JUDGMENT OF THE COURT (SECOND CHAMBER)
12 JULY 1973 [1]

Nunzio di Pillo
v Commission of the European Communities

Joint Cases 10 and 47/72

Summary

1. *Officials — Recruitment — Probation — Report — Delay in making thereof — Validity — Responsibility of the administration*
   (Staff Regulations, Article 34)

2. *Officials — Recruitment — Probation — Unfavourable report — Dismissal of the person concerned — Time limit — Nature — Commencing date*
   (Staff Regulations, Article 34)

3. *Officials — Recruitment — Probation — Unfavourable report — Intention to dismiss — Notification to the person concerned — No obligation*
   (Staff Regulations, Article 34)

1. A probation report made some months late is still valid but the administration is responsible for the damage resulting from this irregularity which is contrary to the express requirements of the Staff Regulations.

2. When the probation report is unfavourable, the administration must take its decision to dismiss within a reasonable period which begins to run from the making of the report and its communication to the person concerned.

3. The Commission is under an obligation to communicate the end of probation report to the probationer so that he may submit his comments, but not to give him an opportunity to state his views on its intention to dismiss him by reason of the unfavourable nature of the report, even if this calls not for an immediate dismissal but for an extension of the probationary period. If the Commission does so, thereby observing the code of good administration, it can allow a very brief period for a reply without the dismissal being vitiated.

In Joined Cases Nos 10 and 47/72

NUNZIO DI PILLO, former probationer of the Commission of the European Communities, resident at Piazza San Andrea della Valle, 6, Rome, represented by Marcel Slusny, advocate at the Brussels Court of Appeal, having chosen

1 — Language of the Case: French.

his address for service in Luxembourg at the Chambers of Ernest Arendt, 34 B/IV, rue Philippe-II,

applicant

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its legal adviser, Pierre Lamoureux, acting as agent, with an address for service in Luxembourg at the office of its legal adviser, Emile Reuter, 4, boulevard Royal,

defendant,

Application for annulment of the end of probation report and of the decision to dismiss the applicant and for various claims for compensation,

THE COURT (Second Chamber)

composed of: P. Pescatore, President of Chamber, H. Kutscher and M. Sørensen (Rapporteur), Judges,

Advocate-General: A. Trabucchi
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Facts and Procedure

The facts and procedure may be summarised as follows:

1. The applicant, of Italian nationality, born in 1933, was head of an animal products office in Italy known as the IVRAM, which is concerned with agricultural research and information. He was appointed a probationer with the Commission on 1 March 1971 in Grade A 3 with the title of Head of the 'Cattle and Meat' Division of the Directorate-General of Agriculture. The appointment was made without competition under Article 29 (2) of the Staff Regulations.

The end of probation report, provided for in Article 34 of the Staff Regulations, was made on him on 4 November 1971. The report, signed by the Director-General of Agriculture, was unfavourable. It suggested however a three months' extension of the probationary period to

allow a final assessment. The report was brought to the applicant's notice on the day on which it was made.

On 8 November, the applicant lodged an appeal through his immediate superior in which he objected to the lateness of the end of probation report, which under Article 34 (2) of the Staff Regulations, as it then stood, should have been made on 31 July at the latest. Moreover he made reservations about the alleged intention of the Commission to replace him by an official of another nationality.

By letter of 7 December, the Commission dismissed his complaint of 8 November, and informed him that it had examined the report on his probation and intended to dismiss him by reason of the unfavourable nature of the report. The applicant was invited to submit his comments to the Commission by 15 December 1971 at the latest.

On 14 December he sent a letter to the Commission, objecting to the dismissal and disputing the assessments made about him in the end of probation report. He referred generally to the facts set out in his appeal of 8 November.

On 21 December 1971 the Commission decided to dismiss him with effect from 1 February 1972.

On 3 March 1972, the applicant made an administrative appeal against the Decision of 21 December, to which the Commission did not reply.

In July 1972, another official of Italian nationality, Mr Sergio Ventura, was appointed to the post left vacant by the applicant.

2. The applicant made two appeals to the Court of Justice, the first, registered at the Court on 13 March 1972 under number 10/72, against the Commission's express Decision of 7 December 1971 and the second, registered at the Court on 11 July 1972 under number 47/72, against the Commission's implied dismissal of his appeal of 3 March 1972.

By Order of 4 October 1972, the Court (Second Chamber), on the report of the Judge-Rapporteur, having heard the Advocate-General, directed that the two cases be joined.

The Court (Second Chamber), having heard the Advocate-General, decided to open the oral procedure without any preparatory inquiry.

The parties presented oral argument at the hearing on 30 May 1973. The Advocate-General presented his opinion at the hearing on 27 June 1973.

II — Submissions of the parties

The applicant asks the Court:

— to annul the end of probation report;

— to annul the implied refusal by the Commission of the administrative appeal of 3 March 1972;

— to annul the dismissal notified to the applicant by the letter of 21 December 1971 with all the legal consequences relating to the re-establishment of the applicant in his former post, the payment of arrears and various other benefits;

— to annul the appointment of Mr Sergio Ventura to the post previously held by the applicant, viz Head of the 'Cattle and Meat' Division of the Directorate-General of Agriculture;

— alternatively to declare that giving the applicant reason to believe, from 31 July 1971 at least until mid-October, 1971 that he would be established, constitutes a breach of duty;

— to order the Commission to pay the applicant by way of damages under various heads BF 25 000, BF 57 400, BF 100 000 and BF 2 500 000;

— to order the Commission to pay interest on these sums from 8 March 1972, at a rate to be determined by the Court;

— to order the Commission to pay the costs of the proceedings.

In the course of the proceedings, the applicant abandoned a submission that

he should be considered as established at the end of his probationary period, i.e. 31 August 1971. He declared that he accepts the implications to be drawn from the judgment given by the Court in Case No 52/70 *(Nagels v Commission,* Recueil 1971, p. 363).

The Commission asks the Court:
— to dismiss the applications as unfounded,
— to order the applicant to pay the costs.

III — Pleas and arguments of the parties

The pleas and arguments of the parties may be summarized as follows:

1. Validity of the probation

(a) The *applicant* contends that the probation was irregular because the end of probation report is dated 4 November 1971, while the probationary period of six months ran to 31 August 1971 and that the report should have been made one month before expiry of this period, i.e. 31 July 1971 at the latest. He claims that if the report had been made on 31 July 1971 it would have been favourable because his superiors had made no comments on him before mid-October. The applicant is prepared to call on witnesses to prove that he could not possibly have imagined that his probation was not considered satisfactory. He further submits that when he travelled with his Director, Mr Amiet to Poland between 3 and 7 October, 1971, he asked Mr Amiet if he could take some leave in December. Mr Amiet replied that, having regard to the work during this period, he thought it was not possible for him to be away except for the Christmas holidays.

In the course of this journey Mr Amiet discussed at length the work of his Divison with the applicant without the slightest mention of the future end of probation report or of any shortcomings whatever by the applicant in carrying out his duties.

The applicant also makes the point that if the end of probation report had been made for 31 July 1971 and on the assumption that it had contained the same reservations as those in the report of 4 November together with a proposal to extend the probationary period, he would certainly have asked his superiors to say what complaints they had against him and he would have been able, during the period of the extension to which he was entitled, to bring himself up to the required standard.

The *Commission* observes that the applicant had the benefit of a certain extension of probation which would have enabled him to obtain a decision which was not unfavourable. The failure to observe the time limit in no way harmed his interests. An end of probation report before the end of July 1971 would have been just as unfavourable as that dated 4 November 1971. Mr Amiet, the Director, the applicant's immediate superior, states that about mid-July he made some essential basic observations to the applicant setting the tone of the end of probation report. Mr Amiet was so concerned that he had discussed this freely with Mr Pizzuti, a member of the cabinet of the President of the Commission, before the holidays. Likewise, the Assistant Director-General, Mr Heringa, did not keep from the applicant the unfavourable opinion he had formed of him. The Commission considers that the applicant's arguments are ill-founded, the error in the matter of form concerning the end of probation report not being such as to make any serious difference to him.

(b) The *applicant* contends moreover that the probation was irregular because it did not take place in conditions enabling him to demonstrate his ability, and especially that it was too short. The applicant raises the question of his personal and ordinary leave, the eight missions he had made abroad — each of them lasting an average of a week, as

well as the month of August, which he contends was a slack month for him which effectively reduced his probationary period. On this point he invokes the submission in the end of probation report which suggested the period of probation be extended by three months. Moreover he invokes the judgment in Case No 10/55 *(Mirrosevich v High Authority,* Recueil 1955-56 p. 367).

The *Commission* contends that the applicant's criticisms should be rejected as unfounded. The eight missions abroad were an integral part of his duties and the Directorate-General of Agriculture was very busy during August. It observes the contradiction in the contentions that his probation was too short and that it was too long.

2. Irregularity of dismissal

(c) The *applicant* makes the point that his dismissal notified by letter of 21 December 1971 and brought to his notice on 17 January 1972, when his probation ended on 31 August 1971, cannot be considered as having taken place within a reasonable period.

The *Commission's* reply is that the decision to dismiss him took place within a reasonable time and, if the applicant did not receive notice of it until 17 January 1972, this was not the Commission's doing.

(b) The *applicant* contends that his rights of defence had been infringed because the letter of 7 December, dismissing his complaint of 8 November against the end of probation report and informing him of the Commission's intention to take action to dismiss him, did not reach him until 13 December 1971, while he was allowed only until 15 December to submit any possible comments. He draws attention to the fact that the report did not advise dismissal but a three months' extension of probation, and he invokes the judgment in Case No 19/70 *(Almini v Commission,* Recueil 1971, p. 623).

The *Commission's* reply is that the Staff Regulations do not give a probationer a right to make advance observations on a dismissal measure. The Staff Regulations state expressly in the last sentence of the first paragraph of Article 34 (2) that 'a probationer whose work has not proved adequate for establishment in his post shall be dismissed'. Moreover the applicant had an opportunity to submit his comments in writing on the end of probation report, the tone of which Mr Amiet had indicated to him from October 1971. Yet he made none. In his reply of 14 December 1971, which could have contained the considerations which he had been able to elaborate from October, the applicant put forward nothing concrete to show that the opinions about him contained in his end of probation report were wrong. The Commission contends that there are some fundamental differences between Case 19/70 and the present cases.

(c) The *applicant* makes the point that there was a misuse of powers: the unfavourable opinion given on him and his dismissal are explained, not by objective grounds connected with the interest of the service, but by the desire to promote Mr Garet, a French official in Grade A 4, to the post to be filled or at any rate to appoint him to it temporarily. Mr Garet had been a candidate for the post to which the applicant was appointed. Mr Garet made an administrative appeal and only after this appeal, 'undoubtedly in October, 1971', had there been any question of an unfavourable assessment and the dismissal of the applicant. Since it appeared to the officials of the Commission that Mr Garet's appeal was likely to be completely successful, steps were taken to dismiss the applicant so as, if not to promote Mr Garet, at any rate to give him the post temporarily.

The *Commission's* reply is that these allegations are devoid of any foundation and that the applicant adduces nothing in support of them. In fact, since the applicant's dismissal, Mr Garet was neither given the post in question temporarily nor was he appointed to it;

on the contrary the Commission, at its meeting of 24 July 1972, appointed an official of Italian nationality, Mr S. Ventura. In the opinion of the Commission the applicant has not shown that his unfavourable end of probation report was not a sufficient ground to justify his dismissal.

3. Claims for damages

The *applicant* makes the point that the irregularity and lateness of the acts constitute breaches of duty giving rise to damages, even on the assumption that the grounds set out do not necessarily lead to annulment of the dismissal. The applicant contends, as a subsidiary plea, that the Commission committed a breach of duty in leading him to believe, from 31 July 1971 at least until mid-October 1971, that he would be established. The heads of damage are as follows:

(a) the applicant, after 1 August 1971 signed a lease for the flat rented in Brussels, under the terms of which a three months' indemnity was payable if the lease was terminated less than a year from its inception; he had had to pay BF 25 000 under this head;

(b) the lease for the applicant's flat in Rome provided that any surrender must take place three months before it expired in December 1971; on 14 September 1971 the applicant surrendered his lease; on 31 December 1971 he had to remove his furniture temporarily into a flat and make a second removal in July; the cost of these two removals may reasonably be estimated at BF 57 400;

(c) in September 1971, he disposed of his livestock hastily; lost production and the cost of repurchase involved a loss which could reasonably be estimated at BF 100 000;

(d) in August 1971, he was offered a post at a salary of Lit. 7 200 000 a year by Confagricoltura, an association of agricultural proprietors and cultivators; this offer could not be kept open. Although it is difficult to determine how long the applicant will need to find another post as well paid, it seems reasonable to take three years as a basis which represents a gross salary, disregarding increments, of BF 2 500 000.

The *Commission's* reply is that the grounds for its liability and especially the existence of a breach of duty and damage resulting therefrom, are not substantiated in this case. The Commission has committed no breach of duty such as to make it liable, since the dismissal of the applicant was entirely due to his work not having proved adequate. The Commission had not led the applicant to believe that he would definitely be appointed at the end of his six months' probation or that he would be established. The loss was due to actions in which the applicant took a personal risk and whose consequences he must suffer.

The Commission makes the further point that as regards the claims for damages recited at (a) and (d) the applicant's argument based on his claim to believe he had definitely been appointed from 31 July 1971, disregards the fact that his appointment as an official could not take place under the Staff Regulations before 31 August 1971.

The *applicant* counters this by saying that the Commission overlooks the fact that the probation report should have been made before 31 July 1971 and that until then he had no reasonable cause for thinking the report would be other than favourable.

As regards the loss alleged by the applicant at (b), the *Commission* observes that the applicant was authorized from 4 March 1971 to move to Brussels and that he should have transferred his belongings not to a fresh address in Italy but to his residence in Brussels.

The *applicant* replies that the double move in Italy was due to the Commission's attitude and that moreover it is to be noted that the amount of damages claimed is well below that of the expenses which would have fallen on the Commission if the furniture had been taken to Brussels and then taken back to Rome after his dismissal.

As regards the loss alleged by the applicant at (c), the *Commission* observes further that it does not see how conditions of haste came about suddenly in September and that it has not been established that the applicant will repurchase a stock of cattle and, if he does, that he will do so at a price higher than that at which he sold.

The *applicant's* reply is that he sold his stock in September for a number of reasons and that *inter alia* at this particular time the Assistant Director, Mr Heringa, told him that his personal ownership of livestock might give rise to a conflict of interest with the Commission.

The *Commission* denies the applicant's statements that Mr Heringa, the Assistant Director, urged the applicant to dispose of his livestock. As to the loss mentioned at (d), the *applicant* observes that he has not found employment and that, in a specialized field like his, there was not room for more than three experts in the semi-official Italian bodies; and these posts were filled. It was to be feared that his virtual unemployment might last for a long time to come. He considers it reasonable to assume that he will need three years to find a post like the one he had before joining the Commission. He leaves it to the Court to decide *ex aequo et bono* according to the circumstances.

The *Commission* observes that the applicant is not highly specialised and that the opportunities for work in Italy for a qualified agriculturist are not so limited as he claims. The applicant's curriculum vitae shows that he has a general education in husbandry and that his professional experience was very varied.

In its rejoinder, the *Commission* contends that the applicant has adduced no evidence of the existence, the substance or the amount of damage he claims to have suffered.

Grounds of judgment

1 The application asks for the annulment of the end of probation report on the applicant, the annulment of the decision of 21 December 1971, whereby the Commission dismissed him and compensation for the loss alleged to have been incurred by the dismissal.

Complaint as the lateness of the end of probation report

2 The applicant was appointed a probationer on 1 March 1971 in Grade A 3, under Article 29 (2) of the Staff Regulations, which allow for recruitment without competition in exceptional cases for posts which require special qualifications.

3 The end of probation report provided for in Article 34 of the Staff Regulations should have been made on 31 July 1971 at the latest under the provisions of Article 34 as they then stood.

4 The report was not however made and communicated to the applicant until 4 November.

5 Whilst it is true that this delay in making the report constitutes an irregularity having regard to the express requirements of the Staff Regulations, this irregularity is not such as to call in question the validity of the report.

6 This complaint must therefore be rejected.

Complaints as to dismissal

7 The end of probation report being unfavourable, the Commission was authorised to dismiss the applicant under Article 34 (2), first paragraph, of the Staff Regulations.

8 The applicant makes the point that the Commission, in case of dismissal of a probationer after expiry of the probationary, period, is obliged to take the decision within a reasonable time, and this time was exceeded in the present case.

9 Whilst the Commission is bound to take its decision within a reasonable time, this time could not begin to run until the end of probation report was made and communicated to the person concerned.

10 In this case, the commencing date for calculating the time being 4 November, the decision, taken on 21 December, was taken within reasonable limits.

11 The applicant moreover alleges certain irregularities in the procedure followed by the Commission in deciding his case.

12 He claims first that the decision to dismiss him is vitiated by misuse of powers in that it was motivated by the Commission's desire to appoint an official of another nationality to the post he held.

13 The applicant has not however even begun to prove that this was so.

14 The applicant in addition makes the point that the Commission did not allow him sufficient time to submit his comments at the time of the letter whereby it made known to him its intention to dismiss him.

15 On this point it is established that this letter dated 7 December, inviting the applicant to submit his comments to the Commission by 15 December 1971 at the latest, did not reach him until 13 December.

16 It follows from Article 34 of the Staff Regulations that the Commission has to communicate the end of probation report to the probationer concerned so that he can formulate his observations, but it is not bound to give him also an opportunity to state his views on the intention to dismiss him as a result of the unfavourable nature of the report, even if this calls, as in the present case, not for an immediate dismissal but for an extension of the probationary period.

17 If, in such circumstances, the Commission nevertheless invites the probationer to submit his comments, thereby observing the code of good personnel administration, the fact of giving him only a very brief period to reply cannot vitiate the dismissal.

18 The complaints as to dismissal must therefore be rejected.

Claim for damages

19 The applicant makes the point that the irregularity and lateness of the Commission's acts involved him in losses for which the Commission should compensate him.

20 The losses which the applicant claims to have suffered are due to certain measures he himself took in anticipation of a definite appointment to the post he held as a probationer.

21 Since, however, the applicant, in spite of the extension of his probationary period, had no definite expectation of an appointment, the measures he took were at his own risk.

22 Hence no responsibility can fall on the Commission.

23 Nevertheless the delay established in making the end of probation report considerably prolonged the state of uncertainty in which the applicant was placed after the expiry, at the end of August 1971, of the probationary period fixed by the Staff Regulations, and this prevented his looking after his interests adequately, particularly as to his career and his position generally.

24 This delay being contrary to the provisions of the Staff Regulations the Commission is liable within the framework thereof.

25 It is therefore right to require the Commission to pay the applicant compensation, which, having regard to the post he occupied, may fairly be determined at BF 200 000.

Costs

26 Under Article 69 (3) of the Rules of Procedure, where each party succeeds on some and fails on other heads, the Court may order that the parties bear their own costs in whole or in part.

27 The Commission has failed in some of its pleas.

28 It is therefore right to require it to pay a part of the applicant's costs, estimated at 50 per cent.

29 Moreover, under Article 70 of the Rules of Procedure, the costs incurred by the institutions in applications by servants of the Communities shall be borne by the institutions.

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the submissions of the parties;
Upon hearing the opinion of the Advocate-General;
Having regard to the Staff Regulations, expecially Article 34 as it stood at the time, and Article 91;
Having regard to the Protocol on the Statute of the Court of Justice;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities, especially Articles 69 and 70;

THE COURT (Second Chamber)

hereby:

1. **Orders the Commission of the European Communities to pay Mr Nunzio di Pillo a sum of BF 200 000.**
2. **Orders the Commission of the European Communities to bear its own costs and half the applicant's costs.**

Pescatore Kutscher Sørensen

Delivered in open court in Luxembourg on 21 July 1973.

A. Van Houtte
Registrar

P. Pescatore
President of the Second Chamber