

OPINION OF MR ADVOCATE GENERAL MISCHO
delivered on 11 December 1986 *

*Mr President,
Members of the Court,*

The facts and background of Case 403/85 are set out in detail in the Report for the Hearing. I shall therefore make reference thereto.

Before undertaking an examination of the submissions put forward by the applicant in support of his application for the annulment of the decision of 6 May 1985 by which the Commission removed him from his post, it seems to me essential to set out the framework for this Opinion. That framework is determined by the nature of the control exercised by the Court over decisions adopted by the appointing authority in disciplinary matters.

The Court has already referred to the nature of that control in paragraphs 34 and 35 of its judgment of 29 January 1985 in Case 228/83, between the same parties,¹ in which it stated as follows:

'As the Court has already held, *inter alia* in its judgment of 30 May 1973 in Case 46/72 *De Greef v Commission* [1973] ECR 543, once the truth of the allegations against the official has been established, it is for the appointing authority to choose the appropriate penalty. The Court cannot substitute its own judgment for that of the appointing authority except in the case of a manifest error or misuse of powers.'

* Translated from the French.

¹ — [1985] ECR 275.

Let me state at once that in this case the applicant has not claimed that there was any misuse of powers and therefore I have no need to examine that question.

It is thus my duty to ascertain whether the two grounds relied upon by the applicant, namely an inadequate and erroneous statement of the reasons on which the decision was based and breach of the principle of proportionality in the choice of penalty, reveal a manifest error on the part of the Commission.

The statement of the reasons on which the decision was based, alleged by the applicant to be erroneous and inadequate

1. The allegations against the applicant

In paragraph 37 of its judgment of 29 January 1985 the Court stated that the first decision to remove the applicant from his post restricted itself to stating 'that the applicant committed "a violent assault" on Mr Morel "causing him injuries"'. The Court then stated that that brief statement did not reveal whether the decision was based solely on the explanation given by the applicant or whether, and if so to what extent, the appointing authority had relied also on the depositions of Mr Morel and his assistant, which were to a large extent challenged by the applicant.

The new decision to remove him from his post, adopted on 6 May 1985, contains six recitals (Nos 6 to 11 inclusive) which describe the incident in detail and the injuries suffered by Mr Morel as a result.

As the Commission itself points out, one of those recitals concerns an allegation which is denied by the applicant, namely that he threw an ashtray.

Another recital refers to Mr Morel's statement that the applicant kicked him while he was on the ground, of which the applicant stated that he had no recollection.

I therefore consider that I should disregard those two recitals and consider solely whether the other facts referred to in the decision are capable of establishing manifest error in the summary and assessment of the facts.

Recital No 6 states that the applicant:

- (i) struck Mr Morel;
- (ii) grabbed hold of the front of his shirt, causing it to tear;
- (iii) caused him to fall from the armchair in which he was sitting, resulting in a superficial injury to his hand.

Those facts are not disputed.

Recital No 9 sets out the findings of two doctors as regards the grazing and bruising exhibited by Mr Morel.

Recital No 10 states that 'such grazing and bruises, the existence of which cannot be denied, are the direct or indirect result of the violence with which (the applicant) attacked Mr Morel'.

As there is no dispute over that finding, the causal link between the applicant's actions and the injuries suffered by Mr Morel is thus established.

Thus it may be said that the conclusion which the Commission draws from all those factors in recital No 11, namely that 'it is established that [the applicant] committed a violent act of aggression against the Director-General' follows logically from the facts set out above.

The facts denied or not admitted by the applicant do not constitute a necessary precondition for reaching that conclusion.

I therefore consider that the statement of reasons in the contested decision may, as regards the facts, be regarded as adequate and without error.

2. The context in which the events occurred

In the second place, the applicant complains that the contested decision does not place the applicant's action in 'the context of the provocation and humiliation' to which he was subjected at the interview on 6 October 1982, and which, in his contention, resulted from factors such as the obstinate refusal by Mr Morel to pay attention to the applicant's repeated arguments, Mr Morel's desire to harm the applicant, his laughter and the question of whether or not Mr Morel stated that he had received the agreement of the head of the private office of the French Minister for Cooperation to the termination of the applicant's secondment in Paris.

It is clear from the file that all those matters were strenuously denied by Mr Morel and

by Mr Petit-Laurent, who was the only person present at the interview.

I therefore consider that those matters should be disregarded, in the same way as were the facts contested by the applicant.

3. *The problem of mitigating circumstances*

The applicant next claims that the contested decision does not contain any valid rebuttal of the Disciplinary Board's finding that there were mitigating circumstances.

That claim is undoubtedly linked with the passages in the Court's judgment of 29 January 1985 in which it stated that it was 'indispensable that the preamble to the decision should specify... the considerations which have led the appointing authority to impose the particular penalty' (paragraph 35) and stated that the first decision removing the applicant from his post did not allow the Court 'to assess the reasons for which the appointing authority chose a penalty which was more severe than that proposed by the Disciplinary Board' (paragraph 40).

In that regard a distinction must be drawn between the question of the applicant's responsibility for his action and the question of mitigating circumstances.

As regards the question of responsibility, the starting point must be Article 86 (1) of the Staff Regulations of Officials of the European Communities, which makes it a condition for the application of disciplinary measures that the official's failure to comply with his obligations under the Staff Regulations should have been intentional or through negligence.

In that connection I would point out that recital No 15 of the Commission's decision

of 6 May 1985, after citing paragraph 8 of the Court's judgment in Case 12/68,² refers to the medical opinions submitted by Dr De Geyter and Dr Dumont on 27 October 1982 and concludes that when the applicant committed the acts 'he was fully aware of what he was doing'.

In fact the two experts found that 'for legal purposes, [the applicant] must be regarded as responsible for his actions at the date on which the allegations made against him occurred and at present'. Thus the condition that he should have acted 'intentionally' is fulfilled.

It remains to ascertain whether there are none the less mitigating circumstances which should be taken into account in the applicant's favour.

Unlike the decision of 7 April 1983, the decision of 6 May 1985 sets out to explain in detail why the Commission considers that the circumstances referred to by the Disciplinary Board do not have the mitigating character which the Board attributes to them. Nine recitals are devoted to that question.

As regards the applicant's insecurity and anxiety the Commission refers to a number of factors which do not seem to me to be open to question.

It is indeed undeniable that from an objective point of view the applicant had, by standing in the elections for the Corsican Regional Assembly, helped to create the situation in which he found himself when, on 6 October 1982, he presented himself in the office of his superior. It is indisputable that he did not comply with his obligations under Article 15 of the Staff Regulations of Officials. Those two actions were at least

2 — Judgment of 27 May 1970 *X. v Commission* [1970] ECR 291, 294.

partly responsible for the applicant's state of insecurity. It is also undeniable that the interests of the service in the Commission might have demanded that the applicant should in any case be recalled to Brussels before the date on which his secondment to Paris was to end, irrespective of his electoral mandate. It is agreed between the parties that all officials are deemed to have knowledge of the Staff Regulations and that it follows from Article 15 of the Staff Regulations that the appointing authority shall consider the case of an official elected to public office and, having regard to the importance of the office and the duties it entails for the holder, shall decide whether the official should continue in active employment or should apply for leave on personal grounds for a period equal to the term for which he has been elected.

Lastly it is true that if one of those administrative measures had been adopted with regard to the applicant, he would have had ample opportunities for appeal at various levels.

Thus the outlook facing the official on 6 October 1982 was not unforeseeable or exorbitant.

It therefore seems to me that the Commission did not commit a manifest error in considering that the insecurity and anxiety produced by that outlook could not be so serious as to constitute a mitigating circumstance.

Recitals 20, 21 and 22 of the contested decision concern the 'inability to contain frustration' and the applicant's impulsive nature.

The Commission considers that 'although differences in tolerance between one indi-

vidual and another may explain differences in behaviour, they can never justify recourse to physical violence' and 'by resorting to the act of aggression in question he exceeded the bounds of acceptable conduct on the part of a responsible official in the performance of his duties'.

By that the Commission undoubtedly means that there is an entire range of possible reactions between a polite and measured expression of disagreement and physical aggression by which persons who are unable to contain frustration can express their dissatisfaction, or even their outrage, such as shouting, banging their fists on the table, etc.

Here again, it seems to me difficult to characterize that reasoning as manifestly erroneous. For the applicant had either entirely lost control of his actions, in which case he should not be penalized at all — but the psychiatrists say that that was not the case in this instance — or was still to some extent capable of controlling himself, in which case the Commission is not wrong in stating that he should not have resorted to an act of physical aggression against his superior.

As regards the third factor referred to by the Disciplinary Board, namely the absence of premeditation, the Commission states that although premeditation may in certain cases be regarded as an aggravating circumstance, the absence of premeditation cannot be regarded as a mitigating circumstance.

As in this case both the Disciplinary Board and the Commission have made use of concepts drawn from criminal law (which do not appear in the Staff Regulations), it must therefore be permissible to refer to that area of law in order to find the interpretation to be given to those concepts.

It must be stated that under the criminal law of the country in which the incident occurred, and whose courts would therefore have had to decide the case if Mr Morel had brought an action, premeditation does indeed constitute an aggravating circumstance. In particular, Article 398 of the Belgian Criminal Code provides as follows:

‘Any person who intentionally injures or strikes another person will be liable to imprisonment for a period between eight days and six months and to a fine ...’

In the case of a premeditated act, the accused will be liable to imprisonment for a period between one month and one year and to a fine ...’.

I have been unable to ascertain the position under the criminal law of all the other Member States, but I have established that under German, English, French, Italian and Luxembourg law premeditation is also regarded as an aggravating circumstance.

Thus in this connection once again the statement of reasons in the decision is not vitiated by manifest error.

In its opinion of 8 March 1983 the Disciplinary Board stated that ‘conduct such as that described merits very severe judgment, particularly since it was that of an official of the rank of principal administrator ... An official guilty of such conduct ... should suffer in consequence the severest penalty’ (see paragraph 8).

However, the Disciplinary Board went on to recognize the existence of the mitigating circumstances dealt with above, and recommended that the applicant should be downgraded from Grade A 5, Step 4, to Grade A 6, Step 8.

In its decision of 6 May 1985 the Commission makes virtually the same

assessment of the facts as the Disciplinary Board, namely that ‘the gravity of such conduct merits a particularly severe judgment, especially as it was the act of an official of the rank of principal administrator’.

Having concluded that there are no mitigating circumstances, the Commission concludes that ‘any penalty of downgrading would be inappropriate in view of the misconduct which has been established, the seriousness of which could not be diminished by the circumstances referred to by the Disciplinary Board’.

Consequently, the Commission imposes on the applicant the disciplinary penalty of removal from his post, without any reduction or withdrawal of entitlement to retirement pension, as provided for in Article 86 (2) (f) of the Staff Regulations.

Thus the decision sets out precisely the reasons for which the Commission chose a penalty which was more severe than that recommended by the Disciplinary Board.

In summary, I would say that the statement of reasons provided by the Commission in support of its decision of 6 May 1985 removing the applicant from his post shows clearly the facts on which it is based, makes it possible to ascertain the reason why the Commission departed from the opinion of the Disciplinary Board and why it imposed on the applicant the penalty of removal from his post. Thus the decision of 6 May 1985 cannot be criticized on the grounds which justified the annulment of the decision of 7 April 1983.

It remains to be considered whether, having decided that there were no mitigating circumstances, the Commission imposed a penalty which was manifestly excessive by

removing the applicant from his post by way of penalty for the facts set out in the statement of reasons for its decision.

The alleged breach of the principle of proportionality

Unlike the Criminal Codes of the Member States which set out a list of offences, on the one hand, and corresponding penalties (providing for a minimum and a maximum) on the other hand, the Staff Regulations of Officials does not contain any list of that kind.

In order to assess whether the penalty imposed by the Commission in this instance is excessive, it is therefore necessary to have recourse to other criteria.

First of all, it will be noted that the penalty imposed is not the most severe penalty possible, since the applicant's pension rights are not affected.

Next, it may be considered whether, if the same facts were committed in a national civil service or a private undertaking, the penalty which could be imposed on the person concerned would not in general be that of removal from his post. That is certainly not the case.

Lastly, a comparison may be made with the circumstances in which the Court itself has annulled or has refused to annul decisions removing officials from their post.

So far as I know, the Court has in the past found that there was manifest error by the appointing authority with regard to a

decision by which employment was terminated in only one case. That was Case 18/63,³ which concerned the termination of a nurse's contract as a member of the auxiliary staff. A motor accident had occurred in the immediate vicinity of the Commission's offices, and an official had ordered the applicant, who at that time was on duty, to make her way to the scene of the accident with her first-aid kit. He complained that the nurse had not followed his instructions with the necessary diligence and, in the presence of the crowd surrounding the accident, refused to intervene; lastly, he criticized her for not having brought her first-aid kit with her. After examining all the circumstances of the case, the Court arrived at the conclusion that the Commission's reaction had been *manifestly disproportionate* and that the contested decision, being based on a reason which was not valid in law, had to be annulled.

In a series of other judgments the Court has rejected applications for the annulment of a decision to remove a person from his post.

Those cases are as follows:

An official who showed no initiative in ensuring that the day-to-day work for which he was responsible was carried out, expressly refused to carry it out himself, claiming that it did not correspond to his level, was absent without justification and was not punctual;⁴

Shoplifting, notes addressed to the official's superior which were evidence of malicious conduct towards his colleagues which was inexcusable and deplorable, theft of documents and, probably, writing of an anonymous letter; (in this case the

³ — Judgment of 19 March 1964 *Mrs Estelle Wollast (née Schmitz) v European Economic Community* [1964] ECR 85.

⁴ — Judgment of 11 July 1968 in Case 35/67 *Van Eick v Commission* [1968] ECR 329, and judgment of 4 February 1970 in Case 13/69 [1970] ECR 3.

psychiatric expert appointed by the Court had found that the applicant's responsibility had undergone an 'average diminution';⁵

involved in the fight and the Court had strongly criticized the Commission for its negligence at the material time.

Reprehensible activities and participation in the reprehensible activities of another official, which amounted to an abuse of official status and a demand for payment from a person desiring to obtain employment with the Commission;⁶

I must also point out that in order to evaluate the choice of penalty imposed by the Commission, it is necessary to refer to the time at which the allegations against the applicant occurred. Therefore all the considerations concerning the consequences suffered by the applicant after those events are extraneous to the assessment of the severity of the penalty in relation to the facts established.

Refusal by an official to appear at her post, failure to comply with the duty of obedience (third paragraph of Article 21 of the Staff Regulations) and of the duty to be at all times at the disposal of the institution (third paragraph of Article 55 of the Staff Regulations).⁷

I have therefore reached the same conclusion as that of Mr Advocate General Mancini in the first case decided by the Court between the same parties.⁹

It seems to me that the allegations made against the applicant are no less serious than those at issue in the cases referred to above.

After citing the Court's statement in *Van Eick* and *De Greef*, to the effect that 'it is not a matter for the Court to substitute its own judgment for that of the disciplinary authority, except in cases of obvious disproportion or abuse of power', Mr Mancini stated that in his view 'there is neither of those defects in the contested decision'.

The applicant also relies on another case in order to accuse the Commission of applying 'double standards'. That case is Case 18/78,⁸ which concerned a brawl between two officials in Grade C 2.

That case, it is true, concerned the Commission's decision of 7 April 1983. But the decision of 6 May 1985 contains a more detailed statement of reasons than the first and follows the same logical order as that described by Mr Mancini in the last paragraph of section 7 of his Opinion. That reasoning is therefore in my view equally valid as regards the decision of 6 May 1985. May I quote the words of Mr Mancini: 'After stating that the applicant is to be held responsible for his conduct and that the circumstances which he pleads do not mitigate the seriousness of his offence, the

The Commission rightly observes that that case cannot be used as a 'model' in the present case, owing to the fact that the Commission had not established the respective responsibilities of the two officials

5 — Judgments of 7 May 1969 *X. v Audit Board* [1969] ECR 109 and of 27 May 1970 [1970] ECR 291, in Case 12/68.

6 — Judgment of 30 May 1973 in Case 49/73 *Drescig v Commission* [1973] ECR 565 and judgment of 30 May 1973 in Case 46/72 *De Greef v Commission* [1973] ECR 543.

7 — Judgment of 16 December 1976 in Case 124/75 *Perinciolo v Council* [1976] ECR 1953.

8 — Judgment of 14 June 1979 in Case 18/78 *Mrs V. v Commission* [1979] ECR 2093.

9 — Opinion of 13 December 1984 in Case 228/83 [1985] ECR 275.

appointing authority concludes that "in those circumstances the penalty recommended by the Disciplinary Board is inappropriate in relation to the misconduct in question". There is nothing unreasonable or arbitrary in that conclusion. On the contrary, it is logical and in accordance

with the criterion of sound disciplinary administration.'

Like Mr Mancini, I am therefore bound to conclude that the complaint based on an alleged breach of the principle of proportionality cannot be upheld.

Conclusion

Since I have found that the two submissions put forward by the applicant do not reveal any manifest error on the part of the Commission, I cannot but propose that the Court should dismiss the application. In accordance with Articles 69 (2) and 70 of the Rules of Procedure, the parties should be ordered to bear their own costs.