JUDGMENT OF THE COURT (First Chamber)
15 January 1985 *

In Case 168/83

Laura Pasquali-Gherardi, a secretary/shorthand-typist in Grade C 2, Step 3, at the European Parliament, residing at 17 Boulevard Royal, Luxembourg, represented by V. Biel, of the Luxembourg Bar, with an address for service in Luxembourg at the latter's Chambers, 18 A rue des Glacis,

applicant,

v

European Parliament, represented by M. Peter, Head of the Legal and Administrative Questions Division, residing in Luxembourg, assisted by A. Bonn, of the Luxembourg Bar, with an address for service in Luxembourg at the latter's Chambers, 22 Côte d'Eich,

defendant,

APPLICATION for an award of damages on the ground of wrongful acts or omissions on the part of the administration,

THE COURT (First Chamber),

composed of: G. Bosco, President of Chamber, A. O'Keeffe and R. Joliet, Judges,

Advocate General: M. Darmon
Registrar: D. Louterman, Administrator

gives the following

* Language of the Case: French.

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the conclusions, submissions and arguments of the parties may be summarized as follows:

1. Facts and written procedure

Mrs Pasquali-Gherardi, who is an official in Grade C 2, Step 3, entered the Parliament's service on 17 October 1979 and was established on 29 January 1981.

On 15 November 1979, she suffered an accident at her place of work, causing irreversible damage to her left eye.

Since that accident, the applicant has continued to work as a shorthand typist in the pool.

On 21 January 1982, the Director of Personnel and Social Affairs at the Parliament informed the applicant that her case would be referred to the Invalidity Committee under Article 78 of the Staff Regulations of Officials. On 25 May 1982, on a recommendation from the Parliament's medical officer, he wrote a letter to Mr Vinci, the Director-General for Sessional and General Services, suggesting that the applicant be transferred 'to a post which will enable her to do work more in keeping with her state of health'. Despite that proposal, the applicant's situation has not changed in any way. On 28 January 1983, the Invalidity Committee submitted its report, which contained the following conclusions:

'The after-effects of Mrs Gherardi's accident on 15 November 1979 constitute a condition of partial invalidity preventing her from continuing in her present post.

The Committee recommends that she should be assigned to a post corresponding to her career bracket but not involving a high level of visual effort.'

This application was lodged on 2 August 1983.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court (First Chamber) decided to open the oral procedure without any preparatory inquiry.

2. Conclusions of the parties

The *applicant* claims that the Court should:

Declare the application admissible;

Declare that the defendant bears responsibility for two wrongful omissions, inasmuch as it failed to communicate to the applicant the findings of the Invalidity Committee, and did not, over a period of years, take steps to relieve the applicant of work which clearly exceeds her physical capacities and is causing her serious physical harm;

Declare that a causal relationship exists between those wrongs and the deterioration in the applicant's state of health;

Award the applicant by way of damages the sum of Lfr 1 000 000 or such greater sum as the Court shall decide, plus interest at the rate of 10% from the date of the application;

In the alternative,

Appoint three experts to assess the damages and, if necessary, to give an opinion on

the causal relationship between the administrative delays and the deterioration in the applicant's vision and her general state of health;

Order the defendant to pay the costs.

The *defendant* contends that the Court should:

Declare the application inadmissible;

If not, declare it unfounded.

3. Submissions and arguments of the parties

With regard to the admissibility of the application, the applicant acknowledges that no complaint through official channels preceded the application. She seeks to justify that omission by referring to the reasons for which a complaint is not necessary in appeals against the decisions of a selection board. In his Opinion in Case 255/78, *Anselme* v *Commission*, [1979] ECR 2323, Advocate General Warner stated that 'the condition in Article 91 refers only to measures which the appointing authority can review'. In this case there is no longer anything to review since the wrongs done are irremediable. The applicant does not wish to be understood as saying that it will be impossible to find a satisfactory solution in the future, but that, as regards the past, the damage has been done and compensation by way of damages is the only possible remedy. By going through the complaints procedure, she would have allowed the matter to drag on for at least four months, four months which the defendant could not have used to any purpose.

The Invalidity Committee's conclusions were never formally notified to the applicant despite the provisions of the second paragraph of Article 9 of Annex II to the Staff Regulations. That failure to notify constitutes an omission on the defendant's part to take a measure prescribed by the Staff Regulations within the meaning of Article 90 (2).

After representations made by the applicant's lawyer to the competent officials at the Parliament, the Invalidity Committee's conclusions were communicated to her.

According to the applicant, the Parliament did not comply with the Invalidity Committee's conclusions. Two proposals for the transfer of the applicant were discussed, but they were not in accordance with the recommendations made by the Invalidity Committee and would have entailed *capitis deminutio* for the applicant. A young woman of 33 cannot resign herself to spending the rest of her career in a post for somebody who is past work or handicapped. The proposals which were discussed would have resulted in a position devoid of any future or hope of improvement. Both had the disadvantage that they would have isolated the applicant from her colleagues and friends.

The applicant claims that there have been two wrongful omissions on the part of the administration which have caused her real harm. Over the years, but especially since 1982, the applicant's state of health has deteriorated in two respects:

— As a result of stress and as a result of taking the necessary pain-killing drugs (analgesics), the applicant has suffered irreversible after-effects as regards her general state of health;

— The applicant's difficulties of vision have become so bad that in her private life she no longer has any pastimes, whether watching television, sport, theatre or reading, and is unable to drive a car.

The applicant claims compensation for that wrongful conduct. In its judgment of 11 July 1974 in Case 53/72, *Guillot* v *Commission*, [1974] ECR 791, the Court held that the principles of justice and of sound administration are binding on the administration. The administration should look after the interests of its employees, and by not fulfilling that specific obligation it makes itself liable for the damage suffered by the employee concerned. The applicant

assesses the damage done to her health and more specifically to her sight at one million Luxembourg francs, with the proviso that the exact amount should be established by an expert medical examination which two ophthalmologists and one general practitioner should be designated to carry out.

Facts

The Parliament states that following her accident, after a break from work, the applicant returned to work on 3 December 1979. On 18 December 1979 she returned to Rome in order to consult an eye specialist. After that she remained on sick leave for a period of eight months.

On 11 August 1980, on the advice of Dr Libutti in Rome, the applicant resumed her work part-time in order to allow her sight to readjust gradually. She was back in Rome from 4 September to 21 October 1980 for medical consultations. After that she worked again full-time from 22 October 1980 to 9 January 1981 and was then absent, partly on sick leave and partly as part of her annual leave, from 10 January 1981 to 22 March 1981. She resumed her work full-time on 23 March 1981.

By a registered letter dated 14 May 1981, the appointing authority notified the applicant that she was to be dismissed, following the unfavourable report on her probationary period, with effect from 30 April 1981.

She was subsequently employed from 1 July 1981 to 31 December 1981 as a member of the temporary staff.

By letter of 2 December 1981, the Secretary-General of the European Parliament decided to revoke the applicant's dismissal and to submit her case to the Invalidity Committee in order that it should examine to what extent she was able to continue to perform the duties corresponding to the post she held.

By decision of 11 February 1982, the applicant was established. On 14 January 1983 she was promoted to Grade C 3 with effect from 1 January 1982.

The Invalidity Committee delivered its report on 28 January 1983, and the administration then offered the applicant two posts which it considered to be in accordance with the Invalidity Committee's recommendation: one in the Messengers Service and the other in Personnel Archives.

Taking the view that those posts would involve wholly unrewarding work and would give her no opportunity for advancement, Mrs Pasquali-Gherardi declined them and brought this application.

The *Parliament* submits that the application is inadmissible because it was brought without any prior complaint having been submitted as required by Article 91 (2) of the Staff Regulations.

It states that the applicant seeks to justify her failure to take her complaint through official channels by relying on the Court's decisions on the supererogatory nature of a complaint through official channels in appeals against a selection board's decisions.

The basis of that exception is that complaints against decisions which the appointing authority cannot review are futile. That is so in the case of the decision of a selection board, against which 'a complaint . . . through official channels . . . appears to be pointless, as the Commission is not competent to annul or amend the decisions of such a board' (Case 44/71, *Marcato* v *Commission*, [1972] ECR 427).

That exception is due solely to the independent nature of selection boards.

In Mrs Pasquali-Gherardi's case, the legal basis for a departure from the normal procedure is lacking.

On the contrary, the application criticizes the administration for acts or omissions which allegedly brought about the deterioration in her condition and for not having taken into account the Invalidity Committee's recommendations.

It is for the administration to examine the claims of the official concerned with a view to deciding upon the action to be taken; the appointing authority has full powers to change the applicant's legal position where necessary.

Therefore the defendant considers that the applicant was not entitled to dispense with the complaints procedure and that her direct application to the Court of Justice is inadmissible.

As to the substance, the defendant notes that the second paragraph of Article 9 of Annex II to the Staff Regulations requires the Invalidity Committee's conclusions to be communicated to the appointing authority and to the official concerned.

The applicant admits that she received those conclusions through her lawyer, who was in contact with the administration.

The claim is therefore unfounded in fact.

As to the applicant's second claim, namely that it failed to take any action or acted wrongfully towards Mrs Pasquali-Gheradi, the defendant submits that the administration did not fail to look for a fair solution to the problem caused by the applicant's state of health.

The administration offered her two posts in which the level of visual effort required was lower than that for a secretary/shorthand typist.

The applicant rejected those offers, citing personal reasons (isolation or the unrewarding nature of the work) and not the fact that the visual effort required would remain the same.

The administration has sought various ways and means of giving the applicant satisfaction within the limits of the medical opinion delivered by the Invalidity Committee.

It offered her two posts. One was in the Messengers Service, the other in Personnel Archives. The applicant may have had reason to find fault with the replacement posts she was offered, but what other solution could the appointing authority have envisaged?

In any event, it must be held that the administration, first, was not insensitive to the difficulties experienced by the applicant, and, secondly, did not remain inactive faced with a complex situation which it is extremely difficult to resolve.

As regards the medical consequences of keeping Mrs Pasquali-Gherardi in her present post, the Parliament states that it must rely on the expert medical advice submitted to it and further denies that it can be responsible for failing to re-assign the applicant when that was due to successive refusals on her part.

In conclusion, the defendant rejects the applicant's claims as being unfounded.

In its *reply*, the applicant maintains that it is not necessary in a case such as the present to lodge a prior complaint. However, in order to safeguard her rights, she submitted a complaint to the appointing authority on 23 November 1983.

The applicant states that she was not able to obtain a copy of the terms of reference assigned to the expert medical practitioners comprising the Invalidity Committee. The written defence states that those terms of

reference were to examine to what extent she was able to continue to perform the duties corresponding to the post she held. If those were indeed the Committee's terms of reference, it should be noted that they were inconsistent with the various provisions of the Staff Regulations defining the task of an Invalidity Committee. Under Article 78, that task is to examine whether the official concerned may be recognized to be suffering from total permanent invalidity preventing him from performing the duties corresponding to a post in his career bracket. According to the Court's judgment in Case 3/66, *Alfieri* v *Parliament*, [1966] ECR 437, it is not an Invalidity Committee's duty to examine whether other posts in the applicant's career bracket would be suitable for him.

The applicant argues that the proposals made regarding alternative posts did not take into account the medical practitioners' recommendation that any visual effort was to be avoided. However, she never rejected any offer to transfer her and never declined a post. On the contrary, she would have yielded to a transfer decision in proper form.

The applicant admits that the Parliament's administration was not insensitive to her difficulties but asserts that it began to act after her lawyer had drawn attention to its misconduct in May 1983. The Staff Regulations of Officials impose on the administration a duty to assist her and to have regard to her interests. That duty was neglected and nobody assisted the applicant although she was the victim of a tragic accident. There was wrongful conduct on the part of the administration, although it is difficult to pin responsibility for those omissions on an individual official.

In its *rejoinder*, the defendant takes the view that the applicant's claims are essentially self-contradictory. If she was and is unable to perform her duties as a shorthand-typist then she could not and cannot continue to be employed as such. Does that amount to saying that the invalidity from which she suffered should have been regarded as total although from a medical point of view it was certainly only partial? That is a question to be determined by the competent bodies, in this case the Invalidity Committee.

If, however, the applicant is not regarded as suffering from total invalidity or at least from invalidity preventing her from performing her duties, then she cannot attach blame to the administration for retaining her in that post.

The European Parliament had nothing but understanding for the applicant's position. At the end of her probationary period, her assessor delayed making an unfavourable report for as long as possible. When he examined her case following her complaint, the Secretary-General revoked the decision to dismiss her and established the applicant, who was then promoted. The administration has also examined the possibility of employing the applicant in other posts. She has rejected the offers made to her in that connection.

The defendant denies the applicant's assertion that it contributed by its wrongful conduct to her worsened state of health.

The defendant rejects the applicant's submissions as to the admissibility of the application. She maintains that her condition deteriorated because she continued to perform her duties and that it was therefore incumbent upon the administration to find her another post. Since it failed to do so, it is said to be liable for damages.

It therefore appears that the applicant wished to be transferred to another post in her career bracket. She should have submitted a reasoned request to that effect under Article 90 (1) of the Staff Regulations. If she had done so and her request

had been refused, she would have been entitled to lodge a complaint under Article 90 (2).

The usefulness of such a procedure is undeniable because the official's request defines the nature of his claim and constitutes a formal invitation to the administration to act. In the applicant's case a request for a transfer would have indicated the steps which she wished to be taken. The administration would then have been made aware of her situation and would, if need be, have ordered the relevant inquiries.

The defendant concludes that the application to the Court was not admissible in the absence of a prior complaint. Article 90 (2) of the Staff Regulations refers to complaints against either a decision or a failure to adopt a measure prescribed by the Staff Regulations.

As to the substance, the defendant denies that the administration remained inactive despite the applicant's situation. She had her accident on 17 October 1979 [sic]. After that she was more or less absent from her post until mid-April 1981, with the result that it was impossible for her superiors to express a view on her ability and output at the end of an extended probationary period.

All that the administration knew, according to the applicant's statement, was that she had sustained an accident and as a result had suffered eye-trouble so that periods of sick leave were necessary. The doctors treating her did not express a view as to the after-effects of her injury or the degree of invalidity which may have been produced by it. The Parliament's medical officer, to whom her case was referred on 30 May 1980, that is to say after seven and a half months, was unable to state a view and proposed not to establish the degree of invalidity until the middle of 1981, which was a year later. The Medical Committee has even now not yet delivered its opinion. As for the Invalidity Committee, to which the matter was referred in January 1982, its report was not delivered until the end of January 1983, and it confined itself to establishing partial invalidity without indicating its extent.

For the present, therefore, the appointing authority does not possess the medical information which it requires to decide upon the applicant's case and to take the measures required by the Staff Regulations.

The defendant argues that the basis of the claim for compensation submitted by the applicant has not been established. The only fact which is agreed is the reality of her accident and the injuries she sustained as a result. The defendant admits that her injury has made it more difficult for her to carry out her duties as a shorthand-typist. However, it cannot accept that her condition has deteriorated as a result of carrying out those duties. The documents concerning the case do not provide any evidence in support of that assertion. The doctors consulted confined themselves to recommending a different posting.

Consequently, neither the alleged deterioration nor the causal relationship between that deterioration and the applicant's continued performance of her duties as a shorthand-typist is established.

Even on the supposition that that were proven, the Parliament denies that it caused that deterioration by continuing to employ the applicant in that post.

The applicant was recruited from a reserve list of shorthand-typists. The duties as described for her competition consisted exclusively in shorthand-typing.

For that reason, the applicant cannot compel the Parliament to employ her in another post. She may only ask to be considered for such a post. The Parliament may examine the possibilities which have arisen without being obliged to do so. It is not under a duty to do so under any provision of the Staff Regulations. In any event it must restrict itself to posts in Career Bracket C 3 — C 2, to which the applicant belongs.

The defendant therefore denies that it was under a duty to transfer the applicant to another post even if there was 'a post corresponding' to the Invalidity Committee's recommendations.

The defendant recognizes the principle that the administration is under a duty to assist and to have regard to the interests of its staff.

Far from being inactive, the administration made efforts to find a solution to the applicant's problem, but she was unwilling to accept the solutions which were offered her.

4. **Oral procedure**

The parties presented oral argument at the sitting on 15 November 1984.

The Advocate General delivered his opinion at the sitting on 11 December 1984.

Decision

1 By an application lodged at the Court Registry on 2 August 1983, Mrs Laura Pasquali-Gherardi, a secretary/shorthand-typist at the European Parliament, brought an action under Article 91 of the Staff Regulations of Officials for a declaration that there have been two wrongful omissions on the part of the European Parliament which have caused a deterioration in the applicant's state of health; the applicant also claims that she should be awarded damages together with interest thereon or alternatively that three expert witnesses should be appointed to assess the damages and — if necessary — to give an opinion upon the administrative delays caused by the defendant and the deterioration in the applicant's vision and general state of health.

2 The applicant began work for the European Parliament on 17 October 1979 as an Italian-language shorthand-typist in Grade C 3. On 15 November of that year, she suffered an accident at work as a result of which her left eye sustained irreversible damage. She resumed her work on 3 December 1979. On 18 December 1979, she returned to Rome to consult an eye specialist and stayed away on sick leave for eight months. After that she returned to work.

3 Following a time in which periods of work alternated with periods of sick leave, the applicant was dismissed with effect from 30 April 1981 on the basis of an

unfavourable report on her probationary period. However, the Secretary-General of the Parliament rescinded that decision by a letter of 2 December 1981. He then referred the applicant's case to the Invalidity Committee in order to establish to what extent she was still able to carry out the duties corresponding to a post in her career bracket. On 28 January 1983, the Invalidity Committee delivered its report. That report states that 'the after-effects of Mrs Gherardi's accident on 15 November 1979 constitute a condition of partial invalidity preventing her from continuing in her present post. The Committee recommends that she should be assigned to a post corresponding to her career bracket but not involving a high level of visual effort.' The Invalidity Committee's conclusions were not at first communicated to the applicant herself. They were sent to her lawyer only after he had intervened.

4 The Parliament's administration then offered the applicant two posts which it considered to satisfy the Invalidity Committee's recommendation, one in the Messengers Service and the other in Personnel Archives. The applicant took the view that those posts would involve completely unrewarding work and offer no chances of promotion and did not accept either offer.

5 Mrs Pasquali-Gherardi then brought this action. In her application, she admits that she did not beforehand lodge a complaint through official channels. In order to justify her failure to lodge a prior complaint under Article 90 of the Staff Regulations, she argues that the condition in Article 91 of the Staff Regulations is only applicable to measures which the appointing authority can review. In this instance, there is nothing to review, since the wrongs committed are irreparable.

6 The applicant alleges wrongful conduct against the Parliament under two heads: in the first place, it did not forward the Invalidity Committee's conclusions to her; in the second place, it did not carry out the Committee's recommendation that she should be assigned to a post corresponding to her career bracket but not involving a high level of visual effort. She claims that, as the years have passed, and especially since 1982, her state of health has been getting worse. First of all, the stress she has been under and the pain-killing drugs (analgesics) which she has had to take have done irreparable harm to her general state of health. Furthermore, her difficulties of vision have become so bad that her former pastimes (watching television, sport, theatre, reading, etc.) are now denied her and she can no longer drive a car.

7 In its defence, the Parliament maintains that the application is inadmissible since it was lodged without any prior complaint having been made in accordance with Article 91 (2) of the Staff Regulations.

8 The Parliament adds that in any event the application is unfounded. It states that it has been shown that the Invalidity Committee's recommendation was forwarded to the applicant's lawyer at his request. In addition, the Parliament points out that the applicant has not given any indication of how its delay in making that recommendation available to her caused her to suffer damage.

9 As regards the applicant's complaint that she was not assigned to a position better suited to her visual capacity, the defendant recognizes that it is under a duty to have regard to the interests of its officials. That indeed was the reason why the applicant was allowed to take sick leave for long periods in 1980 and also later. Even before the Invalidity Committee made its recommendation on 28 January 1983, the Parliament's administration had attempted to find a post which would be suitable for the applicant's state of health. The Parliament says that it is still looking for such a post, which the applicant's lawyer himself described as a 'miracle job'.

10 The Parliament's position is therefore that, although it has not yet found the applicant a suitable position, it has not failed in its obligations towards her.

Admissibility

11 Article 91 (2) of the Staff Regulations provides that an appeal to the Court lies only if the appointing authority has previously had a complaint submitted to it pursuant to Article 90 (2) and if the complaint has been rejected by an express or implied decision. The object of that provision is to permit and encourage an amicable settlement of disputes which arise between officials or other servants of the Communities and the administration. The Court has upheld the admissibility of actions in the absence of a prior complaint only in the case of appeals against decisions of selection boards. In such cases, the appointing authority does not have the power to annul or amend the selection board's decisions. In this case, however, a prior complaint might have served a useful purpose. It was essential for the defendant to be put in a position to know the complaints made against it, so as to enable it, where appropriate, to endeavour to settle the dispute before an action was brought. In the absence of a prior complaint, the application is therefore inadmissible.

Costs

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

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

On those grounds,

THE COURT (First Chamber)

hereby:

1. Dismisses the application as inadmissible;

2. Orders the parties to bear their own costs.

Bosco O'Keeffe Joliet

Delivered in open court in Luxembourg on 15 January 1985.

P. Heim
Registrar

G. Bosco
President of the First Chamber