JUDGMENT OF THE COURT (FIRST CHAMBER)
26 FEBRUARY 1976 [1]

Germaine Van de Roy
v Commission of the European Communities

Case 92/75

Summary

1. *Officials — Probationary period — Annual leave — Inclusion — Permissibility*
(Staff Regulations of Officials, Article 34)

2. *Officials — Probationary period — End — Dismissal — Notification — Reasonable period*
(Staff Regulations of Officials, Article 34)

3. *Officials — Probationary period — End — Dismissal — No liability on the part of the Commission*
(Staff Regulations of Officials, Article 34)

1. The fact that a probationary period includes annual leave during which the amount of work is reduced does not mean that it did not enable the probationer's skill to be assessed.
2. Article 34 of the Staff Regulations of Officials relating to cases in which the employment of an official is terminated at the end of the probationary period does not lay down any precise time-limit for the notification of this decision but allows the institution a reasonable period at the end of the probationary period in which to do so.
3. The dismissal procedure is set out in the Staff Regulations and therefore since the relevant provisions were complied with it cannot entail any liability on the part of the Commission with regard to the dismissed probationer official.

In Case 92/75

GERMAINE LAMBERT (NÉE VAN DE ROY), a former probationer of the Commission of the European Communities, residing at 60 Brugstraat, 3370 Boutersem, Belgium, represented by Marc Goldberg, Advocate at the Cour d'appel, Brussels, with an address for service in Luxembourg at the Chambers of Jacques Loesch, Advocate, 2 rue Goethe,

applicant,

1 — Language of the Case: French.

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, Raymond Baeyens, acting as Agent, with an address for service in Luxembourg at the offices of its Legal Adviser, Mario Cervino, Bâtiment CFL, place de la Gare,

defendant,

Application for the annulment of the decision dismissing the applicant,

THE COURT (First Chamber)

composed of: A. O'Keeffe, President of Chamber, A. M. Donner and J. Mertens de Wilmars, Judges,

Advocate-General: J.-P. Warner
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts

The facts of the case and the arguments of the parties presented in the written procedure may be summarized as follows:

I — Facts and procedure

The applicant, of Belgian nationality, who had been put on the list of suitable candidates following an open competition COM/LA/90a organized in 1973 with a view to drawing up a reserve list, was appointed probationer in Grade LA/8 as from 16 April 1974 in the Dutch translation division of the Commission.

At the beginning of her probationary period she admitted that she found some difficulty with her work. On 15 November 1974 the Head of the Dutch Division confirmed to her the unfavourable opinion expressed on several occasions by the reviser in charge. Written confirmation thereof was given to her in the report at the expiry of the probationary period made on 29 November 1974 which was communicated to her on 2 December following in accordance with Article 34 (2) of the Staff Regulations.

In a letter dated 9 December 1974 the applicant set out her comments thereon.

The decision to dismiss her, effective from 16 January 1975, was notified to the applicant by a telex message which was given to her in person on the next day by the Head of her Division and confirmed by a registered letter of 17 January 1975 (which the applicant states that she did not receive until 21 January).

By a letter dated 10 February 1975 the applicant lodged a complaint under Article 90 of the Staff Regulations requesting the annulment of this decision. The complaint was expressly rejected by a reasoned decision of the Commission of 16 May 1975 which was notified to the applicant on 2 June following.

The applicant then lodged the present application which was registered at the Court on 13 August 1975.

The written procedure followed the normal course. On hearing the report of the Judge-Rapporteur and the views of the Advocate-General, the Court (First Chamber) decided to open the oral proceedings without any preparatory inquiry.

II — Conclusions of the parties

The applicant claims that the Court should:

(1) annul the undated decision of dismissal taken by the appointing authority which was notified to her on 21 January 1975 by a registered letter of 17 January 1975 bearing the postmark of 20 January 1975;
(2) annul the decision of the Commission of the European Communities dated 2 June 1975 rejecting the applicant's complaint of 10 February 1975 under Article 90 (2) of the Staff Regulations of Officials of the EEC;
(3) order the defendant to pay the sum of 100 000 Bfrs as compensation for the non-material damage, subject to any increase or decrease settled during the proceedings;
(4) in the alternative, order the defendant to pay to the applicant compensation of 480 000 Bfrs, equal to 10 months' salary, subject to any increase or decrease settled during the proceedings;
(5) order the defendant to pay costs and expenses of the proceedings.

The defendant contends that the Court should:

(1) rule that the application is unfounded and reject it in its entirety;
(2) order the applicant to pay the costs.

III — Submissions and arguments of the parties

1. The application for annulment

(a) Competence of the persons signing the report at the expiry of the probationary period

The *applicant* states that of the three officials who signed the report at the expiry of the probationary period, that is the Director of the Translation, Documentation, Reproduction and Library Directorate, the Head of the Translation (General Matters) Division and the Head of the Dutch Translation Division, the first two have no knowledge of Dutch.

The *defendant* replies that this fact in no way prevents these officials from ratifying, in accordance with administrative procedure and in the exercise of their powers, a proposal from the applicant's immediate superior, who is incidentally of Dutch nationality and himself drafted the grounds of this proposal.

The *applicant* replies that the report on the expiry of the probationary period is based not on the assessment of her immediate superior who never checked her work but on that of the coordinator of the section. It was solely on the basis of the judgment of this coordinator that

the proposal for dismissal was adopted. The procedure followed was therefore a nullity.

The Commission finds no objection either in law or in practice to such a line of approach. Only if the opposite line had been taken and if the Head of Division had failed to use the information resulting from the permanent and detailed supervision exercised by other more experienced officials of the work done by new translators could there be room for criticism. Moreover the Head of Division, himself a Dutchman, was able to check the quality of the translations.

(b) Assessments of the applicant's ability to perform her duties and of the quality of her work

The *applicant* recalls that she refused to sign the report at the expiry of the probationary period submitted to her on 2 December 1974. She cannot believe that if the shortcomings attributed to her really existed they would not have come to light in the course of the tests which she took on recruitment. Moreover she makes reference to the work of fiction which she wrote in Dutch and which was considered by critics to be 'exact and precise' in language and 'sober and well balanced' in style.

The defendant remarks that whilst it is understandable that the applicant does not pass the same judgment on herself as that formed by her superiors, nevertheless she freely admitted that she had met with numerous problems in her work. The merits of the assessment of the institution may not in principle be the subject of examination by the Court. Nevertheless the Commission submits a note of 4 January 1975 from the applicant's superior giving an unfavourable view as to the possibility of establishment and showing that the assessment was based on a searching and detailed examination of the quality of her work during her probationary period.

The merits of a literary work do not provide evidence for judging abilities for translation which is a very different field.

The applicant replies that the information contained in the file does not in any way show the inadequacy of the work done but rather serves to show that the actual errors were very few: of 30 criticisms only 4 relate purely to translation, the others to imperfections of style and, of these, 17 are 'not incorrect' translations. The value-judgments are therefore merely arbitrary.

As to the criticisms of her book, these show the invalidity of the allegation of lack of general knowledge or of a knowledge of the language below standard.

All the other Belgian probationers faced the same difficulties, caused by the present state of the Dutch language which is ever evolving.

The *defendant* replies that the decision was taken only after a very searching examination of the applicant's work. These assessments constitute a comprehensive value-judgment for which the Court cannot substitute its own assessment (Judgment of 8 July 1965, Joined Cases 19 and 65/63, *Satya Prakash* v *Commission of the EAEC* [1965] ECR 533). On the other hand, it is for the Court to check whether the facts are exact.

By persisting in her attempt to justify her mistakes the applicant is automatically confirming the judgment made by her superiors that she is unable to accept correction.

As to the alleged difficulties faced by all Dutch speaking Belgian translators, dismissal of probationary translators is very unusual. More over Dutch is one of the official languages of Belgium and as such is necessarily used in its official and academic form. Finally, all living languages are evolving and any translator has to refer to authoritative sources.

(c) The situation during the probationary period

The *applicant* states that no complaint had been made to her before 15 November 1974 but that after that date all real work had been taken from her.

Complaints submitted by her to the coordinator of the group and to the replacement acting for her superior who was on leave at the time, did not alter the situation. Moreover her translations were not assessed by an impartial authority. At no time had the applicant any opportunity 'to state her grounds of defence'.

The *defendant* replies that the applicant's superiors were perfectly capable of making a judgment as to her ability to carry out her duties and as to her efficiency in the service. Throughout her probationary period the applicant had the necessary means to judge the quality of her work and to try to improve it. The fact that the Commission did not have recourse to the second subparagraph of Article 34 (2) which provides that a report may be made at any time during the probationary period if the work is proving obviously inadequate, in no way prejudiced the content of the report at the end of the probationary period or put the applicant at a disadvantage.

(d) The length of the probationary period

The *applicant* argues that her probationary period which started on 16 April 1974 and which, under Article 34 of the Staff Regulations, was due to end nine months later was shortened by the holidays in July and August, by periods when, according to the coordinator, there was no work (3 weeks in September and 3 weeks in October) and by periods when there was work but the coordinator refused to give her any (from 15 to 29 November 1974 and from 10 December 1974 to 15 January 1975). Thus the effective probationary period was only five months.

The *defendant* replies that the period of annual leave cannot be subtracted since probationary officials are subject to the same rules as to leave as established officials. As to the 'days without work' the relative length of the periods alleged compared to the total length of the probationary period cannot in any way have prevented the applicant's superiors from making a valid assessment.

The *apllicant* replies that the fact that she received no work after the first complaints made to her prevented her from having any time to improve or right a situation of which she had no prior knowledge. The length of the probationary period is of particular importance, being six months for most officials but nine months for officials in the Language Service.

The defendant states that under Article 34 (1) of the Staff Regulations the length of the probationary period for officials in Categories A and B is certainly nine months.

2. The application for compensation

The applicant observes that the action taken against her caused her serious non-material damage, since dismissal, after the probationary period, of a person who has taken part in an open competition is extremely rare.

Moreover, the decision to dismiss the applicant was notified to her on 21 January 1975 whereas her probationary period had ended on 15 January preceding and in the meantime she was bound to the Commission by a contract of indeterminate duration which was terminated without notice. The probationary period is part of the contract and constitutes a condition upon which the contract is suspended; if notice of termination of the contract is not given, the contract takes full effect once the condition, the completion of the probationary period, is satisfied. The legal situation is the result of the expiry

of the probationary period and not of a definitive appiontment to be made later.

The unilateral breach of her contract of employment caused the applicant a loss equivalent to 10 months' salary.

The *defendant* emphasizes first that the procedure followed complied with the formalities. Not only was the report at the end of the probationary period communicated to the applicant several days before the expiry of the time-limit set in Article 34 (2) but also the decision to dismiss her came on the day following the expiry of the probationary period although no obligatory time-limit is fixed and although the Court has accepted lapses of several days, even several months (Judgment of 12 May 1971, Case 52/70, *Nagels* v *Commission of the EC*, [1971] ECR 365 and Judgment of 12 July 1973, Joined Cases 10 and 42/72, *di Pillo* v *Commission* of the EC, [1973] ECR 763).

This decision was taken solely in the interests of the service whilst taking account as far as possible of the interests of the applicant as is shown both by the speed with which the administration dealt with her case and by the fact that the applicant was informed of the foreseeable outcome of her probationary period two months before its expiry. Moreover she received the compensation equal to two months' basic salary granted to probationers who are dismissed.

If the decision to dismiss her were annulled, the measures which the Commission would have to take would have the effect of redressing the non-material damage, so that any request for additional compensation is wholly unjustified. With regard to the alternative request the applicant was informed of her dismissal on the morning of 16 January 1975 and it was confirmed on 17 January by telex, that is within the period which in the abovementioned cases the Court regards as normal and reasonable. The applicant's argument, making reference to the rules of labour law, is irrelevant. The position of a probationary official is governed by statute and can in no way be compared to a contract under private law. The probationary period is of fixed length and necessarily ends when this period expires. Therefore there must be a decision of the appointing authority at the end of the probationary period either to establish or to dismiss the probationer and whenever that decision is made it takes effect retroactively on the date of the expiry of the probationary period. Therefore the applicant ceased to be an official as from 16 January 1975 and was at no time in a legal vacuum and *a fortiori* not in a contractual relationship with the Commission. The compensation can therefore not be compared to that payable for breach of a contract of employment in private law but depends solely on the statutory provisions of which the applicant had already received the benefit.

The *applicant* replies that if the probationary period established between parties a period of contractual relations of specified duration there was no need to dismiss her for her period of employment to come to an end automatically on 15 January 1975.

The *defendant* contends that there can only be a case for compensation if it can be shown that the Commission had incurred liability. Since this is not the case the action for damages is completely without foundation. Compensation cannot justifiably be granted in the event of annulment of the decision since that in itself would be full compensation for the applicant.

In her alternative claim the applicant no longer alleges that the notification of the decision of dismissal was out of time.

With regard to the legal construction advocated by the applicant she was well aware from 16 January 1975 that the links between her and her employer were

broken. No new legal relationship was established between her and the Commission.

At the hearing on 15 January 1976 the applicant, represented by M. Goldberg, Advocate at the Cour d'appel, Brussels, and the Commission, represented by its Legal Adviser, R. Baeyens, acting as Agent, submitted oral observations.

The Advocate-General delivered his opinion at the hearing on 5 February 1976.

Law

1 By an application lodged at the Court Registry on 13 August 1975 the applicant, of Belgian nationality, has sought the annulment of the decision taken in respect of her on 17 January 1975 by the defendant dismissing her from her post as a probationer official in the Dutch translation division to which she was appointed on 16 April 1974 in application of Article 34 of the Staff Regulations.

2 In addition she requests that the Commission be ordered to pay 100 000 Bfrs as compensation for the non-material damage which she has suffered because of her dismissal and, in the alternative, to pay compensation of 480 000 Bfrs equal to 10 months' salary.

3 The applicant maintains first that her probationary period was curtailed and did not provide conditions enabling her ability to be assessed.

4 It is in no way exceptional for the probationary period to include annual leave during which numerous officials are absent and the amount of work is reduced; this does not mean that the probationary period did not enable the applicant's skill to be assessed.

5 Whilst it appears that on some days the applicant was left without work this is explained by the fact that work suitable for probationers is not always available and they are expected to make use of such periods to improve their linguistic knowledge.

6 The applicant alleges that her superiors 'refused' to give her work after 29 November 1974 but this was because on that date the report on the expiry of

her probationary period had been made in accordance with the provisions of Article 34 (2) of the Staff Regulations, so that the defendant had adopted its opinion.

7 Secondly it is also impossible to uphold the applicant's complaint with regard to the lack of foundation for the decision taken in respect of her, to the absence of examination of her work by her superior, the head of the Dutch Translation Division, and to the incapacity of the officials who signed the report at the expiry of the probationary period to assess her ability in view of their ignorance of the Dutch language.

8 The Director of the Translation, Documentation, Reproduction and Library Directorate and the Head of the Translation (General Matters) Division were in possession of the assessment made by the coordinator of the group in which the applicant was working and were thus, in conjunction with her immediate superior, in a position to assess the applicant's ability, the assessment which they made does not appear to be without foundation.

9 In the circumstances these complaints are without foundation.

10 The applicant further complains that the contested decision was only notified to her after the end of her probationary period.

11 She states that the decision in question, which took effect on 16 January 1975, was only notified to her the next day and was only confirmed in a letter received by the applicant on 21 January.

12 Article 34 relating to cases in which the employment of an official is terminated at the end of the probationary period does not lay down any precise time-limit for the notification of this decision but allows the institution a reasonable period at the end of the probationary period in which to do so.

13 Therefore the fact that the applicant who already was aware of the assessments made of her, was not informed of her dismissal on 15 January

1975, the exact date of the end of the probationary period, cannot transform her employment for a fixed period into employment for an indefinite period.

14 The second submission must therefore be rejected.

15 The applicant further alleges that the decision taken in respect of her caused her serious non-material damage since dismissal at the expiry of the probationary period of a person who took part in an external competition is extremely rare.

16 However, the dismissal procedure is set out in the Staff Regulations and therefore since the relevant provisions were complied with it cannot entail any liability on the part of the Commission with regard to the dismissed probationer official.

17 Since the procedure followed for the adoption of the decision at issue was not vitiated by any defect of form, this submission must be rejected.

18 Finally the applicant maintains that the unilateral breach of her contract of employment caused her damage equal to 10 months' salary.

19 Since the appointment of the applicant was terminated in accordance with the provisions of the Staff Regulations, this final submission must also be rejected.

Costs

20 Under Article 69 (2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs.

21 The applicant has failed in her submissions.

22 Nevertheless under Article 70 of the Rules of Procedure, in proceedings by servants of the Communities, the institutions are to bear their own costs.

On those grounds,

THE COURT (First Chamber)

hereby:

1. **Dismisses the application;**

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

O'Keeffe Donner Mertens de Wilmars

Delivered in open court in Luxembourg on 26 February 1976.

A. Van Houtte
Registrar

A. O'Keeffe
President of the First Chamber

OPINION OF MR ADVOCATE-GENERAL WARNER DELIVERED ON 5 FEBRUARY 1976

My Lords,

Essentially, the applicant in this case seeks an order setting aside a decision of the Commission whereby she was dismissed from its service at the end of her probationary period as an official. She also claims further or alternative relief by way of damages.

The applicant is M^me^ Germaine Lambert, *née* Van de Roy. She is Belgian. She was a successful candidate in Competition No COM/LA/90 held in 1973 to establish a reserve list of translators for the Commission. By a decision of 28 February 1974, she was appointed, as a probationary official, to a post in Grade LA/8 in the Commission's Dutch Translation Division, with effect from 16 April 1974.

That Division forms part of Directorate D (Translation, Documentation, Reproduction and Library) of Directorate-General IX (Personnel and Administration) of the Commission. The Head of the Division was, and I think still is, Mr Dallinga, whilst the Director of Directorate IX-D was Mr Ciancio. That Directorate also included a Division, 'Translation (General Matters)', of which the Head was Mr Pignot.

On taking up her duties the applicant was attached to a group concerned with