OPINION OF MR ADVOCATE GENERAL LENZ
delivered on 21 March 1985 *

Mr President,
Members of the Court,

A. The applicant in the action with which the Court is today concerned was a successful candidate in Open Competition No CES/A/25/80 held by the Economic and Social Committee, defendant in the present proceedings, for the purpose of constituting a reserve list for the recruitment of Greek-language Principal Administrators. With effect from 1 July 1982, he was appointed as a probationary official, on the basis of Notice of Competition No 8/82, to Grade A 5, Step 3, and assigned to Directorate A of the Economic and Social Committee (which deals with the Committee's advisory work). He was placed in charge of the secretariat of the section for economic and financial questions. In that capacity, he was apparently under the direct authority of the head of Directorate A. However, at the beginning of September 1982, the latter directed the head of division immediately subordinate to him 'to guide Mr Patrinos and his colleague through the preparation of section and study-group meetings', and that took place upon the return of the applicant from three weeks' leave on 22 September 1982.

On 22 February 1983, the head of Directorate A, who none the less remained the applicant's immediate superior, prepared the report on the applicant's performance during his probationary period provided for in Article 34 of the Staff Regulations. That report was largely negative. It answered in the negative the question of whether the applicant had demonstrated the necessary qualities for appointment as an official. Moreover, the reporting officer expressly stated in a covering note of 28 February 1983 to the General Secretary of the Economic and Social Committee that he could not recommend the applicant for establishment.

The applicant took note of the report on 7 March 1983 and since he did not agree with its conclusions, asked that the matter be submitted to the Reports Committee established to deal with such cases.

That committee, composed of seven officials (of whom three apparently belonged to Directorate A), examined documents submitted by the applicant and by the reporting officer, interviewed them along with a number of other persons and gave its decision on 22 March 1983. One member apparently did not take part in the deliberation. I will return later to that opinion.

The President of the Economic and Social Committee then decided in a decision of 23 March 1983 referring to the fact that it was clear from the report at the expiry of the probationary period and the opinion of the Reports Committee that the applicant's 'work has not proved adequate for establishment in his post', that the applicant was to be dismissed at the end of his probationary period (31 March 1983).

The applicant submitted a formal complaint against that decision on 17 June 1983. One of the requests made therein, namely that he be allowed to serve a further probationary period because his initial probationary period had not been served under normal conditions, was repeated in a letter to the President of the Economic and Social Committee dated 29 July 1983. That request was however unsuccessful. In a decision of

* Translated from the German.

28 September 1983, the President of the Economic and Social Committee stated that the probationary period had been served under the conditions laid down in the Staff Regulations and that the plaintiff's complaint must therefore be rejected.

Mr Patrinos then applied to the Court of Justice on 4 January 1984, claiming that the Court should:

(i) annul the decision of 23 February 1983 dismissing him;

(ii) order the Economic and Social Committee to pay him his salary and all benefits as from 31 March 1983 (that is to say, from the end of his probationary period) until the date on which he resumed work, together with interest at the usual rate;

(iii) in the alternative, order the Economic and Social Committee to pay damages of 500 000 Belgian francs, together with interest at the usual rate.

Matters did not rest there however since the applicant's legal representative explained at the oral procedure that the latter two claims were being dropped. They could only be considered after the expiry of a new probationary period and if appropriate the plaintiff's retroactive appointment.

We have thus only to decide on the question of whether the sole remaining claim, that is to say, *the claim for annulment*, is well founded or if, as the defendant contends, it must be dismissed.

B. The applicant advanced *four grounds* in support of his claim:

(i) the statement of reasons on which the decision of 23 March 1983 was based is insufficient and therefore infringes Article 25 of the Staff Regulations;

(ii) the probationary period did not in fact last a full nine months, as is required by Article 34 of the Staff Regulations, and did not take place under normal conditions;

(iii) contrary to the general practice, the applicant was not told at the end of the first half of his probationary period that his performance was not satisfactory and that the report at the end of his probationary period was likely to be negative (which would have given him an opportunity to improve his work);

(iv) the facts on which the decision to dismiss the applicant was based by the appointing authority were incorrect, erroneous or, in any event, incorrectly interpreted.

1. With regard to his *first complaint*, the applicant explained in detail that the decision dismissing him stated no specific reason justifying such a step. The reference to the report at the expiry of the probationary period and the opinion of the Reports Committee meet only in the formal sense the requirement to state the reasons on which the decision was based and that cannot be sufficient for the purposes of Article 25 of the Staff Regulations. What was in fact required was for the appointing authority to reject the applicant's comments on the report prepared at the expiry of his probationary period and deal in detail with the opinion of the Reports Committee, which the applicant contends was favourable to him.

(a) It must be stated first, and to that extent the applicant must accept that the principles he asserts cannot be entirely maintained, that according to the relevant case-law, it is not an absolute rule that a measure adversely affecting an individual must itself contain all the details of the reasons on which it is based. It is recognized as being sufficient if the necessary clarity as to the reasons on which a measure is based may be deduced from all the circumstances surrounding its adoption, for example, from discussions which took place with the person concerned or from assessments made

in connection with it (see, for example, the judgments in Cases 131/82, [1] 176/82 [2] and 69/83 [3]). It is also clear that the body adopting the measure is not required to discuss any views of the person concerned which may differ from its own. It merely has to set out its own opinion and state the reasons of fact and law on which the opinion is based (as was decided, for example, in the judgment in Case 266/82 [4]).

(b) In the present case, however, it is difficult to regard the mere *reference* to other documents in the contested decision as satisfactory evidence that the applicant was not sufficiently qualified to be appointed as an official.

It must however be admitted that the report at the expiry of the probationary period makes clear that, in the view of the applicant's superior, he did not fulfil the requirements of the post which he occupied. Of 14 criteria for assessment, he received 'very good' only for written and oral expression in Greek and 'good' only for oral expression in German and 'human relations', whilst he received only 'satisfactory' for six other criteria and even 'insufficient' in a further six cases. Moreover, the applicant's superior set out his short-comings in detail under the heading 'General Assessment', as he had also done in his memorandum of 28 February 1983.

On the other hand, we know that the applicant, who did not agree with that judgment, submitted the case, as he was entitled to do, to the committee established for the purpose of dealing with such disputes. That committee spent five days making a thorough study of the applicant's dismissal. It heard witnesses who were well acquainted with conditions in the department in which the applicant had worked. In the opinion which it issued as a result of its investigations, the committee was strongly critical of the way in which Directorate A functioned and the physical conditions under which the applicant had to work. It also found that the results in relation to quality of work and speed of execution '*had not been established on a verifiable basis*' so that the committee was not in a position '*correctly to assess Mr Patrinos's performance.*' It also found that, 'with regard to sense of organization, no valid assessment has been possible'. It then came to the fundamental conclusion, with five votes in favour and one abstention 'that it has not been established that the report at the expiry of the probationary period is well founded'. Furthermore, with regard to the applicant's superior's proposal to dismiss him, only three members of the committee were in favour and three others were opposed. They considered that in spite of certain weaknesses, it would have been possible to make a positive assessment.

That being the situation of fact — and it must also be said that it is not easy to understand how three members of the committee were *in favour* of dismissing the applicant when the committee's basic finding appears to have been supported by five of its members, with one abstention — it is not possible merely to refer to the report at the expiry of the probationary period *together with* the opinion of the Reports Committee as grounds for the decision to dismiss the plaintiff and conclude that it appears from both of those documents that the applicant had not shown

1 — Judgment of 28 September 1983 in Case 131/82 *Enrico Angelini* v *Commission* [1983] ECR 2801.

2 — Judgment of 14 July 1983 in Case 176/82 *Théo Nebe* v *Commission* [1983] ECR 2475.

3 — Judgment of 21 June 1984 in Case 69/83 *Charles Lux* v *Court of Auditors of the European Communities* [1984] ECR 2447.

4 — Judgment of 12 January 1984 in Case 266/82 *Mariette Turner, née Krecké* v *Commission* [1984] ECR 1.

that he possessed the qualifications for his post. In the light of what I have just stated, that is not merely inconsistent but clearly contradictory. Since the appointing authority appears to have relied principally on the report at the expiry of the probationary period, an explanation should have been given as to how that report could be regarded as well founded regard being had to the contrary conclusion of the Reports Committee. In other words, the reasons why the criticisms made by the Reports Committee were not regarded as justified ought to have been set out or, in so far as the criticisms were accepted, it should have been made clear why, in the view of the appointing authority, there none the less remained so many negative factors that a definitive appointment was out of the question.

Since that was not done, and since the decision taken as a result of the applicant's complaint provides no additional clarification, the complaint that the decision to dismiss the applicant does not contain a sufficient statement of the reasons on which it is based, and therefore infringes Article 25 of the Staff Regulations, must be regarded as justified.

That is sufficient to justify annulment of the contested decision but it may also be stated that in the present case one is left with the impression that *substantive criticisms* are also appropriate.

2. As the Court will recall, the applicant also claims in connection with his second complaint that the probationary period did not take place under normal conditions. He claims, *inter alia*, that the tasks assigned to him at the beginning of the probationary period were not precisely defined; the director under whose authority he worked did not give him any clear instructions later but rather gave him partly contradictory ones; the applicant's own subordinate, an official in Grade A 7, was unable to help him because the applicant's superior gave him instructions direct; the applicant's sectretary was only partly at his own disposal and he did not have an office of his own but had to share an office with his colleague, which considerably disturbed his work. If that is correct, then the way in which the probationary period was organized cannot in fact be regarded as unexceptionable. Nor can it be excluded that the applicant's performance was considerably affected as a result and that if the probationary period had been served under different conditions, in particular if he had received more guidance and if more patience had been showed towards him, his work would have been such that his performance as a whole could have been regarded as positive.

To some extent the defendant's own admissions support the conclusion that the applicant's argument should not be dismissed out of hand, such as, for example, where it is conceded that the applicant's superior wished to give him instructions *daily*, or when it is stated that the applicant's superior continually gave instructions direct to the applicant's colleague, as is also clear from the applicant's superior's memorandum of 25 October and 17 December 1983. A further argument in the applicant's favour is to be found in a written memorandum for the Reports Committee of 14 March 1983, sent in by a former subordinate of the applicant's superior, which speaks, *inter alia*, of 'poorly defined tasks', 'poor demarcation of responsibility' and 'intervention by Mr Kuby in all aspects of the work'. A further significant point is the finding of the Reports Committee, adopted without any opposing vote, to the effect that there was 'systematic disorganization' in Directorate A, responsibility was not 'clearly defined', the 'structure set out in the detailed list of posts has not been respected', contradictory instructions were given, the applicant was

given 'time-limits with which it was impossible to comply', the applicant was at no time given an opportunity 'to organize his own work', he could not count on 'the help of a permanent official' and he did not have an office 'which would permit him to work under satisfactory conditions'.

I would consider that in the light of the foregoing, part of the applicant's substantive criticisms should be regarded as well founded and thus a further ground for annulment emerges. It must at least be accepted that the above-mentioned factors constitute such strong evidence that the applicant's criticisms are well founded that the Court would be obliged, if it had not already decided to annul the decision on the ground that it infringed Article 25 of the Staff Regulations, to hear the evidence of the witnesses who also testified before the Reports Committee and whose evidence considerably influenced that committee's finding.

3. Without going into any of the plaintiff's other claims (and it is doubtful whether they are well founded inasmuch as they claim that the probationary period was for various reasons *too short*, or inasmuch as the view is expressed that the applicant should have been given a clear indication half way through his probationary period that the report on him was likely to be negative), it must therefore be found that the decision to dismiss the applicant cannot be valid because the competent Reports Committee did not accept that the report at the expiry of the probationary period on which the decision is based was well founded and also because it must be concluded that the probationary period did not take place under proper conditions. The only further conclusion that may be drawn from that is that the applicant must be given a further opportunity to demonstrate his capabilities during a properly-organized probationary period (something which, because the post in question has not been definitively filled, is not ruled out by any organizational difficulties).

Nothing more needs to be said about this case because the applicant's legal representative explained that no decision could be made about a possible award of *damages* for the period between dismissal and reinstatement until after the end of a further probationary period.

C. I therefore propose that the Court grant the sole remaining claim for the annulment of the decision of 23 February 1983. That result would mean that the applicant has essentially been successful in his application. The defendant should therefore be ordered to pay the costs.