Case 178/86

Mariette Turner
v
Commission of the European Communities

(Official — Periodic report)

Report for the Hearing 5367
Opinion of Mr Advocate General da Cruz Vilaça delivered on 7 October 1987 ... 5372
Judgment of the Court (First Chamber), 16 December 1987 5382

Summary of the Judgment

1. *Officials — Periodic report — Drawn up late — Irregularity sufficient to justify annulment of the report and award of compensation — Condition — Existence of damage*
(Staff Regulations of Officials, Art. 43)

2. *Officials — Periodic report — Assessments which differ from those given in the previous report — Duty to state reasons — Scope*
(Staff Regulations of Officials, Art. 43)

REPORT FOR THE HEARING
delivered in Case 178/86 *

I — Facts

In a memorandum dated 19 September 1985 Mr Morel, Director-General for Personnel and Administration, acting in his capacity as appeal assessor, established the final version of the periodic report on Mrs Turner for the period 1981-83.

During that period the applicant was employed as Medical Officer at the office responsible for settling claims under the

* Language of the Case: French.

Sickness Insurance Scheme (DG IX). She had been transferred to that post by a decision of 20 October 1981 which she sought unsuccessfully to have annulled (judgment of 12 January 1984 in Case 266/82 *Turner* v *Commission* [1984] ECR 1).

The memorandum of 19 September 1985 marks the conclusion of the reporting procedure which is governed by the rules contained in the Guide Staff Reports drawn up on 27 July 1979 pursuant to Article 43 of the Staff Regulations.

It should be noted that the Guide altered the list of analytical assessments to be used in staff reports: it substituted the words 'excellent, very good, good, adequate, unsatisfactory' for 'above average, average, below average'.

In this case the reporting procedure went as follows:

(a) July 1984 (precise date not known): draft report by the reporting officer, Mr Pratley, Director of General Administration;

(b) 5 February 1985: report by the reporting officer (report modified after discussion with the applicant);

(c) 25 March 1985: report by the appeal assessor, Mr Morel, Director-General for Personnel and Administration (report partially modified, but no change in the 'analytical assessments')

(d) 29 July 1985: opinion of the Joint Committee on Staff Reports, to which the applicant had referred her case.

The Committee states that the file before it does not indicate that the appeal assessor fulfilled his duty to give 'explanations . . . for any change in the analytical assessments since the previous report'.

The Committee considers that the appeal assessor ought to have explained the differences between the report and the analytical assessments contained in the report for the period 1975-77. The latter report should be considered, in the Committee's view, as the last valid report.

The periodic report for 1977-79 was annulled by the Court (judgment of 21 March 1985 in Case 263/83 *Turner* v *Commission* [1985] ECR 893). As for the report for 1979-81, it was not drawn up as a result of another judgment of the Court which declared void the decision of 4 May 1979 assigning the applicant to the new medico-social unit in the Medical Service and the subsequent decision of 20 May 1980 transferring the applicant to a post in Directorate-General XII (Research, Science, Education) (judgment of 9 July 1981 in Joined Cases 59 and 129/80 *Turner* v *Commission* [1981] ECR 1883);

(e) 19 September 1985: final report of the appeal assessor (unchanged).

The assessor states that he has read the previous periodic report, that for the period 1975-77, but that 'in comparing the last report with that for the period 1975-77 it must be borne in mind that

the method of assessment applied at that time was not quite the same, and in particular that [the applicant's] duties changed on 20 October 1981'.

On 10 December 1985 the applicant submitted a complaint under Article 90 (2) of the Staff Regulations seeking to have her final periodic report revised. Since the Commission had not responded to the complaint within the period provided for in Article 90 (2) the applicant brought this action pursuant to Article 91 of the Staff Regulations.

II — Arguments of the parties

(a) *The application for annulment of the decision of 19 September 1985 containing the final report on Mrs Turner for the period 1981-83*

The *applicant* relies on two submissions in support of her claim for annulment. First, the Commission failed to observe an essential procedural requirement by not abiding by the time-limits laid down in the Guide to Staff Reports. Secondly, it did not give sufficient reasons to support the report in question: in particular, it did not explain the changes in the analytical assessments compared with those given in the previous report, as it is required to do by Article 5 (2) of the *Guide to Staff Reports.*

(1) *Delay in drawing up the report*

The *applicant* alleges that the Commission failed to abide by any of the time-limits laid down in the *Guide to Staff Reports* when drawing up her report for 1981-83. On that ground she requests that the report be annulled.

Relying on the judgment of 6 February 1986 in Joined Cases 173/82, 157/83 and 186/84 *Castille* [1985] ECR 497, she also seeks damages *ex aequo et bono* in the amount of BFR 50 000 for harm suffered, inasmuch as her 'career progress has been affected'. The applicant submits that that damage must be assessed not only in the context of this action but also in the light of the disagreement there has been between the parties since 1978. She also considers that she does not have to state precisely in what the damage consists because according to the judgment in *Castille*, in particular paragraph 36, delay in drawing up a staff report is in itself prejudicial to the official. [1]

The *Commission* does not deny that the report was drawn up late, a fact which was in any case expressly acknowledged by the appeal assessor in his letter of 25 March 1985. Relying on the judgment of 1 June 1983 in Joined Cases 36, 37 and 218/81 *Seton* [1983] ECR 1789 and in Case 263/83 *Turner*, cited above, it observes, however, that the report can only be annulled if the applicant first establishes that the delay caused her damage.

The applicant has restricted her description of that damage as being the fact that 'her career progress was affected', without explaining in more detail in what way that was so. Referring likewise to paragraph 36 of the judgment in *Castille*, the Commission submits that the applicant ought to have shown that decisions concerning the

1 — Paragraph 36 of that judgment reads as follows: 'However, delays in the drawing up of staff reports may in themselves be prejudicial to officials for the simple reason that their career progress may be affected by the absence of such reports when decisions concerning them must be taken.'

progress of her career were or ought to have been taken during the period during which the report ought to have been made.

(2) *Insufficient statement of reasons for the report*

The *applicant* submits that the Commission failed to observe the duty imposed on it by Article 5 (2) of the *Guide to Staff Reports* to explain any changes in the analytical assessments since the previous report. In her case the Commission did not explain why the report for 1981-83 was significantly less favourable than that for 1975-77 (the report to be regarded as the previous report for the reasons already set out above).

In particular, the Commission merely pointed out in the disputed memorandum of 19 September 1985 that the method of assessment applied before the adoption of the new *Guide to Staff Reports* was not quite the same and that the applicant's duties had changed since 20 October 1981. In that last respect, the Commission is being inconsistent when it claims that the change in her duties made it impossible to make a comparison with the duties performed by the applicant in the Medical Service. Throughout Case 266/82 (cited above), the Commission claimed that the applicant's new assignment (as Medical Officer at the office responsible for settling claims under the Sickness Insurance Scheme) involved, precisely, duties which qualitatively and quantitatively could not be regarded as inferior to those she had carried out previously in the Medical Service.

The Commission relies upon its memorandum of 19 September 1985, stating that it explained in any case therein the changes made in the analytical assessments of the applicant on the basis of, first, the change in the method of assessment itself and, secondly, the change in the applicant's duties after 20 October 1981.

As regards the first point, the Commission states that the change in the method of assessment makes it difficult to compare assessments made under different rules. On the second point, it claims that since the applicant does not occupy the same post, the reporting officer and the appeal assessor for the 1981-83 report are not the same as those who assessed the applicant's merits when the report for the period 1975-77 was drawn up. It states that it is difficult to see how a reporter who conscientiously makes analytical assessments of the official concerned can explain why those assessments differ from others made by a different person several years previously.

The Commission adds that the applicant was clearly satisfied with the duties she was performing when the previous report was made (for 1975-77), whereas she is also quite clearly unhappy with her new duties. The Commission points out that it is therefore quite natural that the reporting officer who drew up the report for 1975-77 viewed the applicant's aptitude and work more favourably than the reporting officer who drew up the disputed report concerning the period 1981-83.

(b) *The claim for damages for the delay in drawing up the report for 1981-83 and for the absence of any report between 1977 and 1981*

(1) *Delay in drawing up the report*

As this submission in support of the claim for damages coincides with that relied on by the applicant as a ground for annulling her report, reference should be made to the arguments of the parties already set out on that point above.

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

The applicant also seeks compensation for the damage suffered as a result of the absence of any report between 1977 and 1981. Since the report for 1977-79 was annulled by the Court (Case 263/83, cited above), the Commission ought to have drawn up a fresh one, in accordance with Article 176, first paragraph, of the EEC Treaty. For the period 1979-81, the Commission ought to have drawn up a report in spite of the fact that the applicant was compulsorily transferred to another post. The applicant submits that the damage resulting from the absence of any report between 1977 and 1981 consists in the fact that she was unable to take cognizance of any allegations that her work was unsatisfactory during that period, to reply to such allegations and, hence, to avoid the poor assessment of her work for the period 1981-83.

The Commission points out, first, that the applicant has never requested a new report for the period 1977-79 and, secondly, that she agreed to there being no report for the period 1979-81. The Commission also points out that the absence of the latter report was due, not to the fact that she had been compulsorily transferred, but to the fact that her transfer was annulled by the Court (Joined Cases 59 and 129/80, cited above).

(c) *The claim for the award of one franc by way of nominal damages for non-material damage resulting from the absence of a reply to her complaint seeking the revision of her report for the period 1981-83*

Finally, the applicant seeks the award of one franc by way of nominal damages for non-material damage she claims to have suffered as a result of the Commission's failure to reply to the complaint she submitted to it, whereas it was at the Commission's suggestion that the applicant contacted the person in charge of her file in DG IX. The applicant claims that such conduct is 'inadmissible'.

The *Commission* confines its reply to stating that there is no provision obliging it to take an express decision regarding a complaint brought by an official against an act adversely affecting him. In any case, it sees no evidence of non-material damage if an official's complaint is rejected by an implied decision rather than by an express one. In both cases, the applicant is in no doubt as to the outcome of his complaint.

R. Joliet
Judge-Rapporteur