

OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 15 JULY 1982 ¹

*Mr President,
Members of the Courts*

The applicant in the present proceedings was recruited by the European Parliament in March 1979. He was initially a member of the auxiliary staff in the Mail Department and on 1 October 1980 was assigned, as a probationary official in Grade D 3 (Office Messenger), to the Directorate General for Administration, Personnel and Finance.

The Personnel Division issued an unfavourable probation report dated 30 March 1981, that is to say, one day before the expiry of his probationary period. The report recommended that the applicant be dismissed upon expiry of his probationary period. It was delivered to the applicant on 14 April 1981 and signed by him on 6 May 1981. Simultaneously, the applicant submitted in detail his comments on the report in a letter dated 5 May 1981 to the Director General for Administration, Personnel and Finance, which caused the latter to order a second examination of the case.

By a letter of 11 June 1981 the applicant lodged a complaint against the failure to make him an established official, but he was informed by the Secretary General of the Parliament on 19 June that, with effect from 15 July 1981, he was to be dismissed as a result of the unfavourable probation report.

On 8 July 1981 the applicant lodged a complaint against the report and his consequent dismissal, and at the same time brought an action for the annulment of both the probation report and the decision to dismiss him and for the payment of damages.

His application for suspension of the operation of the decision to dismiss him, which accompanied the main application, was dismissed by order of the President of the Third Chamber dated 20 July 1981. On 9 October 1981 the Secretary General of the Parliament expressly rejected the above-mentioned complaints.

My opinion regarding this action, which must be considered admissible by virtue of Article 91 (4) of the Staff Regulations, is as follows:

The applicant takes issue first and foremost with the probation report, whose alleged irregularity must necessarily cause the decision to dismiss him to be annulled. In support of his claim he submits that the report did not adequately state the reasons on which it was based, particularly with regard to the unfavourable assessments which it contained. It was based, moreover, on falsehoods and was issued without an objective appraisal of *all* the circumstances, including those which testified *in his favour*. Lastly, the administration's conduct as a whole constituted a misuse of its powers inasmuch as the one and only objective of the report had been to remove the applicant from the service because of his involvement in trade-union activities.

1. Turning to a detailed examination of these submissions, I would observe first on a procedural point that — as the applicant rightly points out — Article 34 (2) of the Staff Regulations required a report on his ability to be issued and

¹ — Translated from the German.

communicated to him at least one month before expiry of the probationary period. Since, under Article 34 (1) of the Staff Regulations, the applicant's probationary period expired on 31 March 1981, whereas the report was not issued until 30 March 1981, its preparation was unduly late. Such a delay in preparation does amount, as the Court of Justice decided in the cases of *di Pillo*¹ and *Munk*², to an irregularity in view of the express requirements of the Staff Regulations, but the irregularity is not "such as to call in question the validity of the report".

None the less, as the Court of Justice emphasized in the *Munk* case, the decisive factors are that the person concerned must have the opportunity to submit any observations on the report to the appointing authority, and that the authority should be able to take account of those observations. The period of time between the communication of the report on 14 April and the decision to dismiss him taken on 19 June must be regarded as sufficient for these purposes.

Finally, the decision to dismiss him may not be challenged on the ground that it did not immediately follow the expiry of the probationary period. As the Court of Justice made clear in the *di Pillo* case, such a decision must be taken within a reasonable time; however, time begins to run only when the probation report is communicated to the person concerned. The period between 14 April and 19 June may, in the light of the Court of Justice's previous case-law, be regarded as reasonable.

2. Since the procedure followed by the Parliament, which led to the applicant's dismissal, does not in itself disclose any illegality in the dismissal, we must now turn to the objection raised by the applicant that the unfavourable assessments contained in the probation report are insufficiently reasoned.

(a) It may first be observed that of the nine criteria listed in the report, four are marked "unsatisfactory".

Against Heading A.2. (Judgment and adaptability), it is stated that the applicant had difficulty in reconciling the demands of his duties with his personal wishes.

Against Heading A.5. (Responsibility and devotion to duty) is entered the remark that he absented himself from work on several occasions without giving any reasons or prior notice.

Against Headings C.1. (Relations within the department) and C.2. (Relations with third parties) it is observed that he always had difficulties, both with his colleagues and with his superiors. Finally, the summary mentions *inter alia* that he frequently displayed a "lack of interest" in his work and had numerous and sometimes violent disagreements with his superiors.

In the applicant's submission, these remarks are too laconic and too imprecise to be considered an adequate statement of reasons for the unfavourable evaluations. He maintains that the internal memoranda issued later, which specify the criticisms made of him, must be disregarded for these purposes.

1 — Judgment of 12 July 1973 in Joined Cases 10 and 47/72, *Nunzio di Pillo v Commission* [1973] ECR 763.

2 — Judgment of 25 March 1982 in Case 98/81, *K. J. Munk v Commission* [1982] ECR 1155.

This line of argument is irrefutable inasmuch as subsequent statements which are not communicated to the person concerned and upon which he has therefore no opportunity to comment may not be adopted in order to substantiate the assessments contained in the probation report. The duty of notification laid down by Article 34 of the Staff Regulations is indeed designed to ensure that the person concerned has the right to submit any comments to the appointing authority; this presupposes that he is acquainted with the criticisms made of him and with the grounds underlying them.

Consequently, the sole issue is whether the observations in the probation report are sufficiently precise to enable the person concerned to submit his comments and to permit judicial review of the exercise of the discretion (cf. the judgment in *Lachmüller*¹). The duty to state the grounds on which a decision is based, as required by the second paragraph of Article 25 of the Staff Regulations, represents one expression of a general legal principle, but it should not be the subject of unduly rigorous requirements, even with regard to judicial review, since, as the Court of Justice repeated in the case of *Munk*, the judicial review of an authority's exercise of its discretion is confined to cases of manifest error. The requirement is thus satisfied when, as was stated in the judgment in the *Renckens*² case, 'the reasons on which the measure adversely affecting an official is based are shown clearly and unambiguously'.

Whether that applies to the reason stated — that the applicant had difficulties in

reconciling the demands of his employment with his own personal wishes — is perhaps doubtful but may ultimately remain undecided in the present case.

At all events, I would observe that no grounds are entered against the criterion "Relations with third parties" (Heading C.2), which was similarly judged to be unsatisfactory; the comment that the applicant had always had difficulties with both his colleagues and his superiors can logically refer only to "Relations within the departments" (Heading C.1.), in respect of which criticisms were also made.

(b) This failure to state any reasons is in my estimation less serious, however, than the applicant's further criticism that the report was not properly completed and therefore could not enable an objective appraisal to be made of his abilities.

Here I would recall that under the last sentence of the first subparagraph of Article 34 (2) a probationary official whose work has not proved adequate for establishment in his post is to be dismissed. It follows that a probation report, on which a dismissal decision is based, must, in principle, contain all the essential facts and judgments which are needed to convey as objective a picture as possible of his ability, regard being had to his prospective career as an official. An assessment which is to be as objective as possible therefore demands that in principle every line of the report shall be filled in. A glance at the report will show that this was not done in the present case.

Even if the fact that there is no entry against the Heading "Training" does not

1 — Judgment of 15 July 1960 in Joined Cases 43, 45 and 48/59, *Eva von Lachmüller and Others v Commission* [1960] ECR 463.

2 — Judgment of 2 July 1969 in Case 27/68, *Reinoldus Renckens v Commission of the European Communities* [1969] ECR 255.

amount to a failure to fulfil an essential procedural requirement, it is none the less reprehensible that even the space allowed for specifying the main activities carried out during the probationary period has been left blank. As the Court of Justice made clear in its judgment in the *Munk* case, the probation report must give an accurate account of the main activities of the person concerned during his probationary period so that the appointing authority may take its decision and state the reasons on which it is based.

(c) Even if we take the view that even this shortcoming does not, in view of the applicant's duties and the gravity of the other criticisms which are made of him, cast doubt upon the validity of the probation report, there is one final observation to be made, namely that the spaces under Heading B of the report, which are provided for an assessment of the person's efficiency, have not been filled in either. The Community legislature attached such importance to that particular criterion that it introduced the following express provision into the first subparagraph of Article 34 (2) of the Staff Regulations: '... a report shall be made on the ability of the probationer to perform the duties pertaining to his post and also on his *efficiency* and conduct in the service'.

The failure to comment under this heading is thus an infringement of Article 34 of the Staff Regulations and constitutes a failure to observe an essential procedural requirement, which, unlike the non-observance of the time-limit laid down by that article, points to the defective character of the probation report.

3. Since the probation report must consequently be annulled on account of its formal defects alone and since this also entails the annulment of the dismissal decision based upon that report, it is unnecessary to examine the other substantive grounds of complaint relied upon by the applicant.

4. In the light of the foregoing, there is moreover no reason to award the applicant the damages which he has claimed "if appropriate", amounting to BFR 1 000 000 together with interest at 6 % per annum from the commencement of the action. Since the dismissal decision has no legal effect, the applicant must, at least until a new probation report has been issued and the consequent decision concerning his establishment has been taken, continue to receive his salary. That means that he has suffered no material damage. As to the claim of non-material damage, it was not adequately substantiated.

5. In conclusion I therefore propose that the Court should annul both the probation report of 30 March 1981 and the dismissal decision of 19 June 1981 based upon it. Since the European Parliament, as defendant, is the unsuccessful party, it should be ordered to pay the costs, in accordance with Articles 69 (2) of the Rules of Procedure.