decision of 18 March 1993 removing Mr Daffix from his post as a disciplinary measure, without reducing or withdrawing his entitlement to retirement pension, as provided for in Article 86(2)(f) of the Staff Regulations of Officials of the European Communities (hereinafter 'the Staff Regulations').

2 It appears from the contested judgment that in April 1991 the Commission initiated disciplinary proceedings pursuant to the second paragraph of Article 87 of the Staff Regulations against Mr Daffix, an official in Grade B 3 in the Information, Communication, Culture, Audiovisual Directorate-General (DG X) (paragraph 6).

3 The official was accused of having made out three order forms to Newscom SA, a subcontractor of the Commission responsible for managing the studios in the basement of the Berlaymont Building in Brussels, with a view to obtaining cash advances from that undertaking amounting to a total of BFR 450 000 for services allegedly ordered from Ms Lombaerts, an outside supplier, whose existence still remains uncertain, and of having in fact kept that money. It was also alleged that Mr Daffix had forged the signature of the competent assistant head of unit in DG X on two of those order forms (paragraphs 3, 4, 9, 12 and 21 of the judgment).

4 Having regard to a report from the appointing authority and after hearing Mr Daffix and taking evidence from officials on several occasions, the Disciplinary Board considered in its opinion of 18 February 1993 that it had not been proven that the order forms had been forged by Mr Daffix and that, despite various contradictions both in his statements and between them and the evidence heard, it could not rule out the possibility that the money in question had in fact been paid to the supplier of services named by Mr Daffix. The Disciplinary Board nevertheless concluded that, by failing to check the identity and bona fides of that supplier beforehand, Mr Daffix was guilty of a serious breach of his obligations as an official of the European Communities. Accordingly, the Disciplinary Board recommended that the appointing authority downgrade him to Grade B 5, Step 1 (paragraph 19).

- 5 After hearing Mr Daffix, the appointing authority took a decision on 18 March 1993 (hereinafter ‘the contested decision’) containing the following reasoning:

‘The complaint against Mr Daffix is that he forged three order forms made out to Newscom, a subcontractor of the Commission in the “culture” sector, and that he used the said order forms in order to induce Newscom to pay over to him, for and on behalf of the Commission, a large sum in cash in three instalments in June and July 1990.

Mr Daffix admitted at the hearing on 10 April 1991 that he had made out the three order forms, one of which he signed personally *per pro* his immediate superior, in the absence of any instructions from his superior in that regard.

At that same hearing Mr Daffix denied having forged the signature of his immediate superior on the other two order forms.

Mr Daffix used the three order forms in order to obtain payment in cash of the abovementioned sum from Newscom without having obtained any instructions whatsoever in that regard.

Mr Daffix’s statements concerning the payment to a person outside the institution of the sum he had obtained from Newscom, on the one hand, and as to the identity of that person, on the other, were inconsistent and often contradictory and hence could not be taken into consideration, in particular in the light of the other testimony given in the course of the disciplinary procedure.

It may therefore properly be concluded that Mr Daffix kept the sum of BFR 450 000 which he received in cash from Newscom.

That conclusion is, moreover, corroborated by the statement made by Mr Daffix himself at the hearing on 22 July 1991.

Mr Daffix himself admitted before the Disciplinary Board that he had in fact made that statement on 22 July 1991, even though he subsequently refused to sign the record of the hearing.

The conduct with which Mr Daffix is charged constitutes an extremely serious breach of his obligations, which calls into question the very foundations of the relationship of mutual trust which must exist between the institution and each member of its staff, and such conduct justifies the imposition of a disciplinary measure more severe than that recommended by the Disciplinary Board' (point 21).

- 6 Accordingly, the Commission decided to remove Mr Daffix from his post, without reducing or withdrawing his entitlement to retirement pension.
- 7 Reference is made to paragraphs 1 to 23 of the contested judgment for a fuller account of the facts of the case.
- 8 By application lodged at the Registry of the Court of First Instance on 18 January 1994, Mr Daffix brought an action for annulment of the contested decision.

- 9 In support of his action, Mr Daffix relied on five pleas in law. The first plea in law alleged that the disciplinary measure imposed was unlawful; the second claimed that the appointing authority had abused its discretion and committed a manifest error of assessment; the third alleged a breach of the rights of the defence; the fourth a breach of Article 7 of Annex IX to the Staff Regulations; and the fifth that the statement of reasons for the contested measure was inadequate (paragraph 29).

The judgment of the Court of First Instance

- 10 In the circumstances of the case, the Court of First Instance considered that it should examine the last plea first.
- 11 At paragraph 31 of the contested judgment, the Court declared first of all that the plea, which was raised for the first time in the reply, was admissible. Emphasizing the importance which attaches, in general, to the duty of the Community institutions to state reasons for decisions taken in the exercise of their powers, the Court considered that the plea concerned a matter of public interest which as such might, in any event, be raised by the Community Court of its own motion.
- 12 At paragraphs 35 to 46, the Court then considered whether a proper statement of reasons was provided by the contested decision, after observing, at paragraph 32, that, according to the case-law, the requirement that a decision adversely affecting a person should state the reasons on which it is based is intended to provide the person concerned with details sufficient to allow him to ascertain whether the decision is well founded and to enable the Court to review its legality (Case 195/80 *Michel v Parliament* [1981] ECR 2861, paragraph 22; Case 69/83 *Lux v Court of Auditors* [1984] ECR 2447, paragraph 36; Case T-1/90 *Pérez-Mínguez Casariego v Commission* [1991] ECR II-143, paragraph 73).

- 13 In this regard, the Court found, in the first place, at paragraph 42 of the judgment, that the contested decision did not indicate sufficiently precisely the conduct of which Mr Daffix stood accused and which had led the appointing authority to impose the disciplinary measure of removal from post.
- 14 More specifically, the Court observed, at paragraph 35, that the contested decision gave no indication as to whether, according to the appointing authority, the ground of complaint concerning the forgery of the order forms constituted a proven fact.
- 15 At paragraph 36, it also observed that, in so far as the applicant denied forging the signature on the order forms and the appointing authority had not explained why it had not carried out a complete investigation in order to determine who could have signed them, the appointing authority was under an obligation to give explicit and detailed reasons for its decision on that point.
- 16 Likewise, at paragraph 40, the Court found that the appointing authority had not succeeded in refuting Mr Daffix's statements to the effect that he had paid the sum at issue over to a third person, and had not given express reasons for its view that the evidence adduced by the official did not bear out his statements, particularly in view of the fact that Mr Daffix had subsequently retracted his admission. The Court added that a precise indication of the charges made against Mr Daffix was all the more necessary given the fact that the Disciplinary Board for its part, first, had considered that it had not been proven that he had forged the order forms and, secondly, had found itself unable to rule out the possibility that the applicant had paid over the sum in question to Ms Lombaerts.
- 17 Secondly, the Court observed at paragraph 46 that the contested decision did not contain any ground sufficiently specifying the reasons for which the appointing authority had adopted a more severe penalty than the one proposed by the Disciplinary Board.

- 18 In view of all the foregoing findings, the Court of First Instance considered, at paragraph 47, that the grounds given for the contested decision did not enable it to carry out a proper review of its legality, and, at paragraph 49, ruled out the possibility that the appointing authority might regularize the decision in the course of those proceedings, on the ground that compliance with the rights of the defence must be fully secured in litigation relating to disciplinary proceedings. Accordingly, the Court of First Instance annulled the contested decision on the ground that the statement of reasons was inadequate.

The appeal

- 19 In its appeal, the Commission argues that the Court of First Instance infringed Community law by annulling the contested decision on the ground that the statement of reasons was inadequate. In this regard it relies on three pleas: first, the plea alleging an inadequate statement of reasons was raised only in the reply; next, the Court of First Instance's assessment in this regard was not well founded; finally, the Court of First Instance wrongly refused to take account, when assessing the statement of reasons, of the explanations provided by the Commission during the procedure before it.
- 20 In his observations, Mr Daffix contends, for his part, that the appeal is unfounded.

The first plea on appeal

- 21 In its first plea, the Commission claims that the Court of First Instance wrongly upheld the plea that the statement of reasons was inadequate inasmuch as that plea was inadmissible, since it was raised for the first time by Mr Daffix in his reply rather than at the pre-litigation stage.

22 More specifically, the Commission challenges the reasoning of the Court of First Instance, set out in paragraph 31 of its judgment, that a plea in law alleging that the statement of reasons is inadequate may, in any event, be raised by the Community Court of its own motion. It considers that, whilst the lack of any statement of reasons may be considered likely to affect the rights of the defence and the proper functioning of the institutions by preventing the Court of First Instance and the Court of Justice from carrying out their task, that is not the case where the contested act contains a statement of reasons of some kind.

23 In this regard, it should be observed that, according to the case-law, the statement of the reasons on which a decision adversely affecting a person is based must allow the Court to exercise its power of review as to its legality and must provide the person concerned with the information necessary to enable him to decide whether or not the decision is well founded (*Michel v Parliament*, cited above, paragraph 22).

24 Accordingly, the fact that a statement of reasons is lacking or inadequate, hindering that review of legality, constitutes a matter of public interest which may, and even must, be raised by the Community Court of its own motion (Case 18/57 *Nold v High Authority* [1959] ECR 41 and Case 185/85 *Usinor v Commission* [1986] ECR 2079, paragraph 19).

25 Since consideration of such pleas may take place at any stage in the proceedings, the applicant cannot be debarred from relying on them solely on the ground that he did not raise them in his complaint.

26 The first plea must therefore be rejected.

The second plea on appeal

- 27 In its second plea, the Commission submits that the Court's assessment of the inadequacy of the statement of reasons set out in the contested decision is without foundation.
- 28 In this regard, it avers that the contested decision contained both an express statement of reasons and reasoning by reference to a number of documents and statements. The validity of the reasoning should therefore have been assessed in the light of all that material.
- 29 In particular, the Commission asserts that the essence of the reasoning was to be found in its conclusion that Mr Daffix had kept the sum of BFR 450 000. It claims that it justified that conclusion by referring to Mr Daffix's inconsistencies and contradictory statements, which were drawn from the whole of the administrative file to which the contested decision referred. Moreover, Mr Daffix's admission was mentioned in the statement of reasons and was sufficient in itself to justify the measure taken.
- 30 Furthermore, the Commission avers that it made known the reasons why it had diverged from the Disciplinary Board's proposal: unlike the Board, the appointing authority had considered that it was proven that Mr Daffix had kept the money and had stated that it no longer had the trust in Mr Daffix that it had to have in its servants.
- 31 Likewise, the Commission claims that the contested decision gave sufficient reasons for the complaint that the order forms had been forged. That complaint was based not only on the possible forgery of the signature of Mr Daffix's immediate superior but also on a number of other factors specified by the Commission, which Mr Daffix had not denied.

32 Consequently, the Commission complains that the Court of First Instance disregarded Article 190 of the EC Treaty and Article 25 of the Staff Regulations in so far as it imposed requirements which went beyond the objective pursued by the requirement to state reasons, which consists in enabling the person concerned and the courts to ascertain whether the facts alleged are capable of justifying the disciplinary measure taken.

33 As regards the facts underlying the contested decision, it should be noted that it is based on the following:

- forgery of three order forms made out to Newscom and the use thereof to induce that company to pay over to Mr Daffix, for and on behalf of the Commission, a large sum, namely BFR 450 000 (first ground of the decision);
- the fact that Mr Daffix admitted at a hearing that he had drawn up the three order forms, one of which he signed personally *per pro* his immediate superior without his superior having given any instructions in that regard (second ground of the decision);
- the fact that he used the three order forms without having received any instructions whatever in that regard (fourth ground of the decision);
- the contradictions in Mr Daffix's statements as to whether he did in fact hand over the sum of money to a person outside the institution and as to the identity of that person (fifth ground of the decision);
- the fact that Mr Daffix admitted that he did in fact keep the money, an admission which was subsequently retracted (sixth and seventh grounds of the decision).

- 34 It must therefore be held that, contrary to the findings of the Court of First Instance at paragraph 42 of its judgment, the contested decision gave a sufficiently precise indication of the conduct with which the official was charged. Furthermore, the decision constituted the culmination of disciplinary proceedings initiated in 1990, the details of which were sufficiently familiar to the official. Moreover, in the light of the case-file and the grounds of the contested decision referring thereto, as summarized in paragraph 33 of this judgment, it cannot be concluded that judicial review of the legality of that decision was impossible.
- 35 In so far as it considered that the contested decision did not indicate sufficiently precisely the conduct with which Mr Daffix was charged and that hence Article 190 of the Treaty and Article 25 of the Staff Regulations had been infringed, the Court of First Instance committed an error of law.
- 36 As regards the grounds for the disciplinary measure contained in the contested decision, the Court of First Instance found, at paragraph 45 of its judgment, that they were stereotyped inasmuch as they gave no explanation of the particular reasons why, in the specific circumstances of the case, the appointing authority had chosen the disciplinary measure of removal from post rather than that of downgrading as the Disciplinary Board had suggested.
- 37 It appears, however, from the facts described in paragraph 33 of this judgment, that the appointing authority, unlike the Disciplinary Board, was convinced that Mr Daffix had kept the sum in question himself and that he had forged an order form and used it and two more in order to obtain a payment without having received any instructions in that regard from his immediate superior. Whereas the Disciplinary Board had found only that Mr Daffix had not checked the identity of the third party in question and had not made certain of her *bona fides*, which it had described as a serious failure in carrying out his duties as an official, the appointing authority described the complaints which it had made out as an extremely serious breach of his obligations as an official *vis-à-vis* his institution, which called into

question the very foundations of the relationship of mutual trust between the institution and members of its staff (see the ninth ground of the contested decision). Even if it does not specify this expressly, it is sufficiently apparent from the contested decision that that was the reason why the appointing authority had diverged from the Disciplinary Board's opinion.

- 38 In those circumstances, it must be held that the Court of First Instance committed an error in law in finding, at paragraph 46 of its judgment, that the contested decision did not contain any ground specifying sufficiently the reasons why the appointing authority adopted a disciplinary measure more severe than that recommended by the Disciplinary Board.
- 39 The contested judgment should therefore be quashed, without its being necessary to consider the third plea in law relied upon in support of the appeal, inasmuch as it, first, annulled the contested decision on the ground that its statement of reasons was inadequate, and, secondly, ordered the Commission to pay the costs.

Reference of the case back to the Court of First Instance

- 40 According to the first paragraph of Article 54 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 final 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.'
- 41 In the present case, the Court considers that it is not in a position to give judgment on the case and that it should therefore be referred back to the Court of First Instance so that it may give judgment on the substance taking into consideration the other pleas relied upon by the applicant at first instance, which are set out in paragraph 29 of the contested judgment.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

- 1) Quashes the judgment of the Court of First Instance of 28 March 1995 in Case T-12/94 *Daffix v Commission* inasmuch as it, first, annulled the Commission's decision of 18 March 1993 removing Mr Daffix from his post, on the ground that the statement of reasons was inadequate and, secondly, ordered the Commission to pay the costs;
- 2) Refers the case back to the Court of First Instance so that it may give judgment on the other pleas relied upon by the applicant at first instance, which are set out in paragraph 29 of the contested judgment;
- 3) Reserves the costs.

Moitinho de Almeida

Sevón

Edward

Jann

Wathelet

Delivered in open court in Luxembourg on 20 February 1997.

R. Grass

J. C. Moitinho de Almeida

Registrar

President of the Fifth Chamber