JUDGMENT OF THE COURT (First Chamber)
21 March 1985 *

In Case 263/83

Mariette Turner, an official of the Commission of the European Communities, residing in Brussels, represented by G. 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, D. Gouloussis, acting as Agent, assisted by P. Mihail, of the Brussels Bar, with an address for service in Luxembourg at the office of Manfred Beschel, a member of its Legal Department, Jean Monnet Building, Kirchberg,

defendant,

APPLICATION for the annulment of the decision of C. Tugendhat, a Member of the Commission, establishing the final staff report on the applicant,

THE COURT (First Chamber)

composed of: G. Bosco, President of Chamber, T. Koopmans and R. Joliet, Judges,

Advocate General: P. VerLoren van Themaat
Registrar: J. A. Pompe, Deputy Registrar

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* Language of the Case: French.
** after hearing the Opinion of the Advocate General delivered at the sitting on 15 November 1984,

gives the following

JUDGMENT

(The account of the facts and issues which is contained in the complete text of the judgment is not reproduced)

Decision

1 By an application lodged at the Court Registry on 24 November 1983, Mariette Turner, an official of the Commission of the European Communities, brought an action for the annulment of the decision of 29 October 1982 whereby C. Tugendhat, a Member of the Commission, established the final staff report on her for the period from 1 July 1977 to 4 May 1979.

2 Dr Turner is a medical practitioner who has worked since 1968 in the Commission's medical service (Directorate-General IX, Personnel and Administration), where she was initially assigned to the Department of Preventive Medicine. During the period covered by the contested staff report, she first worked under the direction of Dr Semiller until 31 July 1978. Since then her superior has been Dr Siddons.

3 On the occasion of a reorganization of its medical service the Commission proposed to assign Dr Turner to a new medico-social unit that was to be set up. When she refused to accept the change of duties the Commission decided on 4 May 1979 to re-assign her compulsorily. Subsequently, on 20 May 1980, the Commission transferred Dr Turner to another Directorate-General. Those two decisions were however annulled by the Court in its judgment of 9 July 1981 (Joined Cases 59 and 129/80 [1981] ECR 1883).

4 The present case concerns the staff report on the applicant for the period from 1 July 1977 to 30 June 1979. From the pleadings and oral procedure, the circumstances in which the contested report was drawn up may be summarized as follows.

5 On 15 January 1981, the Commission's Director-General for Personnel and Administration, in his capacity as first assessor, sent Dr Semiller a draft report which he asked him to sign. That draft had already been signed by Dr Turner's new superior, Dr Siddons, but not by the first assessor.

6 The draft contained six assessments of 'fair' and one assessment of 'unsatisfactory'. The general assessment stated: 'Dr Turner has a good training and medical experience. Unfortunately she does not adjust to teamwork, which requires a spirit of collaboration with her medical colleagues in the department. Following the reorganization of the medical service she has been unable to adjust to the new and important tasks with which she was entrusted.'

7 On 17 January 1981, Dr Semiller informed the first assessor that he could not agree to the report proposed, because 'there are contradictions between the analytical report and the general assessment and between the present report and the previous one'. Afterwards, using the standard form for reports, Dr Semiller even sent the assessor his own assessment on Dr Turner for the period during which he was her superior. His assessment was undoubtedly more favourable than that contained in the draft report.

8 The first assessor however considered it unnecessary to place Dr Semiller's opinion on Dr Turner's personal file. The staff report which the assessor ultimately drew up contained exactly the same assessments as those in the draft which had been submitted to Dr Semiller and which the latter had disagreed with. Dr Semiller could simply note on the report that he 'could not agree either with the analytical assessments or with the general assessment for the period from 1 July 1977 to 31 July 1978.'

9 Dr Turner decided to submit her observations on the staff report. She therefore requested an interview with the first assessor and, in the alternative, asked for the matter to be referred to the appeal assessor. Faced with silence from the first assessor, Dr Turner approached Mr Tugendhat, the appeal assessor, directly and asked him to intervene. On 15 February 1982, Mr Tugendhat made certain amendments to the report. The analytical assessment in the amended version

contained only five assessments of 'fair' and no 'unsatisfactory'. In addition, the last sentence of the general assessment was replaced by another which stated that Dr Turner had been selected for promotion to Grade A 4 in 1978. Those amendments did not satisfy Dr Turner, who asked for the matter to be referred to the Joint Committee on Staff Reports.

10 The Committee delivered an opinion in which it expressed its regret that 'the time-limits for the various stages of the procedure were not observed and that Dr Semiller did not explain his reasons for disagreeing'. Mr Tugendhat nevertheless saw no reason to alter the report proposed on 15 February 1982, which thereupon became final.

11 In January 1983, Dr Turner decided to lodge a complaint against that decision. At the same time, however, the Commission proposed to annul the part of the staff report covering the period from May to June 1979. That was the period following the decision to assign Dr Turner to another department. Since that decision had been annulled by the Court the Commission thought it preferable not to take that period into account. Dr Turner accepted the proposal but refused to withdraw her complaint.

12 When her complaint was dismissed Dr Turner brought the present action, the admissibility of which is not contested. She seeks the annulment of the staff report, which had become final by the decision of the appeal assessor.

13 In support of her action the applicant pleads three submissions: (i) infringement of essential procedural requirements, (ii) errors of assessment in the staff report and (iii) misuse of powers.

Infringement of essential procedural requirements

14 In the course of the proceedings before the Court, the applicant has drawn attention to the procedural requirements which in her view were not observed in the preparation of the staff report. In the first place, the final report was not made

until some 22 months after the expiry of the period laid down in Article 7 of the Guide to Staff Reports. Secondly, whilst Dr Turner admits that she was granted a meeting with the first assessor, she considers that it did not constitute a true exchange of views as intended by the Guide to Staff Reports because it took place when the draft report was still unfinished. Thirdly, Dr Turner objects that the first assessor and the appeal assessor did not take account of the opinion of Dr Semiller, her first superior. Finally, no sufficient reasons were given in the contested report for the fact that she was given a less favourable assessment than in previous reports.

15 The Commission puts forward two arguments in its defence. In the first place, it considers that, even if there was some delay in preparing the report and no exchange of views between the first assessor and Dr Turner, the breach of those procedural requirements did not adversely affect her: she cannot validly maintain that the contested report was less favourable on that account. As regards the alleged breach of the third requirement, the Commission considers that neither the first assessor nor the appeal assessor was obliged to take account of Dr Semiller's opinion.

16 The applicant's argument must be rejected in relation to the first two requirements which she considers were disregarded. It is true that the final report was made later than it ought normally to have been. Nevertheless, it must be remembered that at the time there was a dispute between Dr Turner and the Commission which was resolved by the aforesaid judgment of 9 July 1981. In those circumstances, far from adversely affecting Dr Turner, the delay enabled the appeal assessor to give his opinion more calmly at a time when the aforesaid situation of conflict had abated. Similarly, the alleged lack of consultation between the first assessor and Dr Turner cannot lead to the nullity of the contested report. The present action relates to the final report as drawn up by the appeal assessor. It is not denied that the appeal assessor had a genuine exchange of views with Dr Turner, thus repairing any neglect at a previous stage of the proceedings. On the other hand, the third defect alleged by Dr Turner merits closer scrutiny.

17 Article 3 of the Guide to Staff Reports provides that the first assessor must consult the official's superior in any other department to which he belonged. In the present case the first assessor confined himself to sending Dr Semiller a draft report for signature without offering him an opportunity to give his opinion. In those circumstances there was no consultation of the previous superior for the purposes of Article 3 of the Guide to Staff Reports.

18 The appeal assessor is also under an obligation to obtain information and to consult. That obligation flows from the following provisions. Article 7 of the Guide to Staff Reports provides that the appeal assessor must undertake all necessary consultations. Point B.9.3.1. of the Guide states, in that respect, that the appeal assessor must obtain the fullest information possible and to fulfil that obligation he may in particular seek information from any other superior of the official assessed. The introduction to the Guide to Staff Reports, which, it must be noted was signed by the person who was the appeal assessor in the present case, states that henceforth the assessor must consult 'not only the official's immediate superior but also other senior officials with information to impart'.

19 In the present case, the appeal assessor knew that Dr Semiller did not approve of the proposed report since he had emphatically noted his disagreement on the first report. That fact should have led him to question Dr Semiller. The latter had been Dr Turner's superior for a far longer part of the period in question than Dr Siddons. His more favourable opinion was all the more important since the report was made during a time when there was a conflict between Dr Turner and the Commission. The Joint Committee on Staff Reports was aware of that fact since it expressed the wish that the appeal assessor should consult Dr Semiller.

20 In spite of the circumstances that have just been related the appeal assessor did not personally question Dr Semiller, although he had no detailed knowledge of his opinion since, contrary to Article 26 of the Staff Regulations, it had not been placed on the applicant's personal file. In those circumstances, the appeal assessor failed to fulfil his obligation to obtain information as required by the aforesaid provisions of the Guide to Staff Reports.

21 It must therefore be concluded that, since neither of the assessors consulted Dr Semiller as required by the Guide to Staff Reports, the procedure which led to the contested staff report was vitiated by the infringement of an essential procedural requirement. Since it is apparent that Dr Semiller was more favourable to Dr Turner, she has every reason to consider that the report was not made on the basis of the fullest information and that she was thus adversely affected. On that ground the contested staff report must be annulled.

Errors of appraisal in the staff report and misuse of powers

22 In her second submission, Dr Turner challenges the validity of the analytical assessments and the general assessment made in the contested report. In her third submission, she alleges a misuse of powers evidenced by various circumstances and explained by the fact that the report was made at a time when the conflict between her and the Commission was acute.

23 The Commission states first of all that, according to established case-law, the Court cannot substitute its own assessment of the facts for that of the assessors. As regards the allegation of misuse of powers, the Commission considers that Dr Turner has not shown that the assessments contained in the contested report were intended to harm her.

24 Since the Court has already held that the contested report must be annulled as a result of the infringement of an essential procedural requirement, it is not necessary to examine the second and third submissions pleaded by the applicant.

Costs

25 Under Article 69 (2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs. Since the defendant has failed in its submissions it must be ordered to pay the costs.

On those grounds,

THE COURT (First Chamber)

hereby:

(1) Annuls the decision of Mr C. Tugendhat establishing the final staff report on Dr Turner for the period from 1 July 1977 to 4 May 1979;

(2) Orders the Commission to pay the costs.

Bosco Koopmans Joliet

Delivered in open court in Luxembourg on 21 March 1985.

P. Heim
Registrar

G. Bosco
President of the First Chamber