

3. Although factors appertaining to an official's private life cannot as a general rule justify the imposition of disciplinary measures, a deliberate failure to comply with several court decisions may reflect on his position as an official and may

therefore be regarded as a factor aggravating other conduct complained of incompatible with the integrity and honesty which each official is required to show *vis-a-vis* the administration.

REPORT FOR THE HEARING in Joined Cases 175 and 209/86*

I — Facts and procedure

1. When he took up his duties as an official of the Council in Grade LA 7 the applicant, Mr M., certified by means of two declarations dated 1 July 1982 that he was married to Mrs M., that he had two dependent children of that marriage and that his wife was not in receipt of family allowances.

2. The declarations were accompanied by an undertaking to inform the administration of the Council immediately and in writing of any change in his circumstances; the declarations were renewed in the annual declarations of 1983 and 1984.

3. On 19 November 1982 the applicant, Mrs M. and their daughter, I., signed application forms for residence permits in Belgium, in which the existence of the marriage was still certified.

4. On the basis of those declarations the Council paid to the applicant from 1 July 1982 until June 1985 the daily subsistence

allowance, installation allowance, family allowances and annual travel expenses payable to officials and members of their family.

5. It was not until the administration of the Council received a letter dated 14 June 1985 from Mrs M. that it learned of a divorce decree between the applicant and Mrs M. delivered on 14 November 1981 by the Haarlem court. The record of the divorce in the registers of civil status is dated 28 April 1982. By decision of 8 July 1982 of the Haarlem court, Mrs M. was awarded custody of the two children. By the same decision the applicant was ordered to pay the sum of HFL 500 per month in respect of each of his two children to the Raad voor Kinderbescherming (Council for the Protection of Children) towards their maintenance and education.

6. At the request of the Council, the Raad van Arbeid (Labour Council), Haarlem, confirmed, by a letter dated 25 July 1985, that family allowances had been paid to Mrs M. in respect of the dependent children until 1 October 1982 and once again from 1 July 1984 in respect of the daughter I.

* Language of the Case: French.

The applicant failed to inform the Council of the payment of those allowances.

7. In addition, the Council discovered that five judgments in default had been entered against the applicant in Belgium for the payment of various debts. In that connection the administration of the Council received requests for attachment against the applicant for a total amount of approximately BFR 1 350 000.

8. On the basis of those facts, the Secretary-General of the Council, in his capacity as the appointing authority, wrote to the applicant on 28 October 1985 setting out the matters complained of and stating his intention to grant him a hearing with regard to those facts in accordance with Article 87 of the Staff Regulations. The letter contains the following opening sentence:

'I have been informed that since you took up your duties on 1 July 1982, you have intentionally committed a serious breach of your obligations under the Staff Regulations'.

The applicant was heard by the Secretary-General on 16 January 1986 but he refused to give any explanation concerning the matters of which he was accused on the ground that the memorandum of 28 October 1985 prejudged the results of the investigation and therefore constituted an infringement of his right to a fair hearing.

9. In accordance with the second paragraph of Article 87 of the Staff Regulations, the Secretary-General then referred the matter to the Disciplinary Board by submitting to it a report dated 4 March 1986. That report and the documents relating thereto were communicated to the applicant on 7 March 1986.

10. The Disciplinary Board was unable to meet until 16 May 1986 owing to the suspension by the Staff Committee of the participation on joint bodies of members appointed by that committee. Despite

several requests made by the Chairman of the Disciplinary Board the applicant refused to appear at that meeting on the ground that the period of one month within which, under Article 7 of Annex IX to the Staff Regulations, the Board is to transmit its opinion to the appointing authority had already elapsed.

11. At its meeting on 16 May 1986 the Disciplinary Board delivered the reasoned opinion provided for in Article 7 of Annex IX to the Staff Regulations. The opinion contains the following grounds:

'Since he took up his duties on 1 July 1982 and over a period of months following that date Mr M(...), an official of the Secretariat-General of the Council of the European Communities in Grade LA 7, completed a number of forms intended to enable the administration to fix, in particular, the amount of the social benefits to which he was entitled under the Staff Regulations.

It is clear from the documents submitted to the Disciplinary Board by the administration of the Council that Mr M(...) deliberately deceived the latter with regard to his family circumstances by a number of false declarations seeking to obtain benefits to which he was not entitled.

Those repeated actions constitute a failure to comply with the duty of integrity imposed on all officials, regardless of the other allegations raised against Mr M(...) by the administration.

Mr M(...) was invited to submit his defence but he has failed to produce any document to that end and has even failed to appear before the Disciplinary Board in

order to explain his actions orally despite repeated invitations to him.

provide information under Article 67 (2) of the Staff Regulations.

Despite the seriousness of the infringement Mr M(. . .) should be given an opportunity to redeem himself.

In addition, Mr M(. . .) has repeatedly failed to fulfil his private obligations, contrary to the second sentence of the first paragraph of Article 23 of the Staff Regulations.

The Board is of the opinion that in view of the circumstances of the case the appropriate disciplinary measure is downgrading to Grade LA 8 Step 2'.

All of the foregoing constitutes a serious and deliberate failure on the part of Mr M(. . .) to comply with his obligations under the Staff Regulations, not only the particular obligations referred to above but also the general obligations laid down in Articles 11 and 12 of the Staff Regulations which require an official to conduct himself solely with the interests of the Community in mind and to abstain from any action which may reflect on his position.

12. On 13 June 1986 the Secretary-General, departing from the opinion delivered by the Disciplinary Board and after hearing the applicant once more on 30 May 1986, decided to remove him from his post with effect from 16 September 1986. With regard to the hearing of 30 May 1986 the decision contains the following paragraph:

Under Article 27 of the Staff Regulations recruitment is to be directed to securing for the institution the services of officials of the highest standard of ability, efficiency and integrity.

'At the hearing Mr M(. . .) gave no explanation concerning either the opinion delivered by the Disciplinary Board or the matters complained of but he did, on the other hand, repeat his argument — submitted at the hearing of 16 January 1986 — that the right to a fair hearing had been prejudiced and he contended that, in addition, a large number of irregularities had been committed by the Disciplinary Board so as to render the disciplinary proceedings unlawful in his opinion, although he did not specify those irregularities.'

The deliberate and repeated submission of declarations concerning Mr M(. . .)'s civil status which no longer corresponded to his status when he took up his duties clearly shows a constant intention to disregard the honesty and trust which should govern relations between officials and the public service, in this case an institution of the European Communities.

As regards the substance, the decision contains, *inter alia*, the following grounds:

'It has been established, clearly and undeniably, that Mr M(. . .) made false declarations concerning his civil status and that he has failed to comply with his duty to

Such conduct, involving deliberate, patent breaches of a serious nature, in itself shows that Mr M(. . .) lacks the necessary integrity and consequently that he is morally unfit to hold any post in the Community public service.

In such circumstances the possibility of his redeeming himself, referred to by the Disciplinary Board, is theoretical.

Secondly, the other allegations made against Mr M(...), namely failure to comply with Article 67 (2) of the Staff Regulations and failure to fulfil private obligations which have been the subject of court orders and which he has intentionally evaded, thereby showing his manifest contempt for the judicial authorities of the country in which he is employed and particularly reflecting on his position, constitute aggravating circumstances in so far as they provide additional evidence of Mr M(...)'s disregard for certain of his obligations, even if those charges were not expressly mentioned in the opinion of the Disciplinary Board.

The theoretical nature of the possibility of the applicant's redeeming himself, referred to by the Disciplinary Board, is therefore reinforced.

In addition, Mr M(...) has not claimed at any time during the inquiry that there are any mitigating circumstances and objective examination of the facts reveals no such circumstance, which leads once again to the conclusion that any possibility of his redeeming himself must be ruled out.

It follows clearly from the foregoing that the disciplinary measure proposed by the Disciplinary Board is not commensurate with the gravity of the facts complained of and that, consequently and in any event, a more serious penalty must be imposed on Mr M(...), if only in respect of the failures expressly referred to by the Disciplinary Board.

Pursuant to the agreement concluded between the Secretary General of the Council and the Staff Committee concerning the action to be taken on unanimous or majority opinions of joint bodies, published in Staff Notice No 2023/82 of 25 November 1982, the Chairman of the Disciplinary Board was informed by memorandum of 4 June 1986 of the appointing authority's intention not to follow the Disciplinary Board's opinion.

It is hereby decided as follows:

1. Mr M(...) is removed from his post under Article 86 (2) (f) of the Staff Regulations.
2. As Mr M(...) has not completed 10 years of service, it is not necessary to take a decision with regard to his pension rights.
3. This decision shall take effect on 16 September 1986'.
13. In the aforementioned memorandum of 4 June 1986 the Secretary-General informed the Chairman of the Disciplinary Board of the reasons for the decision of 13 June 1986 and added, *inter alia*, that the applicant had at no time attempted to provide any explanation of his conduct but had merely sought to extricate himself from the proceedings in question by 'procedural' means.
14. On 14 July 1986 the applicant lodged an administrative complaint and by application lodged at the Court Registry on 16 July 1986 he brought an action against the decision of 13 June 1986 (Case 175/86). By an application lodged on the same day the applicant applied for an interim order suspending the operation of that decision.

15. By order of 5 September 1986 of the President of the Second Chamber the application for interim measures was dismissed and by decision of 8 September 1986 the Council rejected the administrative complaint.

Declare the two actions admissible and well-founded;

Annul or amend the decision in question;

16. By an application lodged at the Court Registry on 5 August 1986 the applicant brought a second action against the decision of 13 June 1986 based, in particular, on the aforementioned memorandum of 4 June 1986 sent by the Secretary-General to the Chairman of the Disciplinary Board (Case 209/86). By order of 10 June 1987 the Court (Second Chamber) decided to join the two cases.

Order the postponement of all disciplinary proceedings;

In the alternative, adjourn the cases until the evidence has been heard;

In the further alternative, and solely for the sake of completeness, amend the penalty so as to accord with the recommendation made by the Disciplinary Board in its opinion of 16 May 1986;

17. By decision of 17 March 1987 the Court (Second Chamber) returned the Council's rejoinder on the ground that it was out of time, since it was received on 17 March 1987, that is to say after the time-limit of 16 March 1987.

Make an appropriate order as to costs.

18. By order of 10 June 1987 the Court (Second Chamber) granted the applicant legal aid.

2. The *Council* contends that the Court should:

19. Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court (Second Chamber) decided to open the oral procedure without any preparatory inquiry. However, the Court requested the Council to give details of the pecuniary loss resulting from the applicant's inaccurate declarations.

Declare the application registered at the Court under No 175/86 inadmissible in so far as it seeks the amendment of the contested decision as regards 'the penalty so as to accord with the recommendation made by the Disciplinary Board in its opinion of 16 May 1986' and declare the remainder of the application unfounded;

Declare the application registered at the Court under No 209/86 inadmissible or, in any event, unfounded;

II — Conclusions of the parties

1. The *applicant* claims that the Court should:

Order the applicant to pay the whole of the costs.

III — Submissions and arguments of the parties

(a) *Admissibility*

1. As regards Case 175/86, the Council maintains that the alternative claim seeking the amendment of the decision as regards the penalty imposed therein is manifestly inadmissible. The only action open to the Court with regard to an alleged misuse of power or an alleged manifest error is to annul the contested decision. It is not empowered to substitute its own assessment for that of the appointing authority. The Council refers to the Court's judgment of 30 May 1973 (Case 46/72 *De Greef v Commission* [1973] ECR 543) and the interim order made on 5 September 1986 in Case 175/86.

2. In response, the applicant states that since the dispute submitted to the Court is of a pecuniary nature in so far as it concerns the means of subsistence of an official, the Court is perfectly entitled to deal with the substance thereof.

3. As regards Case 209/86, the Council maintains that the object of that second application is no different from that of the first apart from the request for the production of the memorandum of 27 September 1983, since produced by the Council. The second application therefore constitutes a request incidental to a measure of inquiry, expressly provided for in Article 45 of the Rules of Procedure, which is not separable from the first substantive action and cannot therefore justify the lodging of a second application putting forward new submissions. The second application is therefore inadmissible. At the very least, the additional costs incurred as a result of the applicant's method of proceeding have been caused vexatiously within the meaning of Article 69 (3) of the Rules of Procedure. It

would, in any event, be unfair to order the Council to pay them.

4. In reply the applicant states that it is a principle of procedure that as long as a party takes action against a decision within the time-limit it is entitled to amplify its earlier application by means of an additional written statement. Consequently, the second application lodged by the applicant is perfectly admissible.

(b) *Substance*

1. The applicant puts forward three sets of submissions relating to:

- (i) the procedure,
- (ii) the statement of reasons,
- (iii) the substance.

(i) *The procedure*

2. The applicant maintains that the Secretary General had already adopted a position against him before he referred the matter to the Disciplinary Board. This is clear from the memorandum of 28 October 1985 and it deprived the applicant of the opportunity of a fair hearing by an independent and impartial tribunal in accordance with Article 6 of the European Convention on Human Rights. Even if that article does not apply to disciplinary proceedings, there nevertheless remains the right of each person in accordance with basic principles of law to an impartial and independent judge.

3. According to the wording of the *first paragraph of Article 4 of Annex IX* to the Staff Regulations the official is to have not less than 15 days to prepare his defence. The applicant states that the Chairman of the Disciplinary Board informed him orally

on 7 March 1986 that he had to submit any defence within 15 days at the most, in writing. The applicant considered therefore, first, that the Chairman of the Disciplinary Board required him to submit a written defence within a shorter period than the minimum fixed by the Staff Regulations and, secondly, that the Chairman prohibited him from submitting any written defence after that period of preparation. He maintains that such conduct is contrary to the Staff Regulations.

4. According to *Article 7 of Annex IX* the Disciplinary Board is to deliver an opinion of the disciplinary measure proposed by it within one month of the date on which the matter was referred to it. That provision has also been infringed by the Disciplinary Board.

5. The Council maintains that the submission based upon the European Convention on Human Rights manifestly confuses judicial proceedings and disciplinary proceedings. According to the case-law of the European Court of Human Rights the dismissal of an official from the public service does not fall within the scope of Article 6 of the Convention since disciplinary action does not deprive the person concerned of any civil right, such as the right to practise a profession. In this case the applicant has not been deprived of his right to practise a trade or profession in accordance with his qualifications; he has merely been excluded from the Community public service. Moreover, the right to a fair hearing relied upon by the applicant is guaranteed, not by the appointing authority, but by the Court of Justice.

6. The Council also argues that when the Secretary-General considers it necessary to initiate a disciplinary procedure he must inform the person concerned of the allegations against him before hearing him in

order to give him an opportunity of clearing himself. The Secretary-General cannot be accused of partiality on the basis of the wording of that communication.

7. With regard to Article 4 of Annex IX the Council does not see how this provision has been infringed. It emphasizes that the report initiating the procedure and the relevant documents were notified to the applicant on 7 March 1986; the hearing was originally fixed on 11 April 1986 and the final date, namely 16 May, was notified to him on 24 April. The applicant therefore had the time needed to prepare his defence.

8. With regard to the time-limit laid down in Article 7 of Annex IX, the Council points out that the Court has held on several occasions that that time-limit is not mandatory, in the sense that any measures adopted after its expiry are void, but simply constitutes a rule of sound administration (see the Court's judgment of 4 February 1970 in Case 13/69 *van Eick v Commission* [1970] ECR 3). As a result of the suspension by the Staff Committee of the activities of members of joint bodies, the applicant himself requested that the Disciplinary Board should not meet until the suspension was lifted.

(ii) *The statement of reasons*

9. The applicant maintains that the reasons given by the Secretary-General for imposing a more severe penalty than that proposed by the Disciplinary Board may be reduced to three grounds: the rehabilitation referred to by the Board is theoretical by reason of the applicant's repeated false declarations; its theoretical nature is reinforced by his failure to fulfil private obligations which have been the subject of court orders; and the applicant has failed to put forward any mitigating circumstances. In the light of the Court's case-law and in particular of its

judgment of 29 January 1985 (Case 228/83 *F. v Commission* [1985] ECR 275) it is obvious that the reasons stated in the contested decision are inadequate and insufficient as regards the imposition of a more severe penalty.

10. In addition, the applicant points out that the aforementioned memorandum of 4 June 1986 sent by the Secretary-General to the Chairman of the Disciplinary Board in order to explain the increase in the penalty raises an additional complaint against the applicant in respect of 'frustration by procedural means'. That complaint, which is not the subject of disciplinary proceedings, explains why the penalty imposed on the applicant is out of all proportion to the infringements found against him.

11. The Council maintains that the Secretary-General set out the three reasons referred to by the applicant in the grounds of the contested decision in an explicit manner and as precisely as possible. The decision was based on the intrinsic gravity of the facts, on the absence of mitigating circumstances and, finally, on the absence of any sign of improvement in the applicant's conduct suggesting that he might redeem himself.

12. In the memorandum of 4 June 1986 to the Chairman of the Disciplinary Board, the Secretary-General did not base his decision on a new complaint but emphasized that if factors explaining his conduct existed the applicant would have been bound to have put them forward rather than take refuge in procedural devices.

(iii) *The substance*

13. The applicant maintains that the contested decision is vitiated by *manifest errors* concerning both his presumed bad faith and his alleged fraudulent intention.

14. With regard to *knowledge of his civil status*, the applicant maintains that the Netherlands divorce procedure is conducted by copy documents only and no writs are served personally or at a person's residence. In addition, he had no notice of any summons before the Netherlands court to decide the question of the custody of his children.

15. Even if his matrimonial position was somewhat unusual, the applicant depended upon his family and their life together, as is shown by the fact that he rented a large house in Belgium and by the fact that Mrs M. signed an application for a residence permit on 19 November 1982 and on the same day signed guarantees for the applicant of BFR 300 000 and BFR 141 000. Until the end of 1982, if not until early 1983, there were regular reconciliations between the applicant and his wife and they lived as man and wife in Brussels during holidays and at weekends at the address indicated in the periodical declarations.

16. If the husband is unaware of the registration of a divorce decree and if, moreover, the circumstances of fact are such that it is possible for the husband legitimately to believe that he and his wife are reconciled, he cannot be charged with being at fault, morally or legally, for making a declaration which is objectively incorrect.

17. In any case there was no *fraudulent intention* since under the Staff Regulations the applicant has the same social benefits whether he is a married official or a divorced official with one dependent child. His daughter I. lived with him in Belgium until July 1984. It was only from that time onwards that benefits were paid to Mrs M. in the Netherlands. In addition, there is a conflict between the provisions of the Staff

Regulations and Netherlands law because the Haarlem court ordered the applicant to pay the benefits he received in respect of I. Since the Council had therefore in any event to pay the family allowances either to the applicant or to Mrs M. the erroneous declarations were incapable of having any adverse affect on the Council.

18. With regard to the child allowance paid by the Netherlands authorities, the applicant emphasizes that Mrs M. herself declared in writing on 15 November 1986 that she had requested and received that allowance without the applicant's knowledge. In those circumstances, the applicant cannot be reproached for having failed to declare it.

19. With regard to his private debts, the applicant maintains that every debtor is entitled to allow himself to be the subject of a judgment in default. If he had been acting in bad faith he would have contested the debt or attempted delaying tactics. In addition, since the complaint concerns his private life it falls within Article 8 of the European Convention on Human Rights and cannot, of itself, justify the bringing of disciplinary proceedings without the production of further details. That is all the more so since to date no appointing authority has ever relieved an official of his post for the involuntary non-payment of private debts.

20. Finally, the applicant points out that, despite a memorandum of 27 September 1983 (produced by the Council on the applicant's request in Case 209/86) drawn up by Mr t'Kindt, the applicant's immediate superior, which called for disciplinary measures to be taken against the applicant and referred to the applicant's debts in the Netherlands and Belgium, no penalty was imposed at that time. In the applicant's view the appointing authority cannot condemn in 1986 what it passed over in silence and in full knowledge of the facts in 1983.

21. The Council emphasizes that a person's civil status is a matter of objective law, independent of feelings or of any intention to become reconciled. The applicant, who is a lawyer by training, should know that, just as he should know that knowledge of his own civil status is an absolute obligation. Moreover, the applicant was summoned to appear before the Haarlem court at the hearing of 27 May 1982 to hear its decision concerning the custody of his two children, which date was prior to his taking up his duties.

22. Even if it is accepted that the applicant acted in good faith when he took up his duties, that does not alter the fact that, as the applicant himself admits, the spouses became 'definitively estranged' at the end of 1982, or at least at the beginning of 1983, with the result that the applicant could no longer contend in good faith that he was still married. He should therefore have notified the administration of his divorce and should not have claimed to be a married official in the declarations made by him on 31 March and 13 April 1983 and 18 September 1984.

23. The applicant's claim that he acted in good faith is supported neither by the lease of a house whose size and price appear to be disproportionate nor by the fact that Mrs M. undertook to act as guarantor for her ex-husband. In any event, Mrs M. stated that she had never intended to settle in Belgium with the applicant.

24. Finally, the Council emphasizes that Article 12 of the Staff Regulations imposes an obligation on an official to 'abstain from any action... which may reflect on his position' without making any distinction between what he does in his private life and what he does at work. In addition, Article

23 of the Staff Regulations provides, in relation to privileges and immunities, that officials 'shall not be exempt from fulfilling their private obligations or from complying with the laws and police regulations in force'. In the Council's view it stands to reason that the disciplinary authority is empowered to impose a penalty in respect of a failure to comply with these elementary obligations. Since the circumstances of the applicant's private life are such as to cast doubt on his character and probity and since such circumstances reflect on the institutions, the appointing authority was right to decide that he no longer satisfies the requirements of good character laid down in Article 28 of the Staff Regulations and that his actions reflect on his position.

IV — Reply to the question put by the Court

1. The Court (Second Chamber) asked the Council to state in writing what pecuniary loss the institution had incurred as a result of the erroneous declarations in view of the information now provided by the applicant.

2. In its answer the Council provided the following figures and mentioned that the amounts are recovered from the applicant's remuneration pursuant to Article 85 of the Staff Regulations:

Travel expenses:

1982: BFR 963

1983: BFR 2 238

1984: BFR 2 324

Total: BFR 5 525

Household allowance:

1 February 1984 to 30 June 1984:

BFR 13 666 per month BFR 68 330

1 July 1984 to 30 June 1985:

BFR 14 010 per month BFR 168 120

Total: BFR 236 450

Family allowance:

Total: BFR 7 118

Installation allowance: no pecuniary loss

Grand total: BFR 249 093

O. Due
Judge-Rapporteur