OPINION OF MR ADVOCATE-GENERAL MAYRAS DELIVERED ON 9 MARCH 1978 [1]

Mr President,
Members of the Court,

The present action is not unlike the case of *Moli* v *Commission* in which you gave judgment on 27 October last. It in fact concerns a decision refusing to engage the applicant on the basis of her alleged physical unfitness to perform the duties of a member of the auxiliary staff at the Commission for which her application had previously been accepted.

The facts are quite simple.

The applicant, who is a Netherlands national by naturalization, completed secondary education in the Netherlands and obtained a secretarial diploma at a school in Doordrecht.

After having held several posts, which enabled her to improve her knowledge of English and French, she took part in a recruitment competition organized by the Council of the European Communities and was appointed a probationer with effect from 1 September 1975. However, she resigned with effect from the following 1 January on the ground that, as a Seventh-day Adventist, her personal beliefs prevented her from working on Sundays, whereas meetings of the Council could be held during the weekends.

Subsequently, after having performed certain tasks for the Commission as a temporary secretary, she took part in the tests organized by that institution on 24 May 1976 for the recruitment of auxiliary staff in Category C, Grade 7. The applicant passed those tests.

Before being appointed, however, she had to undergo a physical fitness examination in accordance with the combined provisions of Articles 28 (e) and 33 of the Staff Regulations. Having therefore been summoned to the Medical Service, she reported there on 15 July 1976. Following her examination that service prescribed two additional examinations by neuropsychiatrists, to be held on 23 and 29 July.

The Medical Service then informed the Directorate General for Personnel and Administration of its conclusion: the applicant was declared physically unfit to occupy one of the posts to be filled.

By decision of 14 September 1976 the Head of the "Recruitment, Appointments and Promotions" Division notified Miss Mollet of the negative result of the examination and informed her that the effect of the declaration that she was physically unfit was to suspend the procedure for recruitment into the services of the Commission. He added, however: "If you wish to know why you are physically unfit I suggest that you ask your own doctor to get in touch with Dr Semiller, the head of the Medical Service . . .".

However, that decision made no mention of the applicant's entitlement, for which — it is true — there is no legal requirement under legislation at present in force, to have the medical assessment of her case submitted to review by a committee of three doctors, whereas in the *Moli* case the administration had expressly invited the person concerned to ask for a meeting of such an *ad hoc* medical board.

However that may be, at the request of Miss Mollet her own doctor, Dr Chevalier, asked the Medical Service to provide him with the medical justification for its opinion.

1 — Translated from the French.

The reply given by that service on 4 October 1976 was as evasive as possible. Allow me to cite it: "I wish to inform you that we formed certain reservations concerning the recruitment of Miss Mollet and, as a result, her candidature was not accepted by the administration of the Commission of the European Communities. There are no medical factors to be communicated which require treatment".

In the light of that reply, which was incapable of providing any further information regarding the medical reasons for the declaration that she was physically unfit for the post, the applicant submitted a complaint through official channels to the Commission on 30 November 1976, which remained unanswered for more than four months.

It is against the implied decision rejecting her complaint that the applicant brings an action before you in which she also seeks compensation for the damage, both material and non-material, which she has been made to suffer.

She claims:

— First, the sum of Bfrs 2 050 000 by way of compensation for the damage, both material and non-material, caused by the unlawful refusal to engage her;

— Secondly, the sum of Bfrs 50 000 by way of compensation for the non-material damage which she suffered as a result of the wrongful conduct of the administration.

The first submission is based on the absence of any statement of reasons for the decision of the Commission of 14 September 1976 and, in consequence, for the implied decision of rejection resulting from the silence of the Commission in relation to the applicant's complaint through official channels.

Support for that submission is to be found in the terms of Article 54 of the Conditions of Employment of Other Servants of the Communities, by virtue of which Article 25 of the Staff Regulations of Officials applies by analogy to auxiliary staff.

As regards the implied decision rejecting the complaint which, by its very nature, cannot be reasoned, the Court has ruled, in particular in its judgment in the *Moli* case of 27 October last (Case 121/76), that the statement of reasons for such a decision is necessarily deemed to be the same as the statement or lack of statement of reasons for the decision which was the subject of the unanswered complaint, with the result that the grounds for each of them must be reviewed at one and the same time.

As regards the refusal, on account of physical unfitness, to engage a candidate for appointment as an official who has been placed on a reserve list, it results from the same judgment that such a decision is one adversely affecting that candidate within the meaning of Article 25 of the Staff Regulations, the reasons for which must in consequence be stated.

That reasoning is applicable *mutatis mutandis* to a decision refusing, on account of physical unfitness, to engage a candidate who has successfully taken part in the competitions or tests organized for the recruitment of auxiliary staff. Such a decision adversely affects that candidate and, therefore, on the basis of Article 54 of the Conditions of Employment of Other Servants, the reasons for it must be given.

However, still in accordance with the *Moli* judgment, that duty must be reconciled with the requirements of professional secrecy which, save in exceptional circumstances, leave the individual doctor to decide whether to communicate to those whom he is treating or examining the nature of the condition from which they may be suffering.

The appointing authority must, therefore, confine itself to giving the reasons for a decision refusing an engagement on account of physical unfitness by means of a reference to the opinion of the Medical Service of the institution concerned, which was the case in this instance.

However, the reconciliation to be achieved between the duty to state the reasons for a decision and respect for professional secrecy is effected through the ability of the person concerned to request — and ensure — the communication by the Medical Service to a doctor of his choice of the grounds on which he has been declared unfit. That information should enable the person concerned, either himself or through his doctor, to judge whether the decision refusing to engage him conforms with the requirements of the Staff Regulations applicable to him.

It is, in consequence, necessary to consider whether in this instance the applicant's private doctor was, within a reasonable time and in any case before the end of the period within which a complaint through administrative channels must be submitted, properly informed of the medical grounds on which the applicant was declared unfit and thereby put in a position to advise his patient in such a manner that she was able to contest those grounds effectively.

I do not consider that to have been the case in this instance. As I have said, Miss Mollet had asked her own doctor, Dr Chevalier, to obtain from the head of the Medical Service the reasons for his opinion, but on 4 October 1976, that is, before the expiry of the period within which a complaint must be submitted, Dr Turner merely replied, without giving the reasons for the opinion held by the Medical Service, that that service had "formed certain reservations concerning the recruitment of Miss Mollet" and that there were "no medical factors to be communicated which require treatment".

From that reply one can only conclude that the applicant's private doctor was not in a position to provide her with a proper explanation of the reasons for her physical unfitness. According to the *Moli* judgment, that fact would be sufficient to justify the annulment of the contested decision.

However, there is more. In her complaint of 30 November 1976 Miss Mollet expressly requested the Commission to make the *entire* medical file prepared by the Medical Service of that institution available immediately to her own doctor.

On 26 May 1977 the defendant informed the applicant that "a complete report" — relating to her medical file — would be communicated to her own doctor "without delay".

Dr Chevalier received that communication on the following 8 June. He received a report drawn up by the Medical Service of the Commission. However, its content certainly did not enable the applicant's private doctor to inform her of the real reasons for her "unfitness for the post for which she was eligible". In fact, it emerges from the reply to the question which the Court put to him that the allegedly complete communication made to Dr Chevalier by the Medical Service merely informed him that the applicant's unfitness for the post under consideration "was based on the unanimous reports of two neuropsychiatrists and that in any event no purely physical factor was referred to in support of the decision that she was unfit".

The decisive element in the opinion that the applicant was unfit formed by the Medical Service of the institution was undoubtedly the unanimous opinion of the neuropsychiatrists who examined the applicant. As he was unaware of their conclusions it was impossible for

Dr Chevalier to inform his patient of the real reasons for the decision that she was unfit.

Although the Court was clearly informed in reply to a question raised at the hearing that Dr Chevalier refrained from asking to receive the report of those two practitioners, I do not think that either the applicant or Dr Chevalier can be blamed for that. It was for the Medical Service of the Commission to communicate the detailed reports drawn up by the two neuropsychiatrists whom it had taken it upon itself to consult.

As the Court stated in the *Moli* judgment, "in suggesting that the applicant should invite his own doctor to ask to be informed of the grounds justifying the declaration that he was physically unfit, the administration intended to give him the means of *effectively* challenging those grounds when the case was reviewed".

Likewise in the present case that opportunity was not given to the applicant — and I quote again from the *Moli* judgment — "with the result that the Commission violated the general principle that when any administrative body adopts a measure which is liable gravely to prejudice the interests of an individual it is bound to put him in a position to express his point of view".

Nothing of the kind took place in this instance. I can therefore only submit that both the initial decision of 14 September 1976 and the implied decision rejecting the applicant's complaint should be annulled.

The Court has, however, no power to substitute itself for the appointing authority and it cannot order that the applicant be appointed to the post for which she is applying.

Furthermore, the unlawful aspect of the contested decision lies in the procedure by which the declaration of unfitness and, subsequently, the refusal to engage Miss Mollet were put to her. Although that consideration justifies the annulment of the contested decisions it does allow it to be decided whether the applicant does or does not possess the requisite degree of fitness, only that the report on her fitness was drawn up under conditions which were unlawful and that it must be recommenced in accordance with the proper procedure. If the Court shares my opinion, it will be for the Commission to take the steps necessary for that purpose.

That being the case, therefore, I do not think that the Court can entirely uphold the application for compensation made by the applicant. Since the damage which she claims to have suffered is material and consists in the fact that the refusal to engage her caused her to lose remuneration on which she was counting from the end of 1976, it seems to me that it cannot be made good. The first reason for that is that there has not been, on the part of Miss Mollet, any service rendered to the Commission and that she cannot, even on the assumption that her physical fitness is acknowledged, claim compensation for the difference between the remuneration which she would have received if she had been engaged and the income from employment which she has been able to obtain since 14 September 1976. It would still be necessary for her fitness to be accepted following a fresh medical examination. At the least, therefore, her request is premature; it is also excessive and I do not see in this connexion what other source of damage could lawfully be invoked.

On the other hand, as regards the compensation for the non-material damage claimed as a result of the state of uncertainty regarding her health in which the action of the Commission has left the applicant, I am led to acknowledge that her conclusions are justified. I do not consider that the sum of Bfrs 50 000 claimed on that ground is excessive and I suggest that the Court should award it.

For those reasons I am of the opinion that:

1. The decision of 14 September 1976 and the implied decision rejecting the applicant's complaint should be annulled;

2. The Commission should be ordered to pay to Miss Mollet the sum of Bfrs 50 000 by way of compensation for the non-material damage which its conduct has caused her;

3. The remaining conclusions in the application should be dismissed;

4. The Commission should be ordered to pay all the costs.