OPINION OF MR ADVOCATE GENERAL DA CRUZ VILAÇA
delivered on 7 October 1987 *

Mr President,
Members of the Court,

1. I — Pursuing what is already a protracted dispute in which she has challenged the Commission of the European Communities before this Court on a number of occasions with varying success, the applicant in this case, Mariette Turner, now seeks to obtain:

(a) the annulment of the decision of the Director-General for Personnel and Administration dated 19 September 1985 confirming her final periodic report for the period 1981-82;

(b) compensation for the delay in drawing up that report and for the absence of any report between 1977 and 1981;

(c) the award of one franc by way of nominal damages to compensate her for the non-material damage resulting from the failure to reply to the complaint whereby the applicant sought to have her periodic report for the period 1981-83 revised.

2. II — The applicant is a doctor and has been an official of the Commission since April 1966.

3. In accordance with Article 43 of the Staff Regulations regular periodic reports were made on her up to the period comprised between 1 July 1975 and 30 June 1977.

4. The report for the period between 1 July 1977 and 4 May 1979 was annulled for breach of an essential procedural requirement as a result of an action brought by the applicant before this Court (judgment of 21 March 1985 in Case 263/83 *Turner* v *Commission* [1985] ECR 893), and no fresh report had been drawn up by the date on which this action was lodged.

5. As regards the period from 5 May 1979 to 30 June 1981, no periodic report was made for that period at all as a result of the judgment of the Court of 9 July 1981 in Joined Cases 59/80 and 129/80 *Turner* v *Commission* [1981] ECR 1883 annulling, for misuse of powers, the decisions of 5 May and 20 May 1979 assigning the applicant to a new post as part of the reorganization of the medical branch and transferring her to a post in Directorate-General XII.

6. The applicant was assigned as Medical Officer to the office responsible for settling claims under the Sickness Insurance Scheme (DG IX) by a decision of 20 October 1981. Her application to this Court to have that decision annulled was dismissed by a judgment of 12 January 1984 (Case 266/82 *Turner* v *Commission* [1984] ECR 1).

7. III — I shall now examine each of the claims made by the applicant in the light of the arguments put forward by the parties, which have been summarized in the Report for the Hearing.

* Translated from the Portuguese.

First claim: Annulment of the decision of 19 September 1985 confirming the final periodic report on the applicant for the period 1981-83

8. *A* — The *first submission* relied upon by the applicant in support of her claim for annulment concerns the delay in drawing up the periodic report for 1981-83.

9. The Commission failed to observe any of the time-limits laid down in the Guide to Staff Reports adopted in 1979 pursuant to Article 43 of the Staff Regulations.

10. According to the time-limits laid down in the Guide the applicant ought in fact to have received the draft report of the reporting officer by 30 November 1983 at the latest, but did not receive it until some time in July 1984. From then on, all the steps to be taken by the Administration were, she maintains, taken out of time, which meant that the entire procedure was brought to a close (by the final decision of 19 September 1985) about nine months after the date on which it ought to have been concluded in accordance with the *Guide to Staff Reports.*

11. The Commission concedes in its defence — as the appeal assessor already conceded in a letter of 25 March 1985 — that the time-limits laid down by the *Guide to Staff Reports* were not observed.

12. What are the consequences of that fact?

13. According to the case-law of the Court of Justice, that breach is not capable in itself of justifying the annulment of a periodic report, particularly if the applicant has not shown that the delay gave rise to damage. [1]

1 — See, of the most recent case-law, *inter alia:* judgment of 25 March 1982 in Case 98/81 *Munk* v *Commission* [1982] ECR 1155, in particular paragraph 8; judgment of 1 June 1983 in Joined Cases 36, 37 and 218/81 *Seton* v *Commission* [1983] ECR 1789, paragraph 13; judgment of 21 March 1985 in Case 263/83 *Turner* v *Commission* [1985] ECR 893, paragraph 16.

The Court has even conceded that in some circumstances the delay might be of advantage to the official. [2]

14. In this instance, the applicant has submitted no evidence that the delay caused her any damage.

15. However, she relies in support of her claim on the statement of the Court in *Castille* [3] to the effect that '... delays in the drawing up of staff reports may in themselves be prejudicial to officials for the simple reason that their career progress may be affected by the absence of such reports when decisions concerning them must be taken'. In view of that passage the applicant confines herself to stating that the ordinary progress of her career could have been damaged and therefore her claim is justified.

16. In my view, however, the passage relied upon does not apply in this case: the point was dealt with in the judgment in *Castille* in the context of an examination of a claim for compensation submitted by the applicant, with no inference to be drawn as regards the question of the validity of the periodic report.

17. For that reason I propose to discuss the interpretation of the judgment in *Castille* later, when I examine the first of the applicant's claims for damages.

18. *B* — The applicant relies on *another submission* in support of her claim for annulment, however: the Commission fails

2 — See Turner, cited above, paragraph 16.

3 — Judgment of 6 February 1986 in Joined Cases 173/82, 157/83 and 186/84 *Castille* v *Commission* [1986] ECR 497, paragraph 36.

to explain the changes made in the analytical assessments of her compared with those contained in the previous periodic report (that for 1975-77), as required by Article 5 (2) of the *Guide to Staff Reports.*

19. The same irregularity was noted by the Joint Committee on Staff Reports in the opinion it gave, at the applicant's request, on 29 July 1985, following the report of the appeal asssessor which differed partly from that of the first reporting officer but did not alter the relevant analytical assessments.

20. The Joint Committee considered that the report for 1975-77 should be regarded as the last valid report since that for 1977-79 had been annulled by the Court of Justice (in Case 263/83) and no fresh one had been drawn up, and that for 1979-81 was never made. Accordingly, since the assessments contained in the report for 1981-83 are clearly less favourable than those for 1975-77, there must be an express explanation for them.

21. However, the appeal assessor merely informed the applicant (in a memorandum of 19 September 1985) that he *had read* the report for 1975-77 but that, in comparing the assessments in the report for 1981-83 with those given in the first report, it was necessary to bear in mind that the method of assessment had changed in the meantime and that the applicant had taken on different duties after 20 October 1981.

22. The Commission considers that the circumstances noted by the appeal assessor provide sufficient explanation for the changes in the analytical assessments of the applicant: the method of assessment was not comparable, the reporting officer for the new periodic report was not the same and the duties performed were different.

23. On that I would make the following comments:

(1) The change in the method of assessment, as regards the analytical assessments, is not in itself an obstacle to comparing them and explaining any differences as required by the *Guide to Staff Reports.*

In this case, it is apparent that the assessments contained in the report for the period 1981-83 are distinctly less favourable than those in the report for 1975-77. In the latter report, on a scale of three ratings, the applicant obtained two mentions corresponding to the highest rating (for ability and performance) and one corresponding to the average (conduct in the service), whereas in the report for 1981-83, on a five-point scale, she was given only one mention above the average (very good — fourth point on the scale) and three corresponding to the average (third point on the scale).

(2) The Court has already stated in its judgment in *Castille* (paragraphs 27 and 28), in terms which leave no room for doubt, that assessors are bound by the obligation to provide an explanation, even if the method of analytical assessment has been altered, and in particular where the difference between one report and the preceding one is significant (see paragraph 26, where reference was made to differences in the assessments which are at least as significant as those in this case).

The Court took pains, moreover, to explain expressly that that obligation to provide an explanation applied even to reporting officers for the period 1977-79, despite the fact that the *Guide to Staff Reports* contains a footnote to the effect that the provision in Article 5 (2) does not apply to assessments for that period when compared with previous assessments.

The Court rightly held that reporting officers 'cannot be released from [the obligation to provide an explanation] by a footnote in the . . . Guide . . . which is intended to give them practical advice' (paragraph 27).

(3) In this case, there is no evidence of such an explanation even in the 'general assessment' (the original version of which, made by the first reporting officer, was subsequently changed), which is more like a general summary from which it is impossible to deduce the reasons for the changes in the report compared to the previous one.

(4) The fact that the reporting officers are not the same and the fact that the official's duties have changed are not, as a rule, obstacles to the fulfilment of the obligation to provide an explanation. If they were, officials would be placed at a grave disadvantage every time they were assigned to new duties, and therefore to a new reporting officer. The latter may, in ordinary circumstances and if there has not been too long a delay, obtain the necessary information from the preceding reporting officer and from the official's previous superiors.

In this case, moreover, the tasks in question are those which, in the previous case (see the summary of the submissions and arguments of the parties in the *Turner* judgment of 12 January 1984), were regarded by the Commission as being of a medical nature and corresponding to the applicant's special qualifications and experience, characteristics which it has never been contested were the same as those of the duties performed by the applicant during the period 1975-77 and regarded in the relevant periodic report as corresponding 'to the qualifications and aptitude of the official'.

(5) I would add that the fact that the last report which is to serve as a comparison (that for 1975-77) was drawn up when the old method of assessment was still in force is a fact which cannot be imputed to the applicant, even if she agreed that the report for 1979-81 should not be made.

(6) The Commission's argument that the applicant has failed to show, as she ought, that without that irregularity she would have been in a more favourable position, is also irrelevant: the obligation to provide an explanation is designed to enable the official to know and to verify the reasons for the change in the assessments of her work, giving her the opportunity to make observations and, if necessary, to adjust her conduct in the service, so that the failure to fulfil that obligation deprives the official of a guarantee conferred on her by the Staff Regulations.

24. As a result of what I have said above I do not consider that the Commission's case can stand: the report drawn up by the appeal assessor contains no real explanation for the change in the analytical assessments, but rather an explanation for the absence of an explanation.

25. My conclusion is therefore that the applicant's periodic report for 1981-83 is vitiated by breach of an essential procedural requirement and must therefore be annulled and amended in the light of that conclusion.

26. Only if it were found to be quite impossible to make that amendment adequately (in view of the time which has elapsed and the death of the first reporting officer in the meantime) would I be prepared, perhaps, to propose that in the alternative the applicant be granted compensation for the persistent irregularity in her personal file capable of having a definitive effect on the progress of her career.

27. However, I do not think that will be found to be the case here. On the one hand, one can detect in the written and oral arguments of the defendant certain indications as to the way in which the applicant performed her duties between 1975 and 1977 and between 1981 and 1983, which were not expressed in her report but which are capable of showing that it may be possible for the defendant to provide a full explanation for the new assessments. Secondly, it should be borne in mind that since the Commission is preparing a new report for the period 1977-79, it will already have that report available for the purposes of comparison when, pursuant to an annulment granted in this case, it proceeds to amend the report for 1981-83, and hence will be able to compare the two.

28. *C* — In view of that conclusion it is not necessary to examine in more detail the two other points raised incidentally by the applicant.

29. The first refers to the fact that, despite her insistence, the appointing authority did not find it necessary to define properly and precisely her administrative situation in her new assignment. Apart from the fact that that allegation was made in the most general terms and is not supported by evidence, it must be regarded as having been settled by the judgment of this Court in *Turner* of 12 January 1984.

30. As regards the second point, it refers to the fact that the applicant, who is a doctor, was assessed by an official who was not a doctor and who was called upon to assess *inter alia* her ability.

31. On that point I need only say the following:

(a) there is no provision in the Staff Regulations or the Treaty requiring an official's superior to have the same technical or academic qualifications as the official under him in order to be able to assess him on the basis of the applicable rules;

(b) the usual situation in any administration is that the superior has under him officials with various technical or academic qualifications, without that preventing him from being able to assess their work in the light of what they actually do, and in the context of the aims pursued by the administration;

(c) as has been stated in the Court's own case-law in *Turner*,[4] one must not confuse 'the freedom of assessment which must be accorded to doctors, as regards making diagnosis and taking medical decisions' with 'the special position of a doctor acting in a consul-

4 — Judgment of 9 July 1981 in Joined Cases 59 and 129/80 (cited above), paragraphs 40, 41 and 46.

tative or supervisory capacity within an administrative framework', the nature and scope of which it is for the administration to define and assess, with the sole condition that the independence of judgment and decision of the doctor it employs must be preserved.

Second claim: Damages for the delay in drawing up the periodic report for 1981-83

32. On the basis, again, of paragraph 36 of the judgment in *Castille*, the applicant submits that she is not obliged to define the nature of the damage which she has suffered and need only rely on the submission that her career progress has suffered, that damage, according to the applicant, having to be assessed not only in the context of this action but in the light of the dispute there has been between the parties since 1978.

33. It will be remembered that in *Castille* the Court held that the delay which was found to have occurred in drawing up the applicant's report was incompatible with the 'principle of sound administration' and that 'since the Commission is responsible under the Staff Regulations for ensuring that the procedures for assessing its officials are properly conducted, it must bear the financial consequences arising from such maladministration' (paragraph 34).

34. However, in order to determine the amount of damages it is necessary, according to the Court,[5] to establish some link between, on the one hand, the factor prejudicial to the applicant's career prospects and, on the other hand, the absence of a periodic report when decisions capable of affecting that career are to be taken.

35. However, can it be inferred from paragraph 36 of the judgment in *Castille* that the right to obtain damages assessed *ex aequo et bono* derives directly from the absence of the report if that was the fault of the administration, independently of any other conditions the existence of which must be proved by the official?

36. In my view that is not so.

37. I agree that the passage from the judgment in *Castille* which I have just cited indicates that the official is not required to show that it is the absence of a report which prevented the adoption of a favourable decision which would otherwise have been taken. In other words, the official does not have to show the existence of a causal link between the absence of the report on the one hand and the adoption of an unfavourable decision or the absence of a favourable decision on the other.

38. But in my view — and in that of the Commission — the official must still show that during the period when there was no report decisions concerning his or her career were or should have been taken on which the absence of the report *could* have had some influence.

39. That was what happened in *Castille*: while there was no report, which was drawn up after a considerable delay, promotion decisions were taken which excluded the

5 — *Castille*, cited above, paragraph 35.

applicant, Mr Castille (paragraphs 9 and 31). For that reason the Court considered that 'in the particular circumstances of this case' (paragraph 37) there was damage which could be assessed *ex aequo et bono.*

40. The applicant in this case, however, Mrs Turner, has not been able to show that any decisions concerning the progress of her career were or ought to have been taken during the period during which the report had not yet been definitively drawn up and on which the absence of the report could possibly have had an effect.

41. The reference to the promotion of another doctor to Grade A 3 as Head of the Medical Service of the Commission in Brussels is made in general terms and is connected by the applicant to her 'exclusion' from the Medical Service, not to the delay in drawing up her periodic report. In any event, that promotion occurred long before the period covered by the report at issue here and the Court has already held that it was properly made and could not serve to justify the two applications for annulment in which it was relied upon. [6]

42. It should also be borne in mind that in *Castille* the delay in finally approving the applicant's periodic report was decidedly longer than that involved in this case, having occurred some four years after the end of the period covered by the report (paragraph 33).

43. The result of all that is that, in my view, the claim for damages for the delay in drawing up the report for 1981-83 must be rejected.

6 — *Turner*, judgment of 9 July 1981 (cited above), paragraphs 47 and 49.

44. I am also bound to reach that conclusion by the recent case-law of the Court of Justice, expressed in the judgment delivered by the Fourth Chamber in *Vincent*[7] rejecting a claim for damages based on the delay in drawing up the periodic report and for the initial absence thereof when a promotion procedure in which the applicant was involved was concluded. Despite the allegation that the applicant in that case had suffered non-material and psychologial damage, the Court held that since the applicant's personal file was subsequently completed and the decisions concerning promotion were revised and confirmed in the light of the new elements, *no prejudice* had been caused to the applicant; for those reasons the Court considered it necessary (paragraph 25) to distinguish between that case and the judgment in *Geist* of 14 July 1977, [8] a case which concerned the complete absence of several periodic reports on the applicant, the absence of which would be very difficult or even impossible to compensate for 'in view of the time which has elapsed and the disposal or departure of the authorities who draw up the reports'. [9]

Third claim: Damages for the absence of a periodic report for the period from 1977 to 1981

45. I shall first examine the claim regarding the absence of a report for the period 1979-81.

7 — Judgment of 10 June 1987 in Case 7/87 *Vincent* v *European Parliament* [1987] ECR 2473, paragraphs 25 and 26. See also my Opinion in the same case, delivered on 1 April 1987, paragraph 62.

8 — Case 61/76 *Geist* v *Commission* [1977] ECR 1419.

9 — Paragraph 47.

46. During that period, the applicant was performing new duties to which she had been assigned by the administration; the decisions in that respect, however, as we know, were annulled by the judgment of 9 July 1981 on the ground of misuse of powers. In view of that, the Director-General for Personnel and Administration suggested to the applicant, who accepted, that the report for the period 1979-81 would not be drawn up, as is explained in the documents produced in this case.

47. Although that is an unusual suggestion which is explained by the particular circumstances of the case, I must conclude that as regards that period the applicant's claim is unfounded, since she cannot legitimately rely on her prior consent to challenge the consequences of that consent.

48. Now as regards the absence of a report for the period 1977-79, the problem is somewhat more delicate. As we know, the first report drawn up for that period was annulled by a judgment of this Court of 21 March 1985 (Case 263/83).

49. In order to comply with that judgment and with the first paragraph of Article 176 of the EEC Treaty, the Commission ought to have drawn up a fresh report taking into account the factors it had previously ignored.

50. However, that had still not been done by the date of the hearing in this case (2 July 1987), that is, more than two years after the Court's judgment. In that hearing, the Commission's agent merely stated that a draft report had been drawn up and that the applicant would receive it shortly.

51. That appears to me to be wholly incompatible with the rules of good administration by which the Commission is bound, both in its relations with its officials and as regards compliance with the judgments of this Court.

52. In that regard, the Court has stated [10] that 'it is not normally possible to comply immediately with a judgment annulling a measure, since it requires the adoption of a number of administrative measures'. That is why — in accordance with the express provision in the second paragraph of Article 34 of the ECSC Treaty — the Commission should be permitted a 'reasonable time' to comply with a judgment annulling a decision adopted under the EEC Treaty.

53. However, in this case it should be acknowledged that the delay in preparing the new report is far greater than anything which might be considered a 'reasonable time', and is not to be justified by the absence of a request by the applicant to that effect, since the Commission has a duty to take of its own motion the steps necessary to comply with the judgment.

54. As regards the position of the applicant and her claim for damages, the allegation that the long absence of a fresh report for 1977-79 was capable of prejudicing the ordinary progress of her career must be regarded as well founded. In view of the elements (the favourable opinion of the applicant's previous superior) whose absence

10 — Judgment of 12 January 1984 in Case 266/82 *Turner*, cited above, paragraph 5.

led the Court to annul the periodic report, it is inevitable that the fresh report will contain, on the whole, a more favourable assessment of the applicant than the previous report. That is what was expressly stated in the judgment in *Turner* of 21 March 1985 (paragraph 21).

55. Consequently, the report for 1981-83 was drawn up in the absence of the favourable assessments of the applicant's first superior which ought to have been contained in the report for 1977-79: the inclusion of those assessments could not only have given a better picture of the applicant's previous career but, moreover, would have meant that there was available a valid report drawn up on the basis of the new method of assessment, thus making it impossible to rely on the change in that method to explain the absence of an explanation for the changes in the analytical assessments.

56. In those circumstances and with the same result I consider that the approach laid down in the judgment in *Castille* may perfectly be applied to this case, in view of the fact that the report was not in existence when decisions bearing on the applicant's career were taken (the drawing up of the report for 1981-83).

57. Since that is the case, and bearing in mind again the provision contained in the second paragraph of Article 34 of the ECSC Treaty ('If the High Authority fails to take within a reasonable time the necessary steps to comply with the judgment, proceedings for damages may be instituted before the Court') — I propose that the Commission be ordered to pay the applicant damages assessed *ex aequo et bono* at BFR 25 000.

Fourth claim: The award against the Commission of nominal damages in the amount of one franc to compensate for the non-material damage incurred as a result of the failure to reply to the applicant's complaint seeking the revision of her periodic report for 1981-83

58. In spite of the applicant's insistence through her legal adviser, and through the contact which she had made, at the suggestion of the administration itself, with the official responsible for her case, the Commission did not consider it necessary to respond to the complaint she submitted on 20 December 1985. In other words, the Commission did not wish to — or could not — make use of the opportunity to reply during the administrative phase of the case as provided for in Articles 90 and 91 of the Staff Regulations in order, if possible, to avoid proceedings before this Court.

59. As regards the administration of justice, that is a fact which must be regretted.

60. Nevertheless, that does not mean that the claim must be upheld: the text itself (the second paragraph of Article 90 (2)) provides for an implied decision rejecting the complaint to be assumed if the time within which the complaint must be replied to has expired, and does not provide for or impose any other consequence for the failure to reply. Since that amounts to an implied decision rejecting the complaint, which may be the object of an action before the Court according to Article 91, the rights of applicants in such cases to be heard are wholly safeguarded and their position is no less favourable than in the case of an express rejection of their complaint.

61. IV — In view of what I have said I propose that the Court:

(a) Annul the decision of 19 September 1985 confirming the final periodic report on the applicant for 1981-83;

(b) Order the Commission to pay damages in the amount of BFR 25 000 by way of compensation assessed *ex aequo et bono* for the harm suffered by the applicant as a result of the long absence of a period report on her for the period 1977-79;

(c) Reject the remainder of the application;

(d) Order the Commission to pay all the costs, including those of the applicant, since she has succeeded in the main part of her application and since the heads of claim which were dismissed arose as a result of conduct on the part of the Commission not entirely free of objection as regards its duty of care and the requirements of good administration.