On those grounds,

THE COURT (Second Chamber),

hereby:

1. **Dismisses the application;**

2. **Orders the parties to bear their own costs.**

Bahlmann Pescatore Due

Delivered in open court in Luxembourg on 17 November 1983.

For the Registrar
H. A. Rühl
Principal Administrator

K. Bahlmann
President of the Second Chamber

## OPINION OF MR ADVOCATE GENERAL VERLOREN VAN THEMAAT DELIVERED ON 20 OCTOBER 1983 [1]

*Mr President,*
*Members of the Court,*

### 1. Introduction

In this case the applicant seeks the annulment of the decision of the President of the Court of 5 May 1982 terminating her probationary period without establishing her and, in so far as necessary, the probation report drawn up prior to that decision and of the decision of the President of the Court of 23 September 1982 rejecting the applicant's complaint.

I draw the Court's attention to those dates at this early stage, because on those dates the appointing authority

1 — Translated from the Dutch.

naturally could not take account of the decision of 6 October 1982 in Case 206/81 (*Alvarez* v *Parliament* [1982] ECR 3369), which is in my opinion in itself decisive for the outcome of the application. As will be seen, the apointing authority in this case made the same procedural error as was considered by the Court to be a sufficient ground for annulment in the Alvarez case.

Since the Court, when summoning the applicant to the oral procedure, also asked her to specify her substantive submissions in the light of the Court's judgments on the administration's power of assessment in relation to establishment at the end of the probationary period, I shall nevertheless also consider further those substantive submissions. In so doing I shall naturally take account of the principle most recently laid down in paragraph 16 of the Court's judgment in Case 98/81 (*Munk* v *Commission* [1982] ECR 1155), that "it is for the competent administrative authority to use its power of assessment as regards the ability of the person concerned to perform the duties entrusted to him, subject to the review by the Court of the manner in which that has been done in the event of manifest error".

However in that regard I also refer to the judgment of the Court in Case 175/80 (*Tither* v *Commission* [1981] ECR 2345). From that judgment it is clear that the criterion of manifest error in no way prevented the Court from examining closely whether the reasons for the absence of the applicant in that case were adequately examined by the Commission, a question which the Court then ultimately answered in the negative. It examined in particular how far there was a "valid ground" ("motif valable") for dismissing the applicant (paragraph 17).

In addition to those judgments, another important principle is that laid down *inter alia* in the Court's judgment in Case 27/68 (*Renckens* v *Commission* [1969] ECR 255), namely that the requirement laid down in Article 25 of the Staff Regulations "is met if the reasons on which the measures adversely affecting an official is based are shown clearly and unambiguously." So far as necessary, I shall return to other criteria which could play a part in the Court's limited review of the administration's power of assessment.

## 2. The main facts

I regard the following facts as most relevant to the determination of the case.

In 1981 the applicant, who was an auxiliary agent in the Translation Directorate of the Court, entered Internal Competition No CJ 38/80 for the recruitment of a clerical assistant in the Documentation and Library Directorate (Library Division). According to the notice of competition, the duties of the official to be recruited comprised the placing of books on the shelves, drawing-up an annual inventory of the library stock, service of the photocopying machine and assistance in the lending department. The applicant was placed first on the list of suitable candidates and she was appointed as a probationary official with effect from 1 August 1981. Doubtless because the instrument appointing her was not signed until 15 September 1981, however, she did not actually take up the duties attached to her new post at the Court until 1 October 1981. Although from a formal

point of view, the report on her probationary period ought, in view of the formal date of her appointment, to have been drawn up on 31 January 1982, it was not in fact completed until 24 March 1982.

In that report, the applicant was assessed as "unsatisfactory" under four heads. First, her "judgment and adapability" were regarded as unsatisfactory on account of her "physical unsuitability".

Secondly, her "sense of responsibility and devotion to duty" were regarded as unsatisfactory on account of her "frequent absences" and "limited interest".

Under the third and fourth heads both the "quality" of her work and the "speed with which the work is performed" were considered unsatisfactory "as a result of her absences".

In the reasons for the proposed dismissal of the applicant, the relevant remarks against the four heads marked as unsatisfactory were as follows:

(In relation to the first head)

"Her duties as library stockroom assistant consist first in the day-to-day movement and arrangement of books, which involves regularly moving trolleys from one floor to another and shifting books which are often cumbersome. The large number of books to be handled daily requires a certain physical strength; ... Mrs Tréfois's strength is insufficient."

(In relation to the second, third and fourth heads)

"... Unfortunately, it has been noted that Mrs Tréfois is frequently absent for family or health reasons" and (on the second) "the work does not fully meet the aspirations of Mrs Tréfois, who has expressed a preference for secretarial work: this explains her very limited interest in the work."

In summary, the reporting officer wrote that "for reasons relating to a lack of interest in the duties with which she is entrusted, the lack of continuity in the work and her physical unsuitability for the duties inherent in the post in question" he was unable to propose that Mrs Tréfois be established. He then added that it was not impossible that Mrs Tréfois might be suited to other work at the Court where the conditions required were less onerous and which involved duties better suited to her interests.

The probation report was not communicated to the applicant until 29 March 1981 and she submitted her comments on the same day, repudiating the complaints made about her. In her comments the applicant (after referring to the fact that her report was late) observed first that the description of duties in the notice of vacancy and in the notice of competition involved more than the duties of store-keeper.

Secondly, she disputed the complaint of her lack of physical strength and noted with regard to that criterion of suitability for the work that the reporting officer could not substitute his judgment for that of the medical officer.

The applicant further denied that she had ever complained about the nature of the work.

Finally, she commented that her absences for family and health reasons had always been authorized by her superior and (in

the case of absence on health grounds) had always been covered by medical certificates, so that he could not rely upon her absences as a ground for proposing that she be dismissed.

By a decision of the appointing authority of 5 May 1982, the applicant's probationary period was "terminated, without her being established". Legally, this is of course a "dismissal" within the meaning of Article 34 (2) of the Staff Regulations. When I consider the submissions, I shall return to the social reasons which the Court subsequently, during the proceedings before this Court, gave for the different terminology. As the reasons for the dismissal, the decision dismissing the applicant states that, "having regard to the report on the applicant's probationary period", "the applicant has not shown sufficient qualities to be established".

On 3 June 1982 the applicant submitted a complaint against that decision dismissing her, whereupon the President on 5 July 1982 asked the head of the department concerned for any further information he considered necessary. The precise text of the request made to the head of department, attached in Annex 13 to the application, is of some importance in connection with the applicant's submission relating to that stage of the procedure.

In her complaint the applicant sought the annulment of both the decision dismissing her and the probation report on which that decision was based. For the full text of the complaint I refer to Annex 11 to the application, but the most important objections put forward were as follows:

1. The allegation that she displayed a lack of interest in her work was inconsistent with reality and based on unsound reasons;

2. The frequent absences on family or health grounds complained of in the probation report were, first of all, not frequent (the applicant goes into detail on this point) and, secondly, were covered by medical certificates or by the permission, expressly requested from and granted by the head of department; they also did not constitute any indication of chronic physical unsuitability for the work;

3. So far as physical unsuitability is concerned, the applicant first refers once again to the different opinion of the medical officer on her appointment; secondly, she disputes that the post requires particular physical strength, which was in fact not specified as a requirement in the notice of competition; in reality, this also amounts to sex discrimination.

The reply from the heads of department to the appointing authority's request for comments contained not just an explanation of the grounds originally given for the dismissal but primarily set out additional grounds in the form of wholly new reasons. I refer in that regard to the relevant parts of Annex 13 to the application, which is self-explanatory in this respect.

In her observations on those further explanations regarding the grounds for the decision dismissing her (Annex 14 to the application), the applicant stressed first that her complaint ought to be

determined solely on the basis of the probation report and not on the basis of information obtained from the heads of division supplementing that report. Next she drew attention to the fact that the supplementary information did not explain the grounds in the probation report but rather constituted new grounds. Finally she also disputed the new grounds in substance and in considerable detail. In so far as necessary, I shall return to those arguments when I come to consider her submissions in the application.

On 23 September 1982, the appointing authority rejected the complaint (Annex 15 to the application) and described the above-mentioned comments of the heads of department on the complaint as a "detailed confirmation of the report which they had earlier made".

In relation to the applicant's substantive objections, the appointing authority stated *inter alia:* 1. "In relation in particular to the lack of continuity in the work, she is not criticized for her absences for health or family reasons but for the fact that even when she was not officially on leave, she was absent for hours from her place of work, without stating where she could be found"; 2. The lack of interest evinced by the applicant in her work must be viewed in the framework of the comprehensive appraisal made by the reporting officer and is confirmed by the comments made by the heads of department on her complaint.

No separate mention is made in the decision rejecting the applicant's complaint of her alleged physical unsuitability for her work and her repudiation of that complaint.

I shall now consider separately the submissions made by the applicant in her application of 10 November 1982, on the assumption that the admissibility of the application as such is not disputed.

## 3. Submissions of the applicant

3.1. In the first submission *(infringement of essential procedural requirements)* in her application for the annulment of the Court's decision, the applicant alleges that essential procedural errors have been committed. As the decision to dismiss her is based exclusively on the probation report, the grounds for her dismissal ought, in the applicant's view, to be exclusively sought in that report. The applicant then contests the three complaints made in that report.

It cannot be inferred from her alleged frequent absences on health or family grounds that she lacked interest in her work, since each absence (the frequency of which, as stated above, she disputed by specifying the actual periods in question) was covered by a medical certificate or the express permission of her superior. Nor can any such inference be drawn from the interest she had expressed in another post. In my view, the applicant's argument on this point may indeed point to a manifest error as referred to in the Court's judgment in *Munk*, cited above.

The applicant maintains that the alleged lack of continuity in her work is also clearly linked in the probation report to her absences on health or family grounds (which in my opinion cannot in fact be disputed). In the rejection of her complaint, however, the applicant submits, that complaint is subsequently also justified by reference to her frequent absences from her post for other reasons

(which in my opinion is in fact apparent from the above-mentioned annexes to the application and was also clearly confirmed by the Court's representative during the oral procedure in answer to a question asked by me). The applicant further states that such absences put forward as a ground *ex post facto*, were explained by the very nature of her duties, which involved the transportation of books and the performance of duties in different parts (and even on different floors) of the building and in particular away from her office. (In that regard I would observe that in those circumstances it is not at all clear what is meant in this case by the "work-place" of the applicant). According to the applicant, it is also not true that when she was out of her office she did not indicate where she was to be found.

The applicant further claims that the allegation of her physical unsuitability lacks any factual or legal basis. She submits that it has no basis in law, because no special physical requirements were laid down for the post (as is confirmed by the papers before the Court), and no basis in fact, on the grounds already put forward by the applicant during the administrative procedure (Annexes 6 and 11, pages 3 and 4). That submission will also in my opinion have to be assessed on the basis of the criterion of manifest error. At this point I would observe that in my opinion the applicant's physical suitability should, subject to subsequent changes, be examined exclusively at the time of her appointment. It is inappropriate and is also incompatible with the relevant heading of the probation report to put forward the applicant's alleged physical unsuitability (inadequate physical strength) as a ground for an unfavourable assessment of her *adaptability*. The applicant also rightly observes that any physical unsuitability for the work that developed in the course of work may, according to the Staff Regulations, be determined only by means of a special procedure which was not followed here.

3.2. In her second submission *(infringement of the assessment procedure)*, the applicant complains, first, that the Court implicitly extended her probationary period and, secondly, that it drew up her probation report too late. However, the implicit extension of the probationary period to six months after the date on which she actually took up her duties followed logically from the latter date, which in turn followed logically from the above-mentioned date of the instrument appointing her.

In those circumstances, "extension" of the probationary period was in my opinion certainly justified, although strictly perhaps a new decision of the appointing authority was required for that purpose (cf. second sentence of Article 34 (1) of the Staff Regulations). In my opinion, the second part of her second submission can also be of no assistance to the applicant. In view of the judgments of this Court, that delay cannot render the probation report void (Joined Cases 10 and 47/72 *De Pillo* v *Commission* [1973] ECR 763, at p. 770; Case 175/80 *Tither* v *Commission* [1981] ECR 2345, at p. 2359; and Case 98/81 *Munk* v *Commission* [1982] ECR 1155, at p. 1167). In view of the valid grounds, already set out, for not drawing up that report until six months after the applicant actually took up her duties, I would not even regard it as a regrettable irregularity. In my opinion, the contested "extension" of the probationary period on the grounds stated is also covered by the case-law cited.

3.3. In her third submission *(misuse of powers)*, the applicant complains that the appointing authority asked the heads of department concerned for further information. In my view, that submission as such must be rejected. The fact that the appointing authority followed an adversarial procedure in relation to the complaint as well, enabling the applicant again to respond in detail to the comments of the heads of department, is on the contrary evidence of carefulness. However, it is true that the heads of department made use of that procedure (perhaps, as a result of a misinterpretation of the President's letter) in order to put forward wholly new grounds for dismissal, which were not based on the probation report but which clearly contributed to the rejection of the complaint.

As I have stated earlier, the representative of the Court also clearly acknowledged that point during the oral procedure. However, that complaint relates not to the procedure followed in the examination of the complaint as such, but to the fact that that procedure finally resulted in the complaint being rejected by the appointing authority and also the fact that those new arguments were not submitted to the applicant for comment before the decision to dismiss her was taken.

3.4. Finally, the applicant accuses the Court of *discrimination on grounds of sex*. There is *prima facie* some support for that accusation in the first sentence of the memorandum from her direct superior, attached to the application in Annex 13 ("un effort physique qu'on peut difficilement demander d'une dame") and it will be seen that the Court's defence contains further corroboration of a similar tenor.

## 4. The Court's defence

4.1. One immediate observation in relation to the first submission is that the Court, in its defence, devotes relatively little attention to the accusation that the statement of the grounds for dismissing the complaint reveals that grounds other than those referred to in the probation report played a part in Mrs Tréfois's dismissal. The position later adopted by the Court in that regard, that it is clear from the applicant's comments on her report and also from the wording of her complaint that she was well aware of the real reasons for her dismissal, is clearly refuted by the wording of those two documents.

In relation to the qualities of the applicant which were judged unsatisfactory in the probation report, I shall follow the order of that report.

On page 8 of the defence, the applicant's physical unsuitability is related to her frequent absences, not mentioned in the probation report, for other than health or family reasons. That argument must be rejected for the simple reason that it is not supported in the probation report. Moreover, I have already observed that physical suitability (in the sense of adequate physical strength) is a requirement that was not laid down for the post and is in addition by its nature a quality that has nothing to do with the applicant's *adaptability* (to which the relevant heading of the report relates) but would have to be checked at the time

of appointment (in the medical examination). Paragraph 20 of the defence, to which I shall return in another connection, and the third paragraph of the statement of grounds in the probation report both confirm that that interpretation of the concept of physical suitability is correct. The defence arguments on that point cannot therefore be accepted.

The statement in the probation report that the applicant displayed a lack of interest in her work is based chiefly on the interest that she expressed for other posts. I regard it as a manifest error to infer, purely on the basis of that interest expressed by the applicant, that she paid insufficient attention to her work during her probationary period. In that connection I would observe that in many report forms individuals are specifically given the opportunity to express a desire for a change of work and that the expression of such a desire can therefore never be used as an argument to show that the individual concerned is not paying sufficient attention to his present work.

The second argument demonstrating the lack of interest referred to in the probation report is, once again, the applicant's frequent absences. As the frequency of those absences is, as has been stated above, clearly and exclusively ascribed in the report to health and family reasons (which the defendant does not deny to have been covered by medical certificates or express permission), it is manifestly wrong to infer that Mrs Tréfois was not interested in her work. On the basis of the above-mentioned judgment in *Alvarez*, the Court can take no account of absences on grounds other than those referred to in the probation report, which were not brought up by the defendant until after Mrs Tréfois's dismissal. I shall return to this point. The Court's defence on that point should therefore also be rejected.

The applicant's unsatisfactory efficiency during her probationary period (twice described as unsatisfactory) is ascribed in the probation report exclusively to the absences for health and family reasons referred to in the report. In fact, those absences appear to form the Court's chief complaint against the applicant.

In the defence, the taking into account of absences for reasons other than those set out is justified by the reference to the wording of the penultimate paragraph of the statement of the grounds for the proposal that the applicant be dismissed. That paragraph does indeed refer to a lack of continuity in the work but it clearly constitutes a summary of the reasons already given, which refer exclusively to absence on the grounds mentioned.

The fourth paragraph is at the very least ambiguous in that regard, and fails to comply with Article 25 of the Staff Regulations as interpreted by the Court in the judgment in *Renckens*. The applicant was thus unable to defend herself in her comments on the probation report against the complaints concerning her absences for other than health or family reasons, which were not specified to her until after she had submitted her complaint against the decision to dismiss her. Thus the Court must be considered, on grounds similar to those set out in paragraphs 3 to 6 of the above-mentioned judgment in *Alvarez*, to have acted contrary to Article 34 (2) of the

Staff Regulations. In those paragraphs, fundamental importance is attached to the adversarial nature of the procedure preceding a dismissal, which is provided for in detail in Article 34 (2). Since it was clear that Mr Alvarez's dismissal had been influenced in part by arguments on which he had been unable to comment prior to that dismissal, the decision dismissing him was annulled. In my opinion the decision dismissing Mrs Tréfois will also have to be annulled on the same ground. That is of course not affected by the factor I mentioned at the beginning of my opinion that, when it decided to dismiss Mrs Tréfois, the Court was not able to take into account the judgment in *Alvarez*. Nor can that fundamental defect in the statement of grounds for the decision to dismiss Mrs Tréfois be affected by the statement made by the Court's representative during the oral procedure, to the effect that the head of department concerned had sought to present his adverse opinion on the applicant in the least disagreeable way possible ("essayait de presenter ses conclusions de la façon la moins choquante possible"). The avoidance of the word "dismissal" in the decision dismissing Mrs Tréfois was also ascribed to similar "social" reasons.

Finally, the said fundamental defect in the dismissal decision cannot, in my opinion, be affected by the fact that the Court did follow an adversary procedure in relation to the new complaints made against the applicant *after* the decision dismissing her in the course of the complaint procedure under Article 90. The procedural safeguards that the Court in *Alvarez* regarded as fundamental and that must be respected *prior* to dismissal would clearly lose any independent value if, *after* the dismissal, new arguments could be put forward to justify the dismissal in the course of the complaint procedure or the procedure before the Court. In paragraphs 3, 5 and 6 of the decision in *Alvarez*, decisive importance is also attached to the fact that the new complaints against the applicant were not submitted to him for comment before he was dismissed.

As regards the applicant's defence to the complaint concerning her absences from her workplace which was not made until *after* the decision dismissing her. I can confine myself under the circumstances to observing that the Court's defence takes insufficient account of the powers which are certainly available to the Court, as is clear from paragraphs 14 to 17 of the judgment in *Tither*, of examining whether the alleged absence constitutes grounds for dismissal, having regard to the criterion mentioned in that case of a "valid ground" for dismissal. If the newly-raised grounds for dismissal on account of the applicant's frequent absences from her workplace had to be examined by the Court in the light of the criteria used in its judgments, the applicant's arguments would in my opinion certainly constitute a basis for such an examination.

On the grounds set out above, however, I do not consider it necessary to carry out that examination in these proceedings.

4.2. *The submission relating to misuse of powers*

I have already observed that and explained why the submission of misuse of powers must be rejected, in so far as it is directed against the actual adversarial procedure followed by the appointing authority in this case.

In so far as the submission is also by implication directed against the introduction of new arguments for the dismissal which have no foundation, or at any rate no clear foundation, in the probation report, I have already stated the grounds on which I consider the claim to be founded.

4.3. *The complaint of sex discrimination*

In reply to the complaint of sex discrimination the defence again relies chiefly on new allegations of frequent absences for other than health or family reasons, which are not, or at any rate not clearly, supported by the probation report. In those circumstances I consider further examination of the oral testimony offered by the applicant in support of that complaint to be superfluous. I would observe that the supplementary argument contained in paragraph 20 of the defence provides greater support for that complaint, by stating that there are occupations which have to be reserved for men because of their physical suitability, but that does not amount to sex discrimination. Used in this connection, that argument seems to support the applicant's view that the department concerned preferred to have a man in the post in question, an idea which, as stated above, was already reflected in the probation report. However, I would not wish to attach decisive significance to that submission in these proceedings. Even if the oral testimony offered by the applicant were to prove that the heads of department concerned did in fact prefer a man for the post in question, paragraph 20 of the defence makes it clear in advance that the nub of the discussion will then shift immediately on to the other fundamental question whether insufficient physical strength can constitute grounds for making a negative assessment of the applicant. However, since I have already said that the answer to that question is "no", further examination of that submission cannot raise any new points.

5. Summary and conclusion

In my view, neither the reply nor the rejoinder raised any really new points worthy of mention. The further judgments cited by the parties during the oral procedure as being relevant to the limits of the Court's review (Case 62/65 *Serio* v *Commission* [1966] ECR 561; Case 110/75 *Mills* v *Investment Bank* [1976] ECR 955, and Case 52/70 *Nagels* v *Commission* [1971] ECR 365) do not in my view add much of substance to the judgments that I have already cited. The only point that may be considered material to this case is the detailed objective review by the Court of the grounds for rejection of the applicant's candidature in *Serio*. During the oral procedure the applicant's representative rightly requested the Court to consider that judgment in that connection.

I can summarize my opinion on the submissions made by the applicant as follows:

1. I regard as decisive in itself the fact that the dismissal, as the rejection of the applicant's complaint shows, was partly, if not mainly, based on grounds that are not clearly supported in the probation report and on which the applicant was therefore unable to comment before her dismissal. Having regard to the above-mentioned judgment of the Court in *Alvarez*, I regard that procedural fault as contrary to Article 34 (2) of the Staff Regulations and also as being so serious that it must in itself result in the annulment of the decision to dismiss the applicant. The fact that the Court was not able to take account of that judgment *explains* that procedural fault but cannot lead to any other conclusion.

2. The reasons given in the probation report for the shortcomings of the applicant set out in that report are not such as to justify the four negative assessments and the conclusion drawn from them. In all four negative assessments, the frequent absences appear to have been of paramount importance. The only justification for those absences referred to in the report was health and family reasons covered by medical certificates or by permission granted by the head of department. *Inter alia* in the light of the above-mentioned judgment in *Tither*, absence on those grounds cannot constitute adequate justification for dismissal.

3. If the Court had been obliged to take into consideration the new arguments to justify the applicant's not being established and her dismissal, which were raised after the decision by the Court to dismiss her, I would have suggested, on the basis of the Court's earlier judgments, a closer examination of a number of counter-arguments put forward by the applicant in answer to those new arguments. However, I see no reason for doing so since, in view of the judgment in *Alvarez*, the Court does not have to consider those new arguments.

4. I have considered the individual arguments put forward by the applicant in support of her application for the annulment of the probation report but, in the light of the judgments of the Court, I do not find that they carry sufficient weight. Nor do I see any reason to annul, as the applicant requests, the appointing authority's decision rejecting her complaint against the decision to dismiss her, if, as in my view is unavoidable, that dismissal decision is itself annulled for the reasons I have given.

5. On the basis of my analysis of the case as summarized above I am of the opinion that:

   (a) The decision of the President of the Court of 5 May 1982 terminating the applicant's probationary period without establishing her should be annulled;

   (b) The Court should be ordered to pay the costs.