

JUDGMENT OF THE COURT (FIRST CHAMBER)
OF 1 JUNE 1978 ¹

Dr Denis D'Auria
v Commission of the European Communities

Case 99/77

Officials — Recruitment — Probationary period — Expiry — Dismissal — Decision — Reasonable period — Time when it starts to run
(*Staff Regulations of Officials, Art. 34 (2)*)

The first subparagraph of Article 34 (2) of the Staff Regulations relating to cases in which the employment of an official is terminated at the end of the probationary period does not lay down any mandatory period within which that decision must be adopted. Although the

administration is bound to adopt its decision within a reasonable period, that period can only start to run as from the moment when the report at the expiry of the probationary period has been drawn up and communicated to the official concerned.

In Case 99/77

DR DENIS D'AURIA, a former probationary official of the Commission of the European Communities, residing at Upton, Didcot (Oxfordshire), United Kingdom, represented by Jaques Putzeys and Xavier Leurquin, of the Brussels Bar, with an address for service in Luxembourg at the office of Georges Nickts, Huissier de Justice, 17 Boulevard Royal,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, Raymond Baeyens, acting as Agent, with an address for service in Luxembourg at the office of its Legal Adviser, Mario Cervino, Jean Monnet Building, Kirchberg,

defendant,

¹ — Language of the Case: French.

APPLICATION for the annulment of:

- The implied decision rejecting his complaint through official channels of 19 January 1977 concerning the withdrawal of the report at the expiry of the probationary period dated 25 October 1976;
- The implied decision rejecting his complaint through official channels of 18 March 1977 concerning the withdrawal of the decision of 20 December 1976 to dismiss him;
- In so far as may be necessary, the express decision rejecting the two complaints through official channels contained in letter No 4425 from the Commission of 30 August 1977;

THE COURT (First Chamber)

composed of: G. Bosco, President of Chamber, J. Mertens de Wilmars and A. O'Keeffe, Judges,

Advocate General: J.-P. Warner

Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and Issues

The facts and the arguments put forward by the parties in the course of the written procedure may be summarized as follows:

I — Facts and written procedure

1. Dr Denis D'Auria, a doctor of British nationality, was engaged for a period of two years in November 1974 as a member of the temporary staff in Grade A 6 of the Medical Service at Ispra, which is attached to the Directorate General for Personnel and

Administration (DG IX). In accordance with the terms of that engagement a probation report, which was favourable, was drawn up on 25 May 1975.

Following the publication of Vacancy Notice/Internal Competition No COM/476/75 in July 1975 he applied for a post of administrator (A 7/A 6). By a decision of 8 May 1976 he was appointed to that post as a probationary official in Grade A 6, with effect from 1 March 1976. The report at the expiry of the probationary period, which was drawn up on 25 October 1976 by the

head of service who had drawn up the earlier report of May 1975, was unfavourable to him and concluded that he should be dismissed at the expiry of the probationary period. By letter of 19 November 1976 Dr D'Auria claimed that that report was unjustified.

An interview between Dr D'Auria and the Director of Personnel took place in Brussels on 8 December 1976. Following that interview a private and confidential memorandum was delivered to him personally on the same day, confirming that in the absence voluntary resignation with effect from 1 April 1977 at the latest, it would be necessary to implement the dismissal procedure.

In a memorandum dated 16 December 1976 the Director General for Personnel and Administration recommended to the President of the Commission that the official concerned be dismissed. The decision to dismiss him was adopted on 20 December 1976, with effect from 1 January 1977.

By a memorandum dated 19 January 1977 the official concerned submitted to the Commission a complaint against the report at the expiry of the probationary period dated 25 October 1976.

2. Following that complaint the Commission called together a medical committee, which was required to give an opinion on the "complaint submitted by Dr D'Auria". The medical committee met on two occasions, that is, on 4 February and 18 March 1977, and made its report to the Director General for Personnel and Administration on 1 April 1977.

Meanwhile, on 18 March 1977, Dr D'Auria lodged a complaint within the meaning of Article 90 of the Staff Regulations against the decision of 20 December 1976 to dismiss him. On 1 August 1977 Dr D'Auria lodged the present application.

By letter of 30 August 1977 the Commission rejected the two aforementioned complaints.

3. 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 after requesting the parties to provide certain preliminary information in writing.

II — Conclusions of the parties

The *applicant* claims that the Court should:

"Declare that his application is admissible and well founded; Consequently, annul the contested decisions and order the opposite party to bear the costs;"

The *defendant* contends that the Court should;

"Dismiss the application as unfounded and order the applicant to bear the costs."

III — Submissions and arguments of the parties

A — *As regards the report at the expiry of the probationary period*

The *applicant* maintains, first of all, that the report at the expiry of the probationary period is vitiated by:

— *Lack of competence*, in that it was signed by the Head of the Medical Service at Ispra, an official in Grade A 3, whereas it should in fact have been signed by the Director of Personnel;

— *Material error*, since it is based upon facts which are manifestly incorrect and incomplete, such as, in particular, those relating to a mission undertaken by the applicant to Friuli and those relating to the extent and variety of the applicant's research activities.

As regards the complaint relating to *lack of competence*, the *defendant* replies that,

unlike the periodic staff report provided for in Article 43, the report at the expiry of the probationary period has not been the subject of any specific rules laying down, in particular, who must draw up the report. Moreover, since the applicant was a doctor the Head of the Medical Service was the only person in a position to assess the applicant's performance of his duties during the probationary period. As regards the Director of Personnel at Brussels, who is not a doctor, he had an interview with Dr D'Auria and on 8 December 1976 confirmed to him in writing his intention to submit to the Commission the report at the expiry of the probationary period recommending his dismissal. Finally, in a memorandum to the President of the Commission dated 16 December 1976, the Director General for Personnel and Administration adopted the conclusions drawn by the report.

As regards the complaint of *material error*, the defendant again points out that under headings A and C of the second section and elsewhere in the report at the expiry of the probationary period of 25 October 1976 there are explanations concerning the comments that his work was unsatisfactory. For example, it does not in any way appear that the mission carried out in Friuli was regarded as evidence of the unsatisfactory nature of the professional abilities of the applicant.

B — As regards the decision to dismiss the applicant

The *applicant* maintains that the contested decision to dismiss him involves:

- (1) *Infringement of Article 34 (1) of the Staff Regulations and an ultra vires act*, inasmuch as it was adopted ten months after the start of the probationary period, whereas once the probationary period (nine months) has come to an end the

appointing authority is no longer entitled to dismiss an official on the ground that it was unsatisfactory.

- (2) *Infringement of Article 9 (5)*, inasmuch as it was adopted without the compulsory opinion of the Reports Committee having been sought;
- (3) *Infringement of Article 34 (2)*, inasmuch as it was adopted on the basis of a probation report drawn up and signed by a servant who was not authorized so to act;
- (4) *Misuse of powers*, inasmuch as it was adopted following an unsuccessful attempt to obtain, under pressure, the "voluntary resignation" of the applicant (cf. the letter from the Director of Personnel of 8 December 1976) at a time when the nine months of the probationary period had passed without the adoption of any decision by the opposite party. That attempt was also based on the desire of the opposite party to be able to invoke the fourth subparagraph of Article 34 (2) of the Staff Regulations of Officials of the European Communities, according to which the compensation equal to two months' basic salary shall not be paid to an official resigns before the end of his probationary period.

The *defendant* replies that:

- (a) It emerges equally from the case-law of the Court that Article 34 (1) of the Staff Regulations does not lay down any precise time-limit for the notification of a decision to dismiss an employee at the end of the probationary period but allows the institution a reasonable period at the end of that time in which to do so;
- (b) Until now no institution has considered it necessary to set up the Reports Committee under the conditions laid down in Articles 10

and 11 of Annex II to the Staff Regulations;

- (c) The decision to dismiss the applicant was adopted on the basis of a report at the expiry of the probationary period signed, it is true, by the Head of the Medical Service at Ispra but confirmed both by the Director of Personnel and by the Director General for Personnel and Administration at Brussels, to whose directorate that service is directly attached;
- (d) The letter from the Director of Personnel of 8 December 1976 constituted a final attempt, in favour of a probationary official whose unfitness to perform his duties is clear, to avoid the recording of a situation which was as unfortunate for the authority as for the official concerned, in a formal decision. It was handed to Dr D'Auria, at his request, after an interview during which all the aspects of the situation which had thus arisen, in particular as regards the professional future of the official concerned, were openly and confidentially weighed up. Moreover, in considering the two complaints lodged by Dr D'Auria, the Commission requested the medical committee, an informal body comprising the officials who were doctors holding positions of responsibility, to give an opinion on the present case.

The *applicant* challenges those arguments and the defendant's analysis of the judgments of the Court in the

matter. As regards the submission of misuse of powers, he draws attention to the correspondence exchanged with the Head of the Medical Service between 29 January 1976 and 28 October 1976, which shows an incompatibility of temperament between that official and himself. Unjustified criticisms appear suddenly in that correspondence, and are amplified and diversified in several letters, as if the Head of the Medical Service wished to build up a vindictory file leading up to the final probation report which, in such circumstances, could not be anything other than negative.

The *defendant* replies by pointing out that none of the factors referred to by the applicant constitutes serious evidence of misuse of powers. The only concrete element is the memorandum of 8 December 1976 which, however, expresses the good-natured desire of the official whose initiative it was to take into consideration the fully understood interests of a probationary official whose dismissal was inevitable.

IV — Oral procedure

During the course of the hearing on 16 March 1978 the Director of Personnel, Jeremy R. Baxter, and the applicant replied to certain questions raised by the Court concerning the interview on 8 December 1976.

The parties presented oral argument during that hearing.

The Advocate General delivered his opinion at the hearing on 27 April 1978.

Decision

1 By an application lodged on 1 August 1977 the applicant seeks the annulment of the report at the expiry of the probationary period, drawn up as regards him on 25 October 1976 under Article 34 (2) of the Staff Regulations of Officials, as well as of the decision of the Commission of 20 December 1976 dismissing him with effect from 1 January 1977.

(a) The report at the expiry of the probationary period

- 2 The applicant maintains, first, that the contested report at the expiry of the probationary period is vitiated by lack of competence, in that it was drawn up and signed by the Head of the Medical Service at Ispra, an official in Grade A 3, whereas such a report ought only to have been drawn up and signed by the director concerned, in this instance the Director of Personnel.
- 3 In addition, the applicant maintains that the said report is vitiated by material error, in that it is based on facts which are manifestly incorrect or incomplete, such as, in particular, those relating to his mission to Friuli and to the extent and variety of his research activities.
- 4 As regards the first submission, no provision in the Staff Regulations of Officials determines the authority competent, as assessor, to draw up and sign the report at the expiry of the probationary period referred to in Article 34 (2) of the Staff Regulations.
- 5 The applicant maintains that the Commission could and should have adopted specific provisions in the matter by making use of the power conferred upon it by Article 110 of the Staff Regulations, with the result that it cannot avail itself of the absence of such provisions in order to justify the award of the duties of assessor to an administrative authority other than the Director of Personnel.
- 6 Although Article 110 of the Staff Regulations provides that each institution shall adopt general provisions for giving effect to the Staff Regulations after consulting its Staff Committee and the Staff Regulations Committee, it does not specify the form in which such provisions must be adopted.

- 7 It is established that in fact the appointment of an assessor forms the subject of a Commission memorandum of 1 February 1974, entitled "Guide à l'intention des notateurs des fonctionnaires stagiaires" (Guide to those acting as the assessors of probationary officials).
- 8 As regards the appointment of an assessor, Chapter 1 of the second section of that memorandum recommends that guidance should be sought "as far as possible" from the directives adopted in relation to the periodic report referred to in Article 43 of the Staff Regulations, according to which, as regards officials in Category A and the Language Service, the staff report is to be drawn up by the competent director or the chief adviser.
- 9 As those directives were adopted by the Commission by virtue of Article 110 of the Staff Regulations, their extension to the report at the expiry of the probationary period cannot be seen as an arbitrary administrative measure, having regard in particular to the analogies between that report and the periodic report.
- 10 Furthermore, the reservation "as far as possible" contained in the memorandum may be explained by the particular nature of certain situations of fact or of law in which the probationary or periodic report is drawn up.
- 11 Such a situation existed in this instance, in which the questions of the professional ability of the applicant and of the duties attaching to the post which he was to occupy in the Medical Service of the institution were so specific that they could not have been properly assessed by the Director of Personnel.
- 12 On the other hand, the drawing up, in this case, of the probation report by a superior authority other than the Head of the Medical Service who, although lower in rank than the Director of Personnel, has a close working relationship with the probationary official, was better able to ensure a correct assessment of his abilities for the purpose of possible establishment and, thus, to satisfy the general interests of the service.
- 13 As regards the second submission, nothing in the contested probation report enables it to be concluded that the material factors alluded to by the

applicant, such as his mission to Friuli, were conclusive as regards the appraisals of him made by the assessor.

- 14 Furthermore, there is nothing to support the argument that that report is incomplete or incorrect as regards the extent and variety of the applicant's research activities, having regard, in particular, to the fact that the report at the expiry of the probationary period itself describes the principal activities carried out by the applicant during that period.
- 15 For all those reasons the heads of the conclusions in the application directed against the report at the expiry of the probationary period must be dismissed as unfounded.

(b) The decision to dismiss the applicant

- 16 The applicant maintains, first, that the decision to dismiss him is illegal, inasmuch as it was adopted after the expiry of the probationary period, that is, at a date at which, by virtue of Article 34 of the Staff Regulations, the appointing authority no longer had the power to dismiss an official for the unsatisfactory performance of his duties during the probationary period.
- 17 In support of that ground of complaint he maintains that in stating that the probationary period "shall be nine months for officials in Category A" Article 34 of the Staff Regulations makes it clear that any decision concerning the dismissal of the probationary official must be adopted before the expiry of that period.
- 18 The first subparagraph of Article 34 (2) of the Staff Regulations, relating to cases such as the present in which the employment of an official is terminated at the end of the probationary period, does not lay down any mandatory period within which that decision must be adopted.
- 19 Although the Commission is bound to adopt its decision within a reasonable period, that period can only start to run as from the moment when the report at the expiry of the probationary period has been drawn up and communicated to the official concerned.

- 20 In this case, since the starting point for the calculation of the period was thus 25 October 1976, the decision to dismiss him, taken on 20 December 1976, was adopted within a reasonable time.
- 21 The applicant maintains, secondly, that the said decision infringes Article 9 (5) of the Staff Regulations, inasmuch as it was adopted without the opinion of the Reports Committee having been sought.
- 22 In his opinion the fact that at present that committee does not exist is not sufficient to rule out such an infringement, since its setting up cannot be delayed indefinitely by the Commission.
- 23 Article 9 (1) of the Staff Regulations provides that a Reports Committee shall be set up "if required".
- 24 As there is no obligation to set up such a committee, the Commission cannot be criticized for not having done so and for having adopted a decision to dismiss the applicant at the expiry of the probationary period without having sought the opinion of such a body.
- 25 The applicant further maintains that the contested decision is irregular, inasmuch as it was adopted on the basis of a report at the expiry of the probationary period which was drawn up and signed by an official who was not competent so to act.
- 26 As, for the reasons set out above, the complaint of lack of competence with regard to the report at the expiry of the probationary period is unfounded in law, the present submission appears to be without legal foundation.
- 27 The applicant maintains, finally, that the contested decision is vitiated by misuse of powers, inasmuch as it was adopted following an unsuccessful attempt by the Director of Personnel to put pressure on him in order to obtain his voluntary resignation.

- 28 In support of that submission the applicant refers to an interview which he had with his Director of Personnel on 8 December 1976 and to a letter delivered to him by that director on the same day, which informed him that the report at the expiry of the probationary period of 25 October 1976 would be destroyed and that the institution would express its thanks in writing for his work if, by 17 December 1976, he sent the administration his resignation with effect from 1 April 1977 at the latest.
- 29 In the applicant's opinion, the aim pursued by the Commission in making that attempt is unlawful, *a fortiori* since voluntary resignation on the part of the official concerned would have enabled the administration to avoid the payment of the compensation equal to two months' basic salary provided for by the third subparagraph of Article 34 (2) of the Staff Regulations.
- 30 The arguments put forward do not demonstrate the existence of elements of fact or of law sufficient to support the allegation of misuse of powers.
- 31 Since the decision of the appointing authority to dispense with the services of the applicant was, as is shown by the aforementioned letter, in the course of adoption at the date of the above-mentioned interview and letter, it may be accepted that — regrettable though it may appear — the proposal made on that occasion by the Director General has its origin in the desire of the appointing authority not to harm the applicant's reputation.
- 32 For that reason the heads of conclusion concerning the annulment of the decision to dismiss the applicant are unfounded in law.
- 33 On those grounds the present application is dismissed.

Costs

- 34 Under Article 69 (2) of the Rules of Procedure, the unsuccessful party shall be ordered to pay the costs.
- 35 The applicant has failed in his submissions.

- 36 However, under Article 70 of the Rules of Procedure, in proceedings by servants of the Communities, institutions shall bear their own costs.

On those grounds,

THE COURT (First Chamber)

hereby

1. Dismisses the application;
2. Orders the parties to bear their own costs.

Bosco

Mertens de Wilmars

O'Keeffe

Delivered in open court in Luxembourg on 1 June 1978.

A. Van Houtte

Registrar

G. Bosco

President of the First Chamber

OPINION OF MR ADVOCATE GENERAL WARNER
DELIVERED ON 27 APRIL 1978

My Lords,

Essentially, the applicant in this case challenges a decision of the Commission whereby he was discharged from its service at the end of his probationary periods as an official.

The applicant is Dr D. A. P. D'Auria. He is a British subject. He was born in London in 1946 and his schooling took place in London. In 1968 he went to Trinity College, Dublin, where, after

taking a B.A. degree in History and Fine Arts, he read medicine and became a Doctor of Medicine. When, in 1974, he was being considered for an appointment on the staff of the Commission, he was given flattering testimonials by distinguished physicians and surgeons under whom he had worked in hospitals in Dublin and in Cork.

The appointment in question was that of Head of the Medical Service Lab-