JUDGMENT OF THE COURT (First Chamber)
16 December 1987 *

In Case 178/86

Mariette Turner, an official of the Commission of the European Communities, represented by Georges Vandersanden, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of J. Biver, 2 rue Goethe,

applicant,

v

Commission of the European Communities, represented by its Legal Adviser, Dimitrios Gouloussis, acting as Agent, assisted by Philippe Mihail, of the Brussels Bar, with an address for service in Luxembourg at the office of G. Kremlis, a member of the Commission's Legal Service, Jean Monnet Building, Kirchberg,

defendant,

APPLICATION for annulment of the decision of 19 September 1985 containing the final version of her periodic report for the period 1981-82, for damages to compensate for the delay in drawing up that report and for the absence of any periodic report between 1977 and 1981, and finally for nominal damages of one franc to compensate for the non-material damage to her resulting from the failure to reply to her complaint seeking to have her periodic report for the period 1981-83 revised,

THE COURT (First Chamber),

composed of G. Bosco, President of Chamber, R. Joliet and F. Schockweiler, Judges,

Advocate General: J. L. da Cruz Vilaça
Registrar: D. Louterman, administrator

* Language of the Case: French.

having regard to the Report for the Hearing and further to the hearing on 2 July 1987,

after hearing the Opinion of the Advocate General delivered at the sitting on 7 October 1987,

gives the following

Judgment

1 By application lodged at the Court Registry on 17 July 1986 Mariette Turner, an official of the Commission, brought an action seeking, first, the annulment of the decision of 19 September 1985 containing her final periodic report for the period 1981-83, secondly, the award of damages for the delay in drawing up that report and for the absence of any periodic report between 1977 and 1981, and lastly the award of nominal damages in the amount of one franc by way of compensation for non-material damage incurred as a result of the failure to reply to her complaint seeking the revision of her periodic report for the years 1981-83.

2 In a memorandum dated 19 September 1985 the Director-General of Personnel and Administration, acting in his capacity as appeal assessor, established the final version of the periodic report for 1981-83 of Mrs Turner, Medical Officer at the office responsible for settling claims under the Sickness Insurance Scheme (DG IX).

3 The Commission acknowledges that that report was drawn up some nine months late and that the analytical assessments it contains differ from those in the previous periodic report.

4 The most recent report which may be used for the purposes of comparison is that covering the period from 1975 to 1977 when Mrs Turner was employed in the Medical Service (DG IX), since no report exists for the years 1977-79 and 1979-81. As far as the period 1977-79 is concerned, the Commission has not

replaced the report which was annulled by the Court in its judgment of 21 March 1985 (Case 263/83 [1985] ECR 93). As regards the period 1979-81 it was agreed between the Commission and Mrs Turner that no report would be drawn up. By a judgment of the Court of 9 July 1981 in Joined Cases 59 and 129/80 [1981] ECR 1883, the Court annulled the decision assigning the applicant to the new department of social medicine within the Medical Service and the subsequent decision transferring her to a post in DG XII (Research, Science, Education). As a result the Commission considered that it was difficult to draw up a periodic report for the years 1979-81 since the duties assigned to the applicant were not, according to the judgment delivered by the Court, those which ought to have been assigned to her.

5 It must also be noted that the *Guide to Staff Reports* adopted by the Commission on 27 July 1979 pursuant to Article 43 of the Staff Regulations altered the list of analytical assessments to be used in periodic reports, substituting the assessments 'excellent, very good, good, adequate, unsatisfactory' for 'above average, average, below average'.

6 For a fuller account of the facts of the case and the arguments of the parties reference should be made to the Report for the Hearing.

The application for annulment

7 The applicant's first submission is that the Commission drew up her periodic report for 1981-83 outside the period allowed for the purpose by the Guide to Staff Reports.

8 In that respect it should be remembered, first, that the Court held in its judgments of 1 June 1983 in Joined Cases 36, 37 and 218/81 *Seton* v *Commission* [1983] ECR 1789, paragraphs 13 and 14, and of 21 March 1985 (cited above, paragraph 16) that delay in drawing up a periodic report justifies the annulment of the report only if the delay has adversely affected the official in question.

9 Next, it must be noted that, according to the Court's judgment of 6 February 1986 in Joined Cases 173/82, 157/83 and 186/84 *Castille* v *Commission* [1986] ECR 497, paragraphs 35 and 36, such a delay does adversely affect the official if a favourable decision concerning him, such as a promotion, ought to have been taken during the period for which the periodic report is lacking, and it is not necessary in that regard for the official to establish a causal link between the failure to adopt such a decision and the absence of the report.

10 However, in this case the applicant merely claims that the delay in drawing up her periodic report affected the ordinary course of her career, without saying in what respect precisely it did so. In particular, she does not claim that a decision concerning the progress of her career ought to have been taken during the period for which the periodic report was lacking. Accordingly, the first submission must be rejected.

11 Secondly, the applicant claims that the Commission failed to fulfil the duty imposed on it by Article 5 (2) of the *Guide to Staff Reports* to explain any change in the analytical assessments since the previous report.

12 In his memorandum of 19 September 1985 the appeal assessor confirmed the analytical assessments for the period 1982-83, which were less favourable than those for the report covering the period 1975-77. He pointed out that 'he had read the previous periodic report, covering the period 1975-77' but that 'it should be borne in mind that the method of assessment applied at that period was not quite the same and that, above all, the [applicant's] duties had changed after 20 October 1981'.

13 Those remarks indicate that, rather than explain the changes in the analytical assessments compared with those given in the previous report, the appeal assessor referred to circumstances which, in his view, made it impossible to provide such an explanation.

14 As regards the first circumstance, the change in the method of assessment in 1979, it should be noted that in its judgment of 6 February 1986 (cited above, paragraph 27) the Court stated that that alteration could not release the Commission from its duty to provide an explanation under Article 5 (2) of the *Guide to Staff Reports.*

15 As regards the second circumstance, the change in the applicant's duties after 20 October 1981, it should be noted that in Case 266/82 *Turner* v *Commission* [1984] ECR 1 the Commission acknowledged that it had assigned the applicant to a post which could only be held by a doctor and which entailed in a large measure duties pertaining to medical practice. That being so, her original duties in the Medical Service and her new duties at the office responsible for settling claims must be regarded as largely equivalent. Consequently, the Commission cannot rely on the change in her duties in order to escape in this instance from its duty to explain any changes in the analytical assessments.

16 It is true that the change in her duties meant that the report at issue in this case was not drawn up by the person who was responsible for the previous report which is to serve as a comparison. However, as the applicant has rightly pointed out, both the reporting officer and the appeal assessor had the opportunity of contacting the previous reporting officer under the procedure set up by the *Guide to Staff Reports* so as to gain a better impression of any changes in the official's standard of work. That being so, the fact that the reporting officer was a different one is also not sufficient to release the Commission from its duty to explain any changes in the analytical assessments.

17 Admittedly, there is a gap of four years between the period covered by the report at issue and that covered by the report to be used as a comparison. Nevertheless, in view of the fact that the original duties and the new duties are similar and the reporting officers for 1975-77 and for 1981-83 were able to discuss the matter between themselves, that particular circumstance cannot be relied upon by the Commission in order to escape its duty to give reasons. Moreover, the Commission itself acknowledged in its memorandum of 19 September 1985 that it is the report

for the period 1975-77 which is to be used as a comparison for the purposes of Article 5 (2) of the *Guide to Staff Reports* in this instance.

18 The Commission maintains that the failure to fulfil the duty laid down by Article 5 (2) of the *Guide to Staff Reports* must be regarded as a procedural irregularity which, according to the case-law of the Court, does not affect the validity of the periodic report unless it is capable of adversely affecting the official. The Court would point out that the duty to state reasons is intended to enable the official to know why the analytical assessments have changed, to verify the factors relied upon and hence to submit his observations on the statement of reasons in the context of his right to be heard. The periodic report is vitiated by failure to observe an essential procedural requirement if the failure to state reasons has infringed the official's right to be heard. The fact that the official in question could not in any event have expected better analytical assessments — that is to say, if the reporting officer had explained his assessments — is therefore irrelevant. The applicant's second submission is therefore well founded.

The claim for damages

(a) *The delay in drawing up the periodic report for 1981-83*

19 As the Court has already stated, the applicant has been unable to show that during the period when there was no report a favourable decision concerning her could have been adopted. That being so, the claim for damages for the delay in drawing up the periodic report for 1981-83 must be rejected.

(b) *The absence of any periodic report between 1977 and 1981*

20 The applicant alleges that the absence of a report for two consecutive periods, 1977-79 and 1979-81, adversely affected her inasmuch as the absence of a report prevented her from answering any allegations of insufficiency in her work and avoiding the poor assessment of her given in the subsequent report for the period 1981-83.

21 As regards the absence of a report for the period 1977-79, that cannot have caused the damage alleged by the applicant. When the less favourable assessment

contained in the report for 1981-83 was given, the report for 1977-79 was still in existence because it was not annulled until the Court delivered its judgment on 21 March 1985 (cited above).

22 It is true that the Commission failed to fulfil its duty to draw up within a reasonable period of time a fresh periodic report for the period 1977-79, in compliance with the judgment annulling the report. However, that failure cannot give rise to compensation for the applicant because she has not explained in what regard that failure has adversely affected her.

23 As regards the absence of a report for the period 1979-81, it should be noted that the applicant agreed that it would not be drawn up, following the judgment annulling the report delivered on 9 July 1981 (cited above). She must accept the consequences of that agreement and cannot, therefore, legitimately seek to be compensated for the absence of a report for that period.

24 In those circumstances the claim for compensation for the absence of any periodic report between 1977 and 1981 must be rejected.

Claim for nominal damages of one franc

25 Finally, the applicant seeks payment of one franc by way of nominal damages to compensate her for non-material damage resulting from the failure to reply to her complaint seeking to have her periodic report for 1981-83 revised.

26 In that regard, it is sufficient to point out that the second paragraph of Article 90 (2) of the Staff Regulations expressly states that there may be no reply to a complaint at the end of the prescribed period. By virtue of that provision, failure to reply shall be deemed to constitute an implied decision rejecting the complaint

which may then be challenged under Article 91. Consequently, the failure to reply to a complaint cannot justify the award of nominal damages of one franc by way of compensation for non-material damage.

Costs

27 According to Article 69 (2) of the Rules of Procedure, the unsuccessful party must be ordered to pay the costs. The first subparagraph of Article 69 (3) provides that the Court may order that the parties bear their own costs in whole or in part where each party succeeds on some and fails on other heads. Article 70 provides that the institutions shall bear their own costs in actions brought by officials.

28 The applicant has succeeded on only one of the four heads of claim. Accordingly, the Commission should be ordered to pay one quarter of the applicant's costs.

On those grounds,

THE COURT (First Chamber)

hereby:

(1) Annuls the applicant's report for the period 1981-83;

(2) Dismisses the remainder of the application;

(3) Orders the Commission to pay its own costs and one quarter of those of the applicant.

Bosco Joliet Schockweiler

Delivered in open court in Luxembourg on 16 December 1987.

P. Heim
Registrar

G. Bosco
President of the First Chamber