Case 263/83

Mariette Turner
v
Commission of the European Communities

'Staff Regulations — Staff reports'

Summary

Officials — Assessment — Staff reports — Obligations of the first assessor and appeal assessor — Breach of obligation to obtain information and to consult — Infringement of essential procedural requirement
(Staff Regulations, Art. 43)

OPINION OF MR ADVOCATE GENERAL VERLOREN VAN THEMAAT on 15 November 1984 *

Mr President,
Members of the Court,

1. Object of the action and submissions relied on

1.1. *The object of the action*

In this — her third — application to the Court, Mrs Turner is seeking the annulment of the decision which Mr C. Tugendhat, a Member of the Commission, made (in his capacity as appeal assessor) on 29 October 1982 in relation to the staff report for the period from 1 July 1977 to 30 June 1979. For the first 13 months of that period she worked under the direction of Dr Semiller and for the last 11 months under the direction of Dr Siddons. Only at a later stage of the proceedings did the applicant claim damages. That claim is therefore clearly inadmissible and may be left out of consideration.

* Translated from the Dutch.

1.2. *The relevance of the period covered by the report*

The particulars given about the period covered by the report are very relevant to consideration of the present case for two reasons.

In the first place, a dispute arose during the second part of the period between the applicant and the Director-General for Personnel and Administration regarding her transfer to a new medico-social unit to be created. That transfer was at first proposed to the applicant and then imposed on her on 4 May 1979 after her reasoned refusal. On 20 May 1980 she was then transferred to another Directorate-General on the initiative of the Commission and also against her will. Those two decisions were annulled by the Court for misuse of powers by judgment of 9 July 1981 (Joined Cases 59 and 129/80, [1981] ECR 1883). As will appear from my subsequent discussion, the grounds on which the Court recognized the existence of a misuse of powers in the first action brought by Mrs Turner are of direct relevance to the present case.

In the second place, the particulars given in relation to the period covered by the report are important for the purpose of assessing the documents which Dr Semiller produced, at the Court's request, at the hearing. Those documents relate to his opinion of the applicant and the way in which he disclosed that opinion. As the Court is aware, the Commission claimed at first, and up to and including its answer to a question put to it by the Court after counsel had addressed the Court, that the documents in question were not in its possession. It is incomprehensible that the Commission apparently did not consider it appropriate to take the initiative of inviting Dr Semiller to produce those documents even after the Court had asked a written question about them before the hearing. They now allow a precise reconstruction of the course of the procedure whereby the report was drawn up. The Commission's failure to request additional information from Dr Semiller during the written procedure or at least after the written question from the Court obviously made it impossible to present a precise summary of the course of events in the Report for the Hearing. I shall therefore devote a relatively large part of the present opinion in Section 3 to consideration of that course of events.

1.3. *The submissions pleaded by the applicant*

The applicant makes two submissions in support of her action. *In the first place*, she alleges that there was a breach of the prescribed procedure for drawing up the report and in particular that the periods prescribed for that purpose were exceeded by a considerable margin. In view of the previous decision of the Court in relation to delays in drawing up reports (see Joined Cases 10 and 47/72 *Di Pillo* v *Commission* [1973] ECR 763, paragraph 5; Case 175/80 *Tither* v *Commission* [1981] ECR 2345, paragraph 13; and above all Case 98/81 *Munk* v *Commission* [1982] ECR 1155, paragraph 8) that submission cannot lead to the annulment of the staff report. Moreover, since the delay which arose in relation to the revision of the staff report on appeal tended, as will be seen later, to the advantage rather than disadvantage of the applicant, it cannot be said to have adversely affected her. Consequently, there can be no question in the present case of damages for the delay, as the Court held might be necessary in certain circumstances in the *Di Pillo* case. Other complaints made in support of the first submission are

however more serious. I shall therefore deal in more detail with that submission after discussing the course of events in the light of the provisions adopted by the Commission for implementing Article 43 of the Staff Regulations.

In her *second submission*, the applicant alleges that there were errors of assessment in the contested staff report. The essence of this submission is that in the internal procedure for appealing against the original assessment the Commission did not draw the proper consequences from the aforesaid judgment of 9 July 1981. That main basic submission is supported by a number of complaints relating *inter alia* to the alleged lack of objectivity and impartiality in the procedure followed (because of the atmosphere of conflict which arose during the period in question), the absence of consultation with Dr Semiller, the incompatibility of the much worse staff report for the period in question (in relation to the previous period) with the applicant's promotion during that very period and with numerous points in the staff report.

The applicant also contends that a staff report may not be made on a doctor by a person who is not himself a doctor. However, since that is an unavoidable consequence of the procedure used in the preparation of staff reports and does not exclude objectivity, I attach only secondary importance to this complaint. For a more complete summary of the complaints made by the applicant in support of her second submission and for a summary of the Commission's submissions in defence, I refer the Court to the Report for the Hearing. The relevance of the other complaints made can be judged only in the light of the course of the procedure for making the staff report and the judgment of 9 July 1981. I shall discuss that in greater detail later.

Finally, the application contains, as part of the second submission, an allegation of *misuse of powers* on grounds which, apart from their relationship with the previous complaints, are very closely related to the reasons which led the Court to find that there had been a misuse of powers in the first case brought by Mrs Turner. I shall therefore consider that important complaint in greater detail later.

2. The Guide to Staff Reports

Pursuant to Article 3 of the Guide to Staff Reports adopted by the Commission on 27 July 1979 in implementation of Article 43 of the Staff Regulations and applied in the present case (the relevant extracts are in Annex I to the reply), the superiors in other departments to which the official was assigned during the reference period must be consulted by the reporting officer. They must sign the report and may make observations if they disagree with the reporting officer.

Article 5 of the Guide provides that the report shall relate exclusively to the reference period. Explanations must be provided for any change in the analytical assessment since the previous report.

Article 6 provides that the assessor is to compile the report and refer it to the official within a specified period. Within 15 working days of such a referral the assessor is to discuss the report with the official, change it where necessary, and re-submit it to the official. The official has to sign it within 15 working days. He may append any comment which he considers relevant and, where necessary, ask that the report and the comments thereon be submitted to an appeal assessor.

Article 7 of the Guide provides that the appeal assessor is to consult the original assessor, the official assessed and any other persons whom he thinks it appropriate to consult. It is clear from Paragraph B.9.3.1. of the Guide that the last-mentioned obligation envisages consultations in particular with other or previous superiors of the official assessed (as referred to in Article 3) and other persons consulted by the original assessor. The mandatory nature of such consultation is also stressed in the introduction to the Guide to Staff Reports signed by Mr Tugendhat.

3. The main stages of drawing up the staff report and the content of the contested decision

On the basis of the documents which were originally missing and were finally produced at the hearing with the defendant's approval by Dr Semiller, the applicant's superior during the first part of the reference period, the most important stages of the procedure whereby the report was drawn up may be summarized as follows:

3.1. On 15 January 1981, the Director-General for Personnel and Administration, as assessor, sent the applicant's former superior a staff report signed by the applicant's current superior but not yet signed by the Director-General himself and asked him to *sign*. Contrary to Article 3 of the Guide, the former superior (Dr Semiller) was thus not *consulted*. In the analytical assessments of the applicant the report had, under the heading 'compétence', one 'très bon' (for knowledge required for the post occupied), three 'bon' and two 'passable' (for 'jugement' and 'sens de l'organisation'). Under the heading 'rendement', the report had two 'bon' and two 'passable' ('rapidité dans l'exécution du travail' and 'adaptation aux exigences du service'). Under the heading 'Conduite dans le service', the report had one 'bon' (for sense of responsibility), two 'passable' (for 'sens de l'initiative' and 'relations humaines') and one 'laisse à désirer'. A comparison with the previous report (in which the applicant obtained for the first two headings the best and most laudatory assessments possible and for the third heading the assessment 'normal', which corresponds to 'bon' in the new form) shows that the report has been altered, practically from beginning to end, to the applicant's disadvantage. Contrary to Article 5 of the Guide to Staff Reports, no explanation is given for those changes in the analytical assessments. The general assessment states: 'Fonctionnaire possédant une bonne formation et une bonne expérience médicales. Elle ne s'adapte malheureusement pas au travail en équipe, qui nécessite un esprit de collaboration avec ses collègues médicins dans son service et au sein du Collège médical, ni aux exigences administratives inévitables dans un service médical. À la suite de la réorganisation du Service médical, elle n'a pu s'adapter aux tâches nouvelles et importantes qui lui ont été confiées.'

3.2. On 17 January, Dr Semiller replied that he could not sign the report as worded 'weil meines Erachtens nicht nur Widersprüche in der Benotung und der allgemeinen Beurteilung vorhanden sind, sondern die Notation auch in erheblichem Gegensatz zur vorherigen Beurteilung steht'.

3.3. On 9 April 1981, having been on leave in the intervening period, Dr Semiller sent

the assessor's secretary 'auf Ihre Anfrage' a more detailed explanation of his initial response. At first sight it thus seems that he was finally consulted in accordance with the Guide to Staff Reports. He gives the more detailed explanation in the form of analytical assessments and a general assessment for the period from 1 July 1977 to 31 July 1978, during which he was the applicant's superior. That seems to me the most practical way to give the opinion requested. For the analytical assessments, the applicant receives from Dr Semiller under the heading 'compétence' two assessments of 'très bon', four assessments of 'bon' and no lesser assessment. Under the heading 'rendement', he gives one 'très bon' and three 'bon' and once again no lesser assessment. Under the heading 'conduite dans le service', he gives two 'très bon', one 'bon' and only one 'passable'. In his final assessment he writes: 'Très bonne expérience professionnelle. Exécute avec grande satisfaction des tâches qui lui ont été confiées dans le cadre de la médecine préventive.'

3.4. Apparently the original assessor refused to take account of the opinion submitted in that form by the applicant's previous superior and he also thought it unnecessary to include that opinion in the applicant's personal file. Otherwise it is difficult to explain why in the staff report signed by the assessor on 30 April 1981 (that is to say, three weeks later) absolutely no account was taken of Dr Semiller's opinion for the first part of the reference period. It appears in fact that after the opinion given by Dr Semiller in the manner stated no alteration was made to the report which was sent to him for signature on 15 January 1981. According to his statement at the hearing, which was not challenged, Dr Semiller was also not consulted orally by the assessor. Further, the assessor did nothing about the comments made on the report by Dr Semiller two days before it was signed by the assessor to the effect that he could not agree either to the analytical assessments or to the general assessment for the period from 1 July 1977 to 31 July 1978. Moreover, the Commission has not challenged the information sent by Dr Semiller in his letter to the Director-General for Personnel and Administration on 23 March 1984, which was produced at the hearing and supports the reconstruction of the course of events set out above. That letter stated that, in response to the opinion which he sent to the assessor on 9 April 1981 concerning the first part of the reference period, he had been told (by the assessor) that no other report could be taken into account. He thus had no other possibility than to indicate his disagreement on the form. That reconstruction of the course of events is by itself sufficient to explain how the assessment made by Dr Semiller on the applicant failed to be included in the personal file. Anticipating my assessment of the case, I will observe that if the assessor in fact received Dr Semiller's opinion, as the latter states in his letter of 23 March 1984, the failure to include it in the personal file is a manifest breach of Article 26 (a) of the Staff Regulations. In assessing the case, I shall consider certain alternative explanations, which in my opinion are less convincing, for the disappearance of the opinion on the applicant sent by Dr Semiller on 9 April 1981.

3.5. All the important matters relating to the following stages of the procedure of

drawing up the report are set out in the application and in Annex 4 *et seq.* thereto. I shall confine myself therefore to the following observations in that respect.

On 9 June 1981, the applicant challenged the staff report and requested the discussion provided for in Article 6 of the Guide to Staff Reports; in the alternative she requested that the report should be submitted to an appeal assessor (Annex 4). Contrary to the aforesaid Article 6, and, moreover, after an initial reminder (Annex 5), a provisional rejection of the request for a discussion (Annex 6) and two more reminders by the applicant (Annexes 7 and 8), that discussion never took place. The meeting between the assessor and the applicant in September 1980, of which the Commission speaks in its defence, can in no way be regarded as an application of Article 6 since, according to my account of the course of events, there was no staff report at that time. On 14 December 1981, the applicant applied personally to the appeal assessor with an urgent request that he should give an opinion before 23 December 1981 (Annex 9). On 15 February 1982, the appeal assessor sent his decision to the applicant (Annex 11 to the application). Dr Semiller's statement at the hearing to the effect that the appeal assessor, contrary to Article 7, did not consider it necessary to hear him was not contradicted. Although the aforesaid decision brought certain changes in her favour the applicant did not consider them sufficient. Pursuant to the third paragraph of Article 7 of the Guide to Staff Reports, she therefore requested that her report should be submitted to the Joint Committee on Staff Reports together with her observations (Annex 12). According to the unchallenged statement of Dr Semiller at the hearing, the Joint Committee did not consider it necessary to hear Dr Semiller in person either. The Committee, however, expressly regretted in its opinion of 22 October 1982 that Dr Semiller had not stated the reasons for his disagreement (Annex 13). As I have already said, he had indeed explained his reasons in detail but the Joint Committee could not know that. On 29 October 1982, the appeal assessor informed the applicant that he saw in that opinion, which, moreover, contained only statements of fact and no reasoned opinion, no reason for changing his decision of 15 February. Apparently, the Joint Committee's remark concerning the absence of a more detailed explanation from Dr Semiller did not seem to him to provide a reason for hearing the doctor even then. It is that final decision of the appeal assessor which the applicant is seeking to have annulled. I shall therefore deal separately with the content of that decision. Annex 15 to the application contains the applicant's complaint under Article 90 of the Staff Regulations with the reasons fully stated therefor. All the points made in that complaint are contained in the application to the Court, so that it is not necessary for me to deal at length with them. It seems to me, however, that some importance should be attached to the fact that the applicant expressly states in her complaint that it is not normal for the staff report not to be rectified in the light of the irregularities established by the Court in its judgment of 9 July 1981 after the report was made. In an addendum to the complaint, the applicant signifies agreement with the singular proposal of the Director-General for Personnel and Administration of 24 October 1983 not to make, after the judgment of 9 July 1981, a report for the subsequent reference period (from 1 July

1979 to 30 June 1981) (Annex 16). The applicant nevertheless adds a proviso that the staff report for the periods to which the complaint relates should no longer cover the months of May and June 1979. In a letter dated 3 June 1983, the Director-General for Personnel and Administration accepted the proviso but took the aforesaid addendum as meaning that the applicant was withdrawing her complaint. He asked in the same letter for confirmation that his proposal of 24 January, as amended, was being accepted and that the complaint was being withdrawn (Annex 17). Since there was no basis for the aforementioned assumption in the applicant's addendum, she did not, as may be imagined, give the confirmation requested. Her complaint was rejected by the Commission on 24 August 1983 (Annex 15 bis).

Annexes 15 to 17 are not only relevant, in my opinion, as regards the admissibility of the application (which is not disputed). It is remarkable to observe that the rejection of the complaint by the Commission pays no attention to two new and important facts, the first of which (the judgment of 9 July 1981) occurred after the original report was made and the second (the proposal made by the Director-General for Personnel and Administration as set out in Annexes 16 and 17 to the application) after the revision of the staff report on appeal. Since the complaint mentioned both the new facts, whereas only the first was mentioned in the applicant's observations to the Joint Committee, the finding in the penultimate paragraph of the Commission's decision rejecting the complaint is contrary to the facts. In that paragraph, the Commission observed that the arguments put forward in the complaint added no new factor over and above the observations which she had submitted to the Joint Committee on 1 March 1982. The new fact constituted by the reduction of the reference period *after* 1 March 1982 is very important in my opinion. It is precisely during the last two months, which were removed from the reference period, that occurred the clearest factual basis for the relatively unfavourable report on the applicant (the decision to alter her duties which the Court annulled in its judgment of 9 July 1981 and to which the applicant had insufficiently adjusted according to her assessor).

That decision, taken on 4 May 1979, had been preceded by a period of conflict with her new superior regarding her new duties and that period represented a large part of the period during which she worked under the new superior. According to the summary of the facts which I set out earlier, no account was taken in the report of the greater part of the reference period during which the applicant worked under Dr Semiller. In those circumstances the Commission ought to have queried, in my opinion, whether the agreed reduction in the reference period and the reasons given for it (in particular the judgment of 9 January 1981) ought not to have called in question the whole report. However, since the rejection of the complaint under Article 90 does not form part of the subject-matter of the application, I shall devote no further attention to that question in the remainder of my opinion.

Finally, I must yet mention in this chronological account the letter from Dr Semiller of 23 March 1984 — a copy of which was produced at the hearing — in which he described, in reply to a request from the Director-General for Personnel and Administration of 6 January 1984, the chronological sequence of his observations during the proceedings relating to the report. It is quite incomprehensible that that

letter, which was requested in relation to the proceedings before the Court, also went astray. If the letter had gone astray, it is reasonable to assume that a reminder would have been sent.

3.6. *The contents of the contested decision*

In his revision of the report, which he confirmed in his contested decision of 19 October 1982, the appeal assessor replaced the assessment 'passable' by 'bon' for the subheading 'jugement' under the main heading 'compétence'. He also improved the assessment for speed of execution under the heading 'rendement', but he kept the assessment 'passable' for the important heading 'adaptation aux exigences du service'. Under the heading 'conduct in the service', he increased the assessments for 'sens du travail en équipe' from 'laisse à désirer' to 'passable'. On appeal also the applicant thus received (contrary to the opinion of Dr Semiller, who was not consulted by the appeal assessor, as I have already observed) the assessment 'passable' for five subheadings in the analytical assessment. Furthermore, the amended general assessment is of particular importance. The following part of the original general assessment was retained: 'Fonctionnaire possédant une bonne formation et une bonne expérience médicale. Elle ne s'adapte malheureusement pas au travail en équipe, qui nécessite un esprit de collaboration avec ses collègues médecins dans son service et au sein du Collège médical, ni aux exigences administratives inévitables dans un service médical.' It may be observed in that respect that the complete retention of that part of the assessment drafted by the original assessor seems incompatible with the more favourable assessment made on the applicant under the analytical heading 'sens du travail en équipe'.

The second part of the original general assessment was struck out by the appeal assessor. Let me remind you that that part was worded as follows: 'A la suite de la réorganisation du Service médical, elle n'a pas pu s'adapter aux tâches nouvelles et importantes qui lui ont été confiées.' I will observe in the first place in relation to that deletion that it is presumably connected with the judgment of 9 July 1981 in the first case brought by Dr Turner, in particular paragraphs 7 and 71 of that judgment, which concern her change of duties. They read as follows:

'It follows from all the foregoing considerations that, in view of the circumstances, the Commission's conduct towards the applicant was verging upon the arbitrary. The differences of opinion existing between Dr Turner and her superiors, which undoubtedly existed, should have been settled by objective examination and not by means of indirect measures designed to remove the applicant from her duties, with no indication of the true reasons and in disregard of her professional interests founded on an honourable service record in the Community administration.

It therefore appears that the submission alleging misuse of powers is well-founded as regards the whole of the measures taken against the applicant, that is to say both in regard to the decision of the Director-General for Personnel and Administration of 4 May 1979 assigning the applicant new duties within the medical branch for Brussels staff and the decision of 20 May 1980 transferring her. Those decisions must therefore be annulled.'

In the second place, it is to be observed in relation to the deletion that it is not compatible with the retention of the word 'passable' as the analytical assessment of the applicant's capacity for adaptation to the

needs of the service. Of more importance however is the fact that the condemnation of the conduct of the Commission and its departments in the aforesaid paragraphs relates to a large extent to the period during which the applicant worked under her new superior. Since the staff report did not take into account, as I have already said, the earlier and larger part of the reference period during which the applicant worked under Dr Semiller, the appeal assessor ought to have appreciated that the judgment was calling in question the whole of the staff report. In that respect reference should be made to paragraphs 52 to 69 of the judgment. It should also be noted that the staff report amended by the appeal assessor still covers the whole period from 1 July 1977 to 30 June 1979. May and June 1979 were not deleted from that period, as I have already said, until the internal administrative proceedings under Article 90 of the Staff Regulations, but the Commission did not draw the proper conclusions from the deletion at that stage.

In place of the passage deleted, the appeal assessor ultimately added in the general assessment the following new passage:

'Cependant, au vu de l'ensemble de la période couverte par la notation, de ses mérites antérieurs et du niveau de sa formation professionnelle, le Dr Turner a été retenue par la Commission pour une promotion au grade A/4 dans le courant de 1978.'

With regard to that new passage, I would say that it is inconsistent with the retention of analytical assessments which are clearly inferior to those given in the previous report.

4. Conclusion

4.1. The summary of the course of events concerned with the making of the report, as seen in the light of the new evidence produced at the hearing, and the discrepancies found in relation to the provisions adopted by the Commission for implementing Article 43 of the Staff Regulations are sufficiently eloquent, in my opinion, to make assessment of the applicant's submissions simple. The obvious breaches of the implementing provisions are all the more serious in that they must be laid at the door, in the first place, of the Director General for Personnel and Administration and, in the second place, of the Member of the Commission who signed the introduction to those provisions. That introduction emphasizes the mandatory nature of the consultation between the assessor and the official concerned and the obligation to consult the previous superior prior to making the report. Further, the last paragraph of the second page of the introduction (Annex 15 *ter* to the application) states that the spirit and principles of the implementing provisions must be carefully and systematically followed. It might surely have been expected of the original assessor and the appeal assessor, in view of their special responsibility for the correct application of the provisions in question, that they should give the other departments an example of careful and systematic compliance with the said provisions. According to the summary of the course of events, however, they even disregarded, in important respects, the letter of the provisions for the adoption of which they had special responsibility. As regards the criteria laid down by the Court in relation to the procedure for drawing up staff reports, reference may be made in particular to paragraph 20 of the decision in Joined Cases 6 and 97/79 (*Grassi* v *Council* [1980] ECR 2141).

4.2. As regards the applicant's *first submission* (breach of essential procedural requirements), as ultimately formulated on the basis of new facts, I think that in view

of the facts established the following complaints are substantially justified:

(a) Contrary to Article 3 of the Guide to Staff Reports, both the person who drew up the report in the first instance and the assessor himself refused to consult, prior to making the report, the person who was the applicant's superior for the first and longest part of the reference period. A detailed report relating to that first period which the superior nevertheless forwarded was disregarded by the assessor. Even in the unlikely event that he did not receive that report the conclusion remains that the assessor did not actually consult the previous superior but only gave him an opportunity to record his disagreement on the report after the event. The Commission's defence to the effect that the previous superior's opinion related only to part of the reference period must be rejected because that part was also covered by the report. In the event of disagreement between the two persons who were the applicant's immediate superiors during the reference period, it might have been expected that the assessor would himself make the assessment for the whole period after interviewing both superiors. In fact he simply adopted the opinion of the person who was the applicant's superior during the second part of the reference period (and that opinion had been drafted without consultation with the superior for the first part of the period).

(b) Contrary to Article 5 of the Guide to Staff Reports, not only does the report at first instance relate only to the second part of the reference period but no reasons are given for the numerous differences in the analytical assessments in relation to the previous reference period or at most the reasons are stated very generally in the summarized general assessment.

(c) Contrary to Article 6 of the Guide to Staff Reports, there was no discussion, in spite of an express request for such, between the assessor and the official after the staff report was compiled at first instance. That omission was, however, rectified by the appeal assessor, so that it may no longer be taken into account since the application relates solely to the report on appeal.

(d) Contrary to Article 7 of the Guide to Staff Reports, the appeal assessor also omitted to consult the applicant's superior in relation to the first and longest part of the reference period in spite of the observation made by that superior on the staff report. That omission must be regarded as all the more serious in the present case since the mandatory nature of such consultation is emphasized in the introduction to the Guide to Staff Reports (Annex 15 to the application, first page) signed by the appeal assessor in person and must be regarded as an elementary guarantee of an objective and impartial report on appeal. Even after the Joint Committee had drawn his attention to the relevance of the former superior's opinion, the assessor did not see fit to enter upon such consultation. Further, he was not able to inform himself of the written opinion given by the former superior since (contrary to the clear provisions of Article 26 (a) of the Staff Regulations) that opinion was not, as I have already said, placed on the applicant's personal file.

(e) As for the delay of 22 months which occurred in the making of the report and which the applicant rightly

criticized, I have already expressed the opinion, on the basis of previous decisions of the Court, that it was irrelevant for the proceedings before the Court. Further, I have observed in relation to the admittedly considerable delay which occurred in the present case that it is difficult to see how that breach of procedural requirements adversely affected the applicant.

The Commission's defence in relation to the aforesaid breaches of procedural requirements, to the effect that the applicant has not shown that she was adversely affected thereby, does not strike me as well-founded except in relation to the complaints considered under paragraphs (c) and (e). The breaches referred to in paragraphs (a) and (b) were not rectified by the appeal assessor. That is of course partly the result of the breach referred to in paragraphs (d), of which he himself was guilty. It is reasonable to assume that it was above all the appeal assessor's failure to consult the applicant's previous superior which strongly influenced the report on appeal in a manner unfavourable to the applicant. On the basis, in particular, of the complaints referred to in paragraphs (a), (b) and (d), taken together, I conclude that the appeal assessor was guilty of breaches of essential procedural requirements such that his contested decision of 29 October 1982 must on that ground alone be annulled.

4.3. The applicant's *second submission* (errors of assessment contained in the staff report — or according to the terminology in the judgment in the aforementioned *Grassi* case, manifest mistakes of fact — and misuse of powers) also seems to me well-founded if reference is made to the above summary of the course of events surrounding the drawing up of the report. Since the appeal assessor did not request, and therefore did not take into account, the opinion of the person who was the applicant's superior during the first part of the reference period, he too based his report solely on the opinion of the applicant's superior during the second, and contentious, part of the reference period. Consultation with the person who was the applicant's superior during the first and longest part of the reference period would probably by itself at least have allowed a mean to be sought between the opinions of the two superiors. Even more serious however, in my opinion, is the error committed by the appeal assessor in failing to realize that paragraphs 70 and 71 of the judgment of 9 July 1981 removed any factual basis for the relatively unfavourable report on the applicant made by the first assessor and largely adopted by the appeal assessor. The decision of the Director-General for Personnel and Administration of 5 May 1979, which the Court held to constitute a patent misuse of powers, was in fact the culmination of earlier attempts on the part of the administration — condemned in paragraphs 52 to 69 of the Court's judgment — to assign the applicant new duties which were not suitable for her. I therefore conclude that the contested staff report, which was essentially based on that same contentious period, was decisively influenced by the same misuse of powers which was established in paragraphs 70 and 71 of the aforesaid judgment and that it therefore also constitutes a misuse of powers. Further, I consider that the breaches of procedural requirements which were also committed by the appeal assessor and the resulting shortcomings, errors and internal contradictions in the appraisal of the facts were of such gravity that the degree of negligence apparent therefrom should itself be regarded as a misuse of the powers conferred on the appeal assessor. In those circumstances, I consider that the second submission, including the allegation of a misuse of powers, is also well-founded.

Since the facts to which attention has been drawn speak for themselves, I do not think it necessary to deal at length with the Commission's defence to the second submission, which is summarized in the Report for the Hearing. An examination of that defence against the background of what we now know about the procedure whereby the report was drawn up is sufficient to refute it. In so far as the Commission may also have considered the judgment of 9 July 1981 in refusing to acknowledge the relevance of certain facts after completion of the procedure for drawing up the report, I leave it to the Court to judge that issue in the light of what I have said.

4.4. The observations of the parties on the documents produced at the hearing have not revealed any appreciably new points of view.

In its written observations on those documents, the Commission expresses reservations about the legal value of the note of 15 January 1981 which the assessor sent to the applicant's former superior and the latter's reactions expressed on 17 February and 9 April 1981 in the form of a proposed report for the period during which he was the applicant's superior. The Commission bases its reservations in particular on the fact that the documents bear no registered number and the fact that the applicant's former superior expressed his opinion prior to the report by completing the headings of a report form. The first argument must, in my opinion, be rejected. The Guide to Staff Reports has no provisions in relation to the way in which the requisite prior consultation with a former superior must take place. Even oral consultation may in certain circumstances be the most appropriate way of complying effectively with that obligation of prior consultation. Since the prior 'consultation' by the Director-General for Personnel and Administration in his capacity as assessor took place in the present case in the form of a handwritten note, an unregistered answer in the same form can surely subtract nothing from the relevance of the opinion given.

That part of the Commission's observations moreover confirms the correctness of what I previously said to the effect that, contrary to Article 3 of the Guide to Staff Reports, there was *no* real prior consultation with Dr Semiller. The relevance of the prior opinion which he nevertheless forwarded is in no way diminished by the fact that it was given in the form of a detailed opinion under the headings contained in the form used for staff reports. I have already observed that the method adopted by Dr Semiller appears to me particularly effective and consistent with the object of prior consultation in a reasonable form. When it contends that Dr Semiller had simply the right (after the report was drawn up by the assessor) to append his own observations on the staff report, the Commission disregards the fact that Article 3 of the Guide to Staff Reports provides for two stages involving the former superior of the official assessed: he must be consulted before the report is drawn up and he must afterwards be allowed to state whether his views have sufficiently been taken into account in the staff report. The opinion expressed by Dr Semiller on 9 April 1981 obviously preceded the completion of the staff report and thus formed part of the requisite prior consultation. The Commission's argument thus confirms the correctness of my previous supposition to the effect that the assessor did *not* want any prior consultation with the former superior and he did *not* wish to take into account the prior opinion which the latter nevertheless expressed. Finally, the Commission's argument at the end of its observations, to the effect that the appeal assessor was not obliged to hear Dr Semiller, must also be rejected on the grounds which I set forth earlier in this opinion. The Commission's suggestion that this breach of an essential procedural requirement is not covered by the wording of the first submission must also be rejected, since the complaint of

breach of essential procedural requirements is worded in general terms in the first submission (with a non-exhaustive list of examples) and that specific breach of an essential procedural requirement did not become apparent until the hearing as a result of the Commission's conduct during the report procedure and during the written stage of the proceedings before the Court. I recall that Dr Semiller stated without contradiction, in reply to a question from me, that he was not heard by the appeal assessor. The Commission, of course, could still have challenged the correctness of that answer in its written observations, after consulting the appeal assessor. Since that was not done, it is not possible to attach much importance to the Commission's argument to the effect that it has not been proved that Dr Semiller was not heard. In its observations the Commission also takes the view that consultation was optional, but that argument must, as I have already said, be rejected.

4.5. In conclusion, I propose that there should be a declaration that the applicant's submissions are well-founded to the extent indicated and that the contested decision of Mr Tugendhat of 29 October 1982 should therefore be annulled and the Commission ordered to pay the costs.