OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN DELIVERED ON 18 JUNE 1981

My Lords,

Peter Tither was a probationary official of the Commission from 10 August 1978 until the events forming the subject of this action. In these proceedings he asks the Court to declare null and void a report, dated 6 July 1979, recommending his dismissal and a decision dated 1 August 1979, dismissing him. He also seeks the annulment of a decision of the Commission contained in a letter dated 24 April 1980, rejecting his complaint against the report and the decision to dismiss him; and he claims substantial damages.

The case turns upon Article 34 of the Staff Regulations, as amended. That Article, so far as is material, reads as follows:

"(1) Officials other than those in Grades A 1 and A 2 shall serve a probationary period before they can be established. The period shall be nine months for officials in ... Category B, and six months for other officials.

Where during his probationary period an official is prevented, by sickness or accident, from performing his duties for one month or more, the appointing authority may extend his probationary period by the corresponding length of time.

(2) Not less than one month before the expiry of the probationary period, a report shall be made on the ability of the probationer to perform the duties pertaining to his post and also on his efficiency and conduct in the service. This report shall be communicated to the person concerned, who shall have the right to submit his comments in writing. A probationer whose work has not proved adequate for establishment in his post shall be dismissed ...

Except where he is entitled forthwith to resume his duties with the civil service to which he belongs a dismissed probationer shall receive compensation equal to two months' basic salary if he has completed at least six months' service ..."

As Mr Tither's appointment was in Category B, his probationary period would, in normal circumstances, have expired on 10 May 1979. Since, however, he was for a while prevented by illness from performing his duties, that probationary period was extended by one month in accordance with the second paragraph of Article 34 (1).

On 11 May 1979 his Head of Division signed a report, prepared in accordance with Article 34 (2). Although this stated that his relations inside the department were unsatisfactory and that he had had some problems in adapting to the

exigencies of life in the Commission, it praised highly his knowledge and his initiative. The report recommended that he should be established. It was shown to the applicant, who added his own signature and comments.

Very shortly thereafter Mr Tither was granted three days' special leave, from Monday 21 May until Wednesday 23 May 1979, in order to vote in local government elections in Llanelli. The remaining two days in that working week were holidays for Commission officials. Mr Tither states that during the subsequent weekend he fell ill again and was unable to return to Brussels.

He claims that on Monday 28 May 1979, and on the next day, he made several attempts to telephone his immediate superior but without success. On Tuesday 29 May, by the applicant's account, he first visited a doctor in Cydweli. The next day he left home for Brussels. In London he received a message to telephone Mr Munro, the Assistant to the Director-General in Brussels. This he did from the Commission offices in London. The parties give different accounts of that conversation, although it is clear that Mr Munro expressed displeasure at Mr Tither's absence from work, and the latter then returned to his home in Wales having (by his account) missed his train to Brussels and become too ill and distressed to travel by the next train, a night service. In the evening of the following day Mr Tither telephoned Mr Munro at his home and in the morning of Friday 1 June Mr Munro telephoned him in Wales. The two parties give different accounts of these conversations, although both agree that Mr Tither spoke of his need to see a doctor.

During the next few days the Commission called on Mr Tither by telegram and letter to explain his absence or return to Brussels. He says that during this period he telephoned his Head of Division stating that he was ill. He posted to the Commission a medical certificate and a letter referring to his illness.

The Commission subsequently received medical certificates dated 4 June, 15 June, 6 July and 30 July stating that the applicant had been examined on each of those days and would be unable to attend work for specified periods. Mr Tither has now produced to the Court a certificate covering the whole period from 29 May to 6 August 1979. This states that he was undergoing investigations of cardiac symptoms and dyspepsia and was unable to attend work. The certificate adds that "these were *bona fide* symptoms exacerbated by an anxiety state ... but subsequent investigation revealed no gross organic disease".

On 6 July 1979 (by which time the first medical certificate had certainly reached the Commission and the second appears to have done so) Mr Tither's Head of Division signed a fresh probation report on the applicant. This complained of his "insufficient sense of responsibility in relation to the claims of urgent work"; and stated "unexplained absences from work have occurred"; and spoke of "serious misconduct ... since the first

probation report was drawn up". By way of amplification, the Head of Division reported that Mr Tither had sent in retrospectively medical certificates covering the period from 4 June to 6 July but had not informed the Commission by telex of having fallen ill. The report stated that "Mr Tither has had conversations with the Assistant to DG VII, and written to him, in terms of arrogant insolence" and it recommended that he should be dismissed.

Mr Tither received that report on 17 July 1979, with a covering letter inviting him to send his written comments within 15 days. By a telex dated 19 July 1979 Mr Tither's solicitors informed the Commission of the date when the letter and its enclosure arrived. Mr Munro replied by telegram dated 20 July, stating that the Commission expected to receive his comments by 31 July 1979. On 1 August, having received no comments from Mr Tither, the Commission decided to dismiss him because he had not proved adequate in his post by reason of the matters referred to in the two reports.

There followed an exchange of correspondence between the parties, in which Mr Tither first submitted a formal complaint under the Staff Regulations, claiming that his purported dismissal was invalid, but later (in a letter dated 11 October 1979) demanded compensation for his dismissal in accordance with the third paragraph of Article 34 (2) of the Staff Regulations. The Commission sent to Mr Tither a cheque for UKL 2 420.43, by way of compensation, calculated in accordance with Article 34 (2) with a covering letter which asserted that the demand for compensation amounted to a modification of his complaint. He promptly replied, stating that on his solicitors' advice he rejected the cheque and did not propose to cash it. Subsequently it appears that he did present the cheque which was met.

The Commission does not contend that acceptance of this compensation is a bar to Mr Tither's claims in these proceedings. It does not seem to me that any form of estoppel arises here. The claim for compensation under Article 34 (2) is to be treated as being without prejudice to the claim in the complaint under Article 90. In view of the position adopted by the Commission I do not consider that the Court is bound of its own motion to rule that the acceptance of this compensation is so inconsistent with the pursuit of his claims in these proceedings that such claims should be rejected *in limine*.

Mr Tither contends, first, that the Commission has no power, under Article 34 of the Staff Regulations or otherwise, to make more than one probationary report on an official. The second report is therefore a nullity. So must be the decision which flows from it. It is of course true that Article 34 imposes a duty to make only one report; but it does not follow from this that no more than one report can be made. The Court seems already to have accepted that, where a first report was unfavourable, the appropriate authority may make further reports at least when this is done in order to give the official the benefit of

any improvement in his work: Case 52/70 *Nagels* v *Commission* [1971] ECR 365 at p. 371.

Likewise, in my view, that authority must be able to make a second report where the first was favourable. This follows from the fact that under Article 34 an official's period of probation does not end on the date of his report, which must be made "not less than one month before the expiry of the probationary period", but extends for the number of months specified in the first paragraph of that Article, unless it is curtailed on the ground that the probationer's work is proving obviously inadequate. If the appointing authority is to carry out its duty (under e.g. Article 27) it must be entitled, and may in some cases even be bound, to take into account important new circumstances or events which occur or come to light in the period intervening between the making of the first probationary report and the end of the probationary period, which have a bearing upon the official's suitability. If the authority is to take into account such a circumstance or events, fairness requires that the official be given an opportunity of making his comments. A second report constitutes a convenient and proper means of warning the official that the authority is considering some new factor and of inviting him to comment upon it. It is also a sensible means of communication between different levels in the service.

On Mr Tither's behalf it was contended that any event occuring or coming to light after the making of a probationary report could only be the subject of disciplinary action under Article 87 (1) of the Staff Regulations. The latter may be one way of proceeding. In my view it does not necessarily exclude the making of a further report before a decision as to establishment.

It was observed, moreover, that the second report was written nearly two months after the period specified in Article 34. The Court has already decided, in Cases 10 and 47/72 *Di Pillo* v *Commission* [1973] ECR 763 at p. 770 that a failure on the part of the competent authority to make its probationary report until some few months after the statutory period, although capable of entailing liability on the part of the Commission, does not result in the invalidity of the report.

Next it was said that the decision to dismiss Mr Tither was vitiated because it followed so shortly after the second report that he was unable to submit his comments on that report in time. According to this submission "it was inequitable to impose a short and strict deadline, or any deadline at all, on an official who, to the Commission's knowledge, was absent due to illness". It is in my view incumbent on the Commission, in a case such as the present, to allow the official a reasonable period in which to give his comments: see Case 99/77 *D'Auria* v *Commission* [1978] ECR 1267 at p. 1274; Case 17/74 *Transocean Marine Paint Association* v *Commission* [1974] ECR 1063 at p. 1079. What period is sufficient must depend on the circumstances of each case. In this case the Commission at first gave Mr Tither 15 days, from the despatch of the second report, in which to submit his comments: and later, on learning that

the report and its letter had taken 11 days to arrive in Wales, it extended by a corresponding period his time to send his comments. By then Mr Tither had instructed solicitors, who had communicated with the Commission by telex, and they at no stage indicated that the time-limit was insufficient nor did they ask for any extension or suggest that Mr Tither's illness was such as to prevent him from giving them proper instructions. If the solicitors had asked for a reasonable extension, explaining why they needed it, I have little doubt that such an extension would have been granted. In the circumstances I would reject the contention that Mr Tither was given insufficient time to comment.

Next it was argued that the decision to implement the second report was defective because it referred only to the unfavourable comments in the first report, and not to the favourable ones. The decision must contain a statement of the grounds on which it was based; it is not obliged to set out all the factors which point the other way. In many cases no doubt a balancing exercise has to be done. I am not prepared to assume here from the terms of this decision that favourable factors were excluded from consideration.

Whether or not a probationer is to be dismissed is, of course, a matter largely within the discretion of the appointing authority. The Court does, however, have the power to intervene as I see it, where the Rules have not been complied with, where natural justice has been violated, where the authority has misdirected itself in law or reached a conclusion which is not one to which an authority acting reasonably could come in all the circumstances. That there has been a recommendation for establishment (made only a month before the anticipated end of a probationary period and communicated to the probationer) is itself a circumstance to be taken into account when assessing subsequent events.

The Commission's complaints of Mr Tither's conduct in the period following the transmission of the first report fall in substance into two parts: first, his absence from work, said to be unexplained and, second, his manner of dealing with his superiors.

The first absence of which the Commission complains was between 21 and 23 May, when he had been given leave for the purposes of enabling him to vote in local elections. It is said that he was not entitled to that leave. There may or there may not have been room for argument as to whether he was entitled to all of it. The fact remains that apparently in good faith, he applied for it and was given it. If, as the Commission now submits, Mr Tither was not entitled to three days' leave for this purpose, but only to one days' leave, the Commission may have been entitled to deduct the reamining two days from Mr Tither's annual entitlement, but it cannot in my view rely on Mr Tither's absence during those two days as a basis for his dismissal.

The next absence to be considered is that from Monday 28 May until Friday 1 June, which was the last working day preceding the date of the first medical certificate submitted to the Commission in advance of the contested decisions. An official who is prevented by illness from performing his duties is, of course, bound by Article 59 (1) of the Staff Regulations to notify his institution as soon as possible and, if he is absent for more than three days, to produce a medical certificate. There is, as far as the Court has been shown, no specific obligation to send the notification by telex, as Mr Tither's head of department maintained in his second report, or by telegram, as Mr Munro told Mr Tither, according to the Defence.

The accounts given to the Court of the telephone conversations between Mr Tither and Mr Munro differ so markedly that it is impossible to state with certainty the date on which the former first mentioned his illness; but even Mr Munro's account refers to a promise made by Mr Tither by telephone late on Thursday 31 May to produce medical certificates covering the period from 28 May to 1 June. It seems that by the fourth day of his period of absence, at the latest, Mr Tither notified his institution that he had been prevented by illness from attending at work from the beginning of the period. Given that fact, and his claim to have attempted to explain his absence on 28 May and to have succeeded in explaining it on 30 May, I do not consider that it can reasonably be said that Mr Tither was in breach of Article 59 (1). Even if he was that has to be seen in the light of subsequent events.

By 6 July when the second report was made the Commission had received two medical certificates covering the period from 4 June to 6 July. By 1 August when the decision to dismiss was taken a further medical certificate dated 6 July had been received. None of these is mentioned in the dismissal decision. Moreover the Court was told that the person taking the decision to dismiss, although he would probably have been told of the dates of the certificates and their receipt and "what they certified as authorized absence" he would not have seen the certificates or had the actual diagnosis.

If the phrase in the second report "unexplained absences from work" is meant to refer to any period between 4 June and 6 July it is unjustified. Since the two medical certificates are referred to in the report, I assume it is not, in which case the only period left at that stage is the period between 28 May and 4 June. Mr Tither was unwise not to get a medical certificate to cover this period before the one he obtained after his dismissal. In view of the discussions which took place during that period and the subsequent medical certificates it seems to me however, not to have been reasonable to dismiss him because of absence during that period, particularly as Mr Tither was not asked specifically whether a medical certificate could be obtained to cover that period.

There remains, therefore, the other alleged reason for the decision to dismiss Mr Tither, namely his manner of dealing with his superiors, described, in the second probationary report as "the problem ... of 'bolshieness' involving at at times contemptuous and impertinent behaviour". This behaviour was said to have taken the form of spoken and written communications with Mr Munro "in terms of arrogant insolence". Even Mr Munro's accounts of those conversations, however, do not impute to Mr Tither language to match the discription of it in the second probationary report; and of course Mr Tither gives a different and more favourable account of his words. It was for this reason that I asked to see any letters on which the Commission relies in support of its claim. The Court was provided only with a copy of the letter dated 10 June 1979, which Mr Tither himself had annexed to his Application. At most, in my view, it can be said in parts to be firm in its tone but I find nothing in it which is offensive, let alone arrogant or insolent. The same remarks apply to several of the other documents written by Mr Tither which are before the Court. None of them is in my view such as to warrant his dismissal, in the face of the first report which recommended his establishment despite his unsatisfactory relations with others in the department.

Moreover, it is to be remembered that between the first report and the date of his dismissal Mr Tither was only actually working for five days. There was very little opportunity for conduct of the kind alleged other than in relation to his absence. Without specific examples of such conduct it seems to me right to confine attention to the matters referred to previously. In my opinion the decision of the Commission was not one, in all the circumstances laid before the Court, to which a reasonable authority could properly come.

On this basis it seems to me that Mr Tither is entitled to have the second report, the dismissal decision and the rejection of his complaint annulled. In Case 24/79 *Oberthür* v *Commission* [1980] ECR 1745 the Court indicated that there may be circumstances where it is more appropriate simply to award compensation and not to annul an act which has been found to be wrongful. This does not seem to me to be such a case. It is of importance to him to have this decision set aside and there is not here the possibility of the wide-ranging effect which would have resulted in the *Oberthür* case. On the other hand it does not seem to me to follow that Mr Tither continues to be employed. Although the matter is not free from doubt, in my view when the probationary period came to an end he ceased to be employed even if he was not dismissed. If the dismissal is set aside he is entitled to be compensated for the loss he has suffered from the failure to make him established. He was not established only because the Commission formed a conclusion to

which it could not reasonably come as to his absences and his conduct.

As compensation he is not entitled to receive the salary which he claims, but "he is entitled to receive compensation for the actual damage he has suffered through the loss of salary". (Case 58/75 *Sergy* v *Commission* [1976] ECR 1139 at 1153.)

In principle this sum will be, first, the difference between the net emoluments to which he would have been entitled had he been engaged by the Commission from the effective date of his dismissal until the date of judgment and the net income which he received for the same period while engaged in other employment, or which he could have received had he taken reasonable steps to find appropriate employment. There should also in my view be deducted receipts (if any) from unemployment benefits and other social security benefits paid to him by reason of his unemployment. The net emoluments for this purpose should not, in my view, include the expatriation allowance which would have been added to Mr Tither's salary in accordance with Article 69 of the Staff Regulations. This sum is designed to cover the actual cost likely to be incurred by an official when he lives away from home. See Judge Donner's comments, CP 27. 6. 1962 and Louis Peeters, "L'impôt communautaire sur la rémunération des fonctionnaires et agents des Communautés européennes", 1968 (3) Revue internationale des sciences administratives 256 at p. 260. At the material time Mr Tither did not live away from home and did not therefore incur these costs.

Secondly it seems to me that, difficult though such an assessment is, he is entitled to be compensated for the loss of future earnings. This involves an assessment of the length of time during which he might have been employed and the possibility of his being lawfully dismissed. There are so many imponderables to be taken into account that it seems to me that the award should be limited in any event to a maximum period of 10 years. He himself limits this claim to BFR 500 000.

He also claims reimbursement of the expenses which he incurred as a result of his dismissal. He has not, however, presented evidence to substantiate any of these claims for expenses. It may well be that he did have to pay money by way of indemnity on the forfeiture of his lease in Brussels. There was, however, no evidence to support the figure for this or the other claims.

It does not seem to me that the Court is in a position to make an award in respect of any of these items. I consider that the appropriate course is for the question of compensation to be left for the parties to seek to reach agreement. If they cannot do so then they should be at liberty to make an application to the Court for the matter to be determined.

Mr Tither also seeks a substantial sum in compensation for mental pain and anguish which he says was caused by the Commission's unlawful actions. No details were given of this claim and it seems to me that it should in any event be rejected.

Mr Tither claims interest on his arrears of salary and allowances from the due date of each payment. In my view he is entitled to receive interest, but not from the date on which the salary was due to be paid. As the Court decided in Case 156/80 *Morbelli* v *Commission* on 7 May 1981 (which is not yet reported) default interest is available only where there has been a wrongful delay on the part of the Commission. The Commission's failure to pay the applicant's claim cannot be said to have become wrongful until 9 October 1979 the date on which his complaint was registered with the Commission. In Case 114/77 *Jacquemart* v *Commission* [1978] ECR 1697 at p. 1709, the Court specified that the period for payment of default interest should be taken to run from the date of the complaint. In my view on the basis of that decision interest should be paid from that date until the date of payment.

Mr Tither has claimed, in another context, that the appropriate rate for the calculation of default interest is 10%. The Court has on a number of occasions awarded 8% as the appropriate figure. I refer to Cases 40/79 *Mrs P.* v *Commission*, and 785/79 *Pizziolo* v *Commission* in the opinion of Advocate General Warner given on 26 February 1981 (neither yet reported). It may be that in the light of changing interest rates this figure may one day have to be reconsidered but it seems to me to be appropriate in this case.

Finally Mr Tither claims his costs. He is in my view entitled to receive his costs from the Commission. I consider that the appropriate order should be that the Commission repay to the Court's cashier any amount which Mr Tither has received from the Court by way of legal aid in accordance with the Court's decision dated 2 October 1980. His other costs, if any, should be assessed and paid by the Commission and no further sum should be paid by way of legal aid pursuant to the Court's decision.

Accordingly I am of the opinion that the appropriate order is that:

1. The Commission's report dated 6 July 1979 recommending that the applicant be dismissed and its decision dated 1 August 1979 dismissing the applicant, and its decision dated 24 April 1980 rejecting the applicant's complaint against the making of that report and against the decision dated 1 August 1979 be declared null and void.

2. The Commission pay to the applicant:

   (a) compensation equal to the net emoluments, other than the expatriation allowance, to which he would have been entitled had he been

engaged by the Commission from the effective date of his dismissal until the date of the judgment, less deductions in respect of his receipts from other employment, and in respect of employment which he could reasonably have obtained or from unemployment or other benefits paid to him during the period of his unemployment, less also the sum paid to the applicant by the Commission by way of compensation for his dismissal;

(b) compensation for loss of future earnings;

(c) damages in respect of expenses incurred by him by reason of the failure to establish him in his post;

(d) interest on the sum referred to in (a) above at the rate of 8% from 9 October 1979 until payment and

(e) the cost of these proceedings in accordance with Article 69 (2) of the Rules of Procedure.

3. The matter be remitted to the parties for compensation to be agreed if possible and in default of agreement for the matter to be referred back to the Court.

4. The Commission pay to the Court's cashier a sum equal in amount to any monies paid to Mr Tither by way of legal aid, in accordance with Article 76 (5), paragraph 2 of the Rules of Procedure and the Commission pay to Mr Tither any other costs incurred by him.

5. No further sum be paid to Mr Tither by way of legal aid in accordance with the Court's decision dated 2 October 1980.