

In Case 175/80

PETER JOHN KRIER TITHER, a former probationary official of the Commission of the European Communities, residing at Yr Hen Popdu Stem, Heol y Bont, Cydweli, Dyfed SA17 4UU (United Kingdom), represented by Ulick Bourke, Solicitor, of Messrs Clifford-Turner, Brussels, with an address for service in Luxembourg at the Chambers of J. Hoss, 84 Grand-Rue,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, Thomas S. Cusack, acting as Agent, with an address for service in Luxembourg at the office of M. Cervino, Jean Monnet Building, Kirchberg,

defendant,

APPLICATION principally for the annulment of the Commission's decision of 1 August 1979 to dismiss the applicant on the expiry of his probationary period,

THE COURT (First Chamber),

composed of: G. Bosco, President of Chamber, A. O'Keeffe and T. Koopmans, Judges,

Advocate General: Sir Gordon Slynn
Registrar: J. A. Pompe, Deputy Registrar

gives the following

JUDGMENT

Facts and Issues

The facts of the case and the conclusions and arguments of the parties put forward during the written procedure may be summarized as follows:

I — Facts

Peter John Krier Tither entered the service of the Commission on 10 August 1978 as an administrative assistant (in Grade B 5) in Division 3, Shipping and Regional and Frontier Problems in Transport, of Directorate A, General Development of the Common Transport Policy and Air and Sea Transport, of Directorate-General VII.

By a decision of which the applicant was notified on 26 April 1979 the Commission extended the applicant's probationary period by one month, from 10 May to 10 June 1979 pursuant to the second paragraph of Article 34 (1) of the Staff Regulations of Officials on the ground that he had been absent owing to illness from 6 November to 3 December 1978.

On 11 May 1979 the applicant's Head of Division prepared the applicant's report at the expiry of the probationary period required by Article 34 (2) of the Staff Regulations. Under the heading "Relations inside the department" the applicant's conduct was described as "Unsatisfactory". Nevertheless, the report recommended that the applicant be established.

On 21 May 1979 Mr Tither went on a week's leave to the United Kingdom. His application for leave, approved by his superior officer, was described as being for "Special leave (voting)". The applicant claims that this was to enable him to vote in local elections.

21 May 1979 was a Monday. Elections in the United Kingdom are usually held on Thursdays and in this case they fell on 24 May, Ascension Day, which together with an extra day on Friday 25 May was a holiday for officials of the Community.

On Monday 28 May 1979 the applicant was not at work. He claims that on that day and the following day he attempted to telephone his superior officer (who was on mission for the week commencing on 28 May). According to the file the applicant's absence was reported to the Assistant to the Director-General who on the afternoon of Tuesday 29 May and on the following day telephoned the applicant at his home in Wales and left a message. The applicant is said to have received that message when he was in London. It is said that he telephoned the Assistant to the Director-General to inform him that he was sick but was nevertheless preparing to return to Brussels.

At the end of that week the parties had several telephone conversations. Mr Tither had returned to Wales and telephoned from there to say that his state of health had deteriorated before he could continue his journey to Brussels.

The parties have given conflicting accounts of the content of these and subsequent telephone conversations.

The applicant was examined by a doctor in Wales on 4 June 1979. On the same day a medical certificate was sent to the Commission recommending two weeks' absence from work. The certificate was received by the Commission's medical branch on 18 June 1979. Subsequent medical certificates, dated 15 June and 6 July 1979, certified incapacity for work for three weeks and two weeks respectively.

On 6 July 1979 the applicant's Head of Division prepared a second probation report which stated that Mr Tither's conduct was unsatisfactory in three respects: sense of responsibility, relations inside the department and punctuality. In the General Observations the main emphasis was on the applicant's failure to justify his absence from the Commission after 28 May 1979. The report concluded with a recommendation that the applicant be dismissed. According to the applicant the report reached him on 17 July; a telegram which he received on 20 July informed him that he had until 31 July to submit his observations to the Commission.

On 1 August 1979 the Commission decided to dismiss the applicant with effect from 1 September 1979.

By letter dated 9 October 1979, registered by the Secretariat-General of the Commission on 11 October, the applicant submitted a complaint under Article 90 (2) of the Staff Regulations of Officials against the fact that a second probation report had been drawn up and its content and against the decision to dismiss him.

By a letter of 11 October 1979 the applicant applied for payment of the compensation provided for in Article 34 of the Staff Regulations of Officials.

That compensation, which amounted to UKL 2 420.43, was sent to him by post on 23 November 1979.

The Commission replied to the applicant's complaint in a letter dated 24 April 1980.

II — Written procedure

The application, dated in error 30 July 1979, was registered at the Court on 1 August 1980.

On 12 September 1980 the applicant applied for legal aid. The Court (First Chamber) decided by order of 2 October 1980 to grant the applicant legal aid subject to certain conditions.

The written procedure followed the normal course.

After 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 preliminary inquiry. However, it requested the parties to answer certain questions and to lodge certain documents before the hearing of oral submissions.

III — Conclusions of the parties

The *applicant* claims that the Court should:

1. Declare the second "End of Probation Report" dated 6 July 1979 to be null and void;
2. Declare the decision of the Commission dated 1 August 1979 dismissing the applicant to be null and void;

3. Annul the Commission's decision, contained in a letter to the applicant dated 24 April 1980, rejecting the complaint submitted by the applicant in writing and lodged with the Secretariat-General on 11 October 1979;

4. Order the Commission to pay the applicant by way of damages and compensation:

(a) (i) All arrears of salary and accompanying allowances from the date of his dismissal, together with interest thereon at 10% per annum, or such other rate as the Court may decide, calculated from the due date of payment;

(ii) A sum equal to the amount of expenses disbursed by the applicant as a result of the unlawful dismissal;

(iii) Compensation for non-material damage suffered by the applicant as a result of the Commission's actions, provisionally estimated at BFR 300 000;

alternatively:

(b) A sum calculated under the following heads of loss:

(i) Indemnity on forfeiture of lease of the applicant's rented accommodation at 83 Hoornstraat, Etterbeek, Brussels, being an amount equivalent to two months' rent in lieu of notice: BFR 11 900;

(ii) Expenses in seeking alternative employment comprising cost of stationery, postage, photocopying and travel expenses (where not reimbursed) estimated at BFR

14 000, full particulars of which will be supplied at the hearing;

(iii) Non-material damage, provisionally estimated at BFR 500 000, including an amount in respect of the present and continuing reduction in the applicant's salary-earning capacity;

5. In any event order the Commission to pay the applicant's costs hereunder;

6. Order such further or other relief as may be lawful or equitable in all the circumstances.

The *Commission* contends that the Court should:

— Dismiss the application as unfounded;

— Order the applicant to pay the costs.

IV — Submissions and arguments of the parties

1. *The application*

The applicant claims that there is no legal justification for the preparation of a second, or even a supplementary, probation report where there is already a "valid" report on which the appointing authority may act.

A fortiori, the Commission cannot justify the preparation of a second report which does not comply with the time-limits set out in Article 34 (2) of the Staff Regulations, the report in question having been made in this case nearly one month after the extended expiry date of the applicant's probationary period.

According to the above-mentioned provision the Commission's duty was to prepare a report one month before the extended expiry date. Instead of that it replaced the first report with a second covering the final month of probation. That amounts to unlawful discrimination between officials whose probationary periods have been extended and others.

In Joined Cases 10 and 47/72 (*Di Pillo* [1973] ECR 763) the preparation of a probation report outside the prescribed period was admittedly held not to constitute an irregularity such as to call in question the validity of the report; but that throws no light on the present case where the second report is invalid principally because of the existence of a "valid" report.

The second report contains allegations which call in question the applicant's honesty and integrity without showing any reasonable evidence on which these allegations are based or from which they could reasonably have been drawn.

In particular, it is incorrect to speak of "unexplained absences" when the applicant kept his superiors informed at all times by telephone of the reasons for his absence and submitted medical certificates in due time.

Even if the applicant's conduct could have been considered to be incorrect the Commission ought to have followed the disciplinary procedure provided for under Title VI of the Staff Regulations.

The second report contains in the General Observations statements on

many matters which, if relevant at all, should have been included in the first report which was properly prepared. Such matters are inadmissible in the second report because the purported justification for the latter was the applicant's conduct after the preparation of the first report.

The Commission's officials have failed to observe a general and fundamental principle of natural justice, which is the right of the applicant to know the substance of the charges brought against him and the right to be heard in his own defence (cf. Article 34 (2) of the Staff Regulations, according to which a probationary official "shall have the right to submit his comments in writing" on the probation report). In addition, the period allowed by the Commission for the applicant to return his written comments was inadequate.

Being so far from Brussels, moreover, he had no access to his personal file, which is supposed to contain "all reports relating to his ability, efficiency and conduct" and did not receive the copy of the Staff Regulations which he had requested until 27 July. It was not until then that he was in a position to commence preparation of his comments on the second report, which could thus not be completed until 31 July.

The decision to dismiss him should be annulled for the following reasons:

- No evidence is adduced to support the conclusion that "Mr Peter Tither has not proved adequate for establishment in his post"; no reference is made to the fact that the first report did not conclude that

the applicant was inadequate for establishment but, on the contrary, recommended his establishment.

2. The defence

The Commission first states that the arguments based on an alleged infringement of Article 34 (2) of the Staff Regulations are not well founded.

- The decision fails to state that the “remarks” made by the applicant, which were written on the first report and signed by him, related only to the first favourable report, and could never invalidate conclusions to which they were not directed.
- The decision constitutes a breach of duty by the Commission towards the applicant inasmuch as the applicant’s legitimate expectation of being established in his post was frustrated.

A common-sense reading of that provision and of the judgment in the *Di Pillo* case reveals clearly that the requirement that the institution prepare a report one month before the expiration of the probation period is intended to ensure that there will be enough time for a decision one way or the other to be taken so as to coincide, as far as possible, with the expiry of the probationary period. It is quite impossible that the legislature can have intended the absurd result that, having prepared the report (under the normal procedure, one month prior to the end of the probation period), the appointing authority should find itself prevented from reacting, in a second report covering the period not dealt with by the first report, to conduct on the part of the probationary official which justified his dismissal.

Should the contested decision be annulled, the applicant requests the Court to order the Commission to pay all arrears of salary and allowances due since the effective date of dismissal together with interest thereon from the due date of each payment. In addition, the Commission should be ordered to reimburse the applicant the expenses incurred by him as a result of his unlawful dismissal and to pay him a substantial sum by way of compensation for the considerable mental pain and anguish caused by the Commission’s unlawful actions. Even if the Court does not declare the decision of dismissal invalid the applicant claims that the Commission should be ordered to pay reasonable compensation *ex aequo et bono* by reason of the irregularities committed by the Commission and its officials and by reason of breaches of the Staff Regulations and infringements of general principles of law.

The “late” production of the medical certificates is not sufficient to rebut the charge of unexplained absences, especially in view of the manner in which the applicant failed to explain his absence between the morning of Monday 28 May 1979 and the afternoon of the following Wednesday when he spoke to the Assistant to the Director-General by telephone. Those explanations gave no reason, apart from the reference to a wisdom tooth, to suppose that the absence was due to medical reasons. In the view of his superiors the applicant did not adhere to the canons of good conduct in the service in this matter.

The applicant's behaviour cannot be treated as a disciplinary matter. Article 34 (2) of the Staff Regulations stipulates expressly that the reports shall deal equally with the official's conduct in the service. Even a probationary official whose aptitude and work are on all counts satisfactory may be dismissed if his conduct in the service, as opposed to his work, falls short of the standard expected of an official of the Communities.

The Commission does not conclude from this that, as far as probationary officials are concerned, Article 34 (2) necessarily excludes application of the disciplinary provisions. The point is arguable and has not yet in fact been raised before the Court. The better view is that the provisions do not necessarily have the effect of excluding the application of Title VI of the Regulations to probationary officials. But neither should the provisions in Title VI exclude the application of Article 34 (2).

As to the applicant's "legitimate expectation" of establishment as a result of the favourable recommendation given in the first probation report, that expectation could in no way be described as "legitimate" because the probationary period still had one month to run and because the applicant's conduct during that period could — and in the event did — count against him.

As the applicant was still on probation after the making of the first report how could that report be expected to contain observations on his conduct during his last month of probation? Furthermore, some of the criticisms contained in the second report appear in the first report, which mentions as unsatisfactory the

area of conduct which was the subject of the severest criticisms in the second report.

It is clear from the wording of Article 34 that officials on probation have been given no right, either by implication or expressly, to be informed of the substance of the charges brought against them and the evidence for such charges, or to be heard in their own defence. Their right is clearly restricted to the submission of observations on the substance of the report.

The time allowed the applicant to make his comments in writing on the second report was adequate. Even if, as the applicant claims, the Commission's letter did not reach him until 17 July 1979 he still had, as from that date, 13 days in which to make his comments on the report. If he considered that period inadequate, it was open to him to ask for an extension. The applicant was at no disadvantage, furthermore, in not having access to his personal file because that could have contained only the one report on his ability, efficiency and conduct, that is to say, the first probation report, a copy of which he had already received. Likewise possession of a copy of the Staff Regulations was not indispensable to him.

The applicant is confusing two distinct matters: on the one hand, his right to give his written comments on the substance of the second report and, on the other hand, his right to appeal, on legal grounds, against a decision which he had anticipated and the object of which was to dismiss him (Article 90 of the Staff Regulations). It cannot seriously be argued that the applicant was not given an opportunity to exercise

the first of those two rights. If he did not do so it is not open to him now to complain of the fact.

As to the alleged invalidity of the decision to dismiss the applicant, the fact that it does not recapitulate textually the recommendation of the first report is of no significance. The appointing authority took its decision in the light of both reports, the first of which contained one negative mention, and it adverted to both of those reports in the preamble to its decision.

The Commission is also at a loss to understand how the omission to state in the preamble to the decision that the remarks made by the applicant related only to the first report could in any way vitiate the decision. The decision simply records that such remarks as were made by the applicant (directed to the first report, unforthcoming as regards the second) "... are not such as to invalidate this conclusion", that is to say, the conclusion reached by the appointing authority, and not the opinions and observations of the reporting officer as set out in each of the two reports.

The Commission considers that the claims relating to expenses incurred as a result of the so-called "unlawful" dismissal and the compensation for mental pain and anguish caused by the Commission's alleged unlawful actions are to be rejected without further consideration. The claim under the first heading would in any case fall to be dealt with under the order for costs and expenses. The claim under the second heading fails for lack of evidence or argument. As to the other claims submitted by the applicant (irregularities committed by the Commission and its officials, breach of the Staff Regulations,

infringement of general principles of law), they have been thrown out at random and need more specification from the applicant.

3. *The reply*

The applicant claims that the defendant's reasoning is defective because it overlooks the clear intention of Article 34 (2).

The provision in question states that, in order to comply with the dual requirement that the probationary official be given one month's notice of dismissal and that his service should not exceed his probationary period, the notice of dismissal must be given at least one month before the end of the probationary period.

Hence the reports on which the decision to dismiss is based must be prepared before that decision is taken and submitted in time for the one month period of notice to elapse before the end of the probationary official's service.

If in the last 30 days circumstances arise which are such as to give rise to doubts as to the official's capacity, ability or conduct, the Staff Regulations provide for application of the disciplinary provisions which are laid down in the rules applicable to all employees.

The second report could only have been made pursuant to the second subparagraph of Article 34 (2), and not the first subparagraph, which refers to a report made not less than one month before the expiry of the probationary period. However, the first sentence of the second subparagraph specifies that such a

report may be made if a probationary official's work "is proving obviously inadequate". Not only does the defendant fail to demonstrate any obvious inadequacies in the applicant's work, his work being classified as "good" in the second report, but it assumes that the second report may legitimately deal with the matter of "Conduct in the department".

The second probation report contains no criticism of the applicant's competence, output or efficiency, either for the five working days between 11 and 21 May, or for the period subsequent to 21 May. In view of the very short period which elapsed after the making of the first report, and the total absence of specific criticisms of his work during the relevant period which followed the making of the first report, it must be concluded that the second report is inadmissible.

The applicant submits that the requirements of natural justice which are fundamental to the principles of administrative law should have been observed in so far as the preparation of the report was concerned. Furthermore, even if the Court were to determine that the proper method for dealing with the applicant's remarks was to consider them after the submission of the report to the appointing authority, then in the circumstances of this case the time allowed for studying the reports was insufficient. Moreover, the defendant was aware that during that period the applicant was sick at his home in Wales more than 700 kilometres from Brussels, and thus did not have ready access to the documents which might be in his file and of which he was unaware; nor did he have access to the Staff Regulations.

The applicant is at a loss to think of anything more relevant to a decision to dismiss him than a recommendation to establish him contained in a report covering eight months' service, when compared with a contrary recommendation covering five working days and a period of approved leave and absence for illness. The applicant's fundamental submission as to the irregularity of the decision to dismiss him is that those who made the decision misdirected themselves. They clearly acted under the mistaken impression that the applicant had been absent for "unexplained" or "unauthorized" reasons. That fundamental mistake of fact is compounded by the fact the defendant did not deduct any days from the applicant's leave entitlement and by the admission in the defence that the applicant's medical certificates were valid.

Lastly, the contested decision is clearly defective because it assumes that the applicant's remarks on the first report go to the second report.

4. *The rejoinder*

The defendant rejoins that even if made late, the probation report is no less valid provided it is based on and refers to the period of probation itself. In the present case there was no "delay" *per se*, as there had been in the *Di Pillo* case. The late production of the report in this instance was no more than a "technical irregularity" resulting from the necessity for the responsible official to report again to the appointing authority in the light of

the opinion he had formed on the applicant's conduct during the remaining 30 days of the probationary period which had still to run. Hence the Court's conclusions in the *Di Pillo* case apply *a fortiori* in the present case.

In brief, three questions arise, the first being whether the reports in question, taken together, constitute an abuse of powers or are founded on a mistake or a misconception of the facts such as to render them patently invalid, thus vitiating the decision which is based on them. There is a serious omission in the applicant's recital of the facts: his inability to explain why, on the morning of the day on which he should have been back at work, he was still in Wales and did not, apparently, consult a doctor until the following week. The defendant, for its part, believes that that reveals conduct inconsistent with a proper regard for duty and far short of what is normally to be expected of a Community official.

The second question is whether the defendant's failure to accord what might be called "rights of defence" amounts to a denial of fundamental rights such as to vitiate the decisions taken subsequently. It is the defendant's submission that, assuming the second report to be in no way illegal, the two reports must be considered to be grounded on the first subparagraph of Article 34 (2) and to constitute, taken together, the "report" contemplated by that provision. The fact that the procedure laid down in Article 34 (2) is the final stage in the recruitment process should not be overlooked. The Commission did not, in reality, "dismiss"

the applicant in the sense that he was sacked; on the contrary, it declined to employ him.

The third question is whether the decision to dismiss the applicant is tainted with an irregularity such as to warrant its annulment. The appointing authority acted upon a report consisting of two separate documents, one complementing the other, and covering between them the entire probationary period. One of those documents was partially unfavourable to the applicant but nevertheless recommended his appointment. The other was largely unfavourable as regards conduct in the department (two mentions of "unsatisfactory", one of "good") and recommended discharge. Since that was the later of the two documents it is reasonable to consider that the second recommendation supersedes the previous one.

V — Oral procedure

The parties presented oral argument at the sitting on 7 May 1981.

The Advocate General delivered his opinion at the sitting on 18 June 1981.

Decision

- 1 By application lodged at the Court Registry on 1 August 1980 Mr Tither, a former probationary official at the Commission of the European Communities, brought an action seeking primarily the annulment of the second probation report on him drawn up by the Commission on 6 July 1979 and of the decision to dismiss him taken by the Commission on 1 August 1979 and, as in subsidiary claims, the award of damages.
- 2 The applicant entered the service of the Commission on 10 August 1978 as an administrative assistant in Grade B 5 in the Shipping Division of Directorate-General VII, and in accordance with Article 34 (1) of the Staff Regulations completed a probationary period of nine months which was extended by one month, from 10 May to 10 June 1979, following a period of illness from the preceding 6 November to 3 December. On 11 May 1979 the applicant's Head of Division prepared the applicant's report at the expiry of the probationary period required by Article 34 (2), which included the description "Unsatisfactory" under the heading "Relations inside the department". Nevertheless the report recommended that the applicant be established.
- 3 On 21 May 1979 Mr Tither went on a week's leave to Wales. He had been granted three days' special leave to vote in local elections, and the last two working days of the week were holidays for Community officials (Ascension Day and the Friday intervening before the weekend).
- 4 The following Monday, 28 May, the applicant did not return to work. He maintains that on that day and the following day he attempted to telephone his superior officer without success. According to the file the applicant's absence was reported to the Assistant to the Director-General who on the afternoon of 29 May and on the following day telephoned the applicant at his home and left a message. The applicant is said to have received the message when he was in London. It is claimed that he telephoned the Assistant to the Director-General to inform him that he was sick but was nevertheless preparing to return to Brussels. By the end of that week the

parties had had several telephone conversations. Mr Tither had returned to Wales and telephoned from there to say that his state of health had deteriorated before he could continue his journey to Brussels.

- 5 On 4 June 1979 the applicant was examined by a doctor in Wales. A medical certificate signed on the same day, recommending two weeks' absence from work, was received by the Commission's medical branch on 18 June 1979. Subsequent medical certificates, dated 15 June and 6 July 1979, certified incapacity for work for "three weeks" and "two weeks" respectively.
- 6 On 6 July 1979 the applicant's Head of Division prepared a second probation report which stated that Mr Tither's conduct was unsatisfactory in three respects: sense of responsibility, relations inside the department and punctuality. In the General Observations, the main emphasis was on the fact that the applicant had asked for three days' special leave to vote in local elections in Wales whereas his entitlement to such leave was doubtful, and on the applicant's failure to justify his absence from 28 May 1979. The report concluded with a recommendation that the applicant be dismissed. According to the applicant the report reached him on 17 July; a telegram which he received on 20 July informed him that he had until 31 July to submit his observations to the Commission.
- 7 On 1 August 1979 the Commission decided to dismiss the applicant with effect from 1 September 1979. By letter dated 9 October 1979 the applicant submitted a complaint under Article 90 (2) of the Staff Regulations challenging the drawing up and content of the second probation report, and the decision to dismiss him.
- 8 By a letter of 11 October 1979 the applicant applied for payment of the compensation provided for in Article 34 of the Staff Regulations. That compensation, which amount to UKL 2 420.43, was sent to him by post on 23 November 1979.

- 9 The applicant seeks: (a) the annulment of the second report on the expiry of the probationary period dated 6 July 1979; (b) the annulment of the decision to dismiss him taken on 1 August 1979; (c) the annulment of the decision rejecting his complaint of 9 October 1979; (d) payment of compensation to cover loss of salary, the expenses incurred as a result of his dismissal and non-material damage estimated at BFR 300 000 or, in the alternative, to cover the expense incurred as a result of the forfeiture of a lease in Brussels, expenses incurred in seeking alternative employment and non-material damage estimated at BFR 500 000 in respect of the present and continuing reduction in the applicant's earning capacity.
- 10 The application is based first on the infringement of Article 34 (2) of the Staff Regulations owing to the absence of any justification for the drawing up of a second report, *a fortiori* when that report was not made within the period prescribed by that provision, that is to say, one month prior to the expiry of the probationary period or of any extension thereof. A second submission relates to the presence of irregularities in the preparation of the second report inasmuch as it contains assertions calling the applicant's conduct in question without showing evidence in support of such conclusions. Mr Tither claims in this respect that any criticism of his conduct should have been treated as a disciplinary matter under Title VI of the Staff Regulations. Thirdly, the applicant alleges violation of general principles of law and, finally, he claims that the decision to dismiss him is void because it makes no reference to the recommendation that the applicant be established which was contained in the first report on the expiry of the probationary period.
- 11 The Commission contends first that the argument relating to an alleged infringement of Article 34 (2) of the Staff Regulations is not well-founded; it claims that as long as the probationary period is running a new report may be drawn up at any time. The legislature certainly did not intend to prevent the appointing authority from reacting, on the basis of a second report covering the period not dealt with by the first report, to conduct on the part of the probationary official justifying his dismissal. The relevant provision should be understood to mean that the requirement that the institution prepare a report one month before the expiration of the probationary period is intended to ensure that it will have at its disposal enough time for a decision to be taken which will coincide as far as possible with the date on which the probationary period, or any extension thereof, expires.

- 12 It is true that Article 34 (2) of the Staff Regulations provides that the report on the expiry of the probationary period is to be drawn up not less than one month before the expiry of the probationary period. The provision enables the report to be sent to the person concerned for any observations he may wish to make and allows the appointing authority sufficient time to study the report in order to make its decision, on the expiry of the probationary period, as to whether or not the probationary official is to be established. It should be noted, however, that the probationary period may be extended, even after the report on the expiry of the probationary period has been drawn up, so that to interpret the Staff Regulations in such a way as to exclude any possibility of drawing up a second report on the expiry of the probationary period should the conduct or ability of the probationary official prove unsatisfactory would be too restrictive.
- 13 As to the argument to the effect that the second report was not drawn up at least one month before the expiry of the probationary period but almost one month after that period had ended, it is appropriate to observe that the Court (Second Chamber) in its judgment of 12 July 1973 (Joined Cases 10 and 47/72 *Di Pillo* [1973] ECR 763) stated that whilst it is true that a delay in making the report constitutes an irregularity having regard to the express requirements of the Staff Regulations, this irregularity is not such as to call in question the validity of the report.
- 14 However, it is undisputed that the first probation report, recommending the establishment of the applicant, was drawn up on 11 May 1979, that the applicant went on leave on 21 May (that is to say, after an interval of five working days), and that the second probation report is not based in any way on that period of five days. It concerns solely the applicant's conduct after 28 May, the date on which he would normally have had to return to work. The essence of the Commission's complaint against the applicant in the report in question reduces itself in fact to his failure to justify his absence on and after the morning of Monday, 28 May 1979. In the Commission's view the applicant failed to adhere in that regard to the requirements of good conduct in the service.
- 15 As far as concerns the complaint that the applicant took special leave for elections, it is to be observed that the applicant's written request was approved by the appropriate authority and that therefore the complaint is unfounded.

- 16 It is also undisputed that the first medical certificate, which was drawn up in Wales on 4 June 1979 and recommended two weeks' absence from work, was not received by the Commission's medical branch until 18 June 1979. The certificate dated 15 June, which supported the applicant's absence until 6 July, was received on 22 June. The certificate dated 6 July 1979 supporting the applicant's absence until 21 July 1979 was received on 23 July 1979. It appears, however, that the applicant's superior officer, in drawing up the second probation report, failed to inform himself fully as to the reasons for the absence of the applicant, who had sent medical certificates justifying his absence. It is also apparent that the Commission did not, prior to taking a decision on the second probation report, which recommended dismissal, take into account, by way of explanation, the successive medical reports declaring that Mr Tither was unfit for work.
- 17 Therefore the second probation report, dated 6 July 1979, which proposes that the applicant be dismissed without giving any valid ground for taking such action, must be annulled and hence the decision to dismiss the applicant, dated 1 August 1979, which is based on that report, must likewise be annulled.
- 18 It is for the Commission to take the measures necessary to clarify the applicant's legal position, the Staff Regulations being designed to ensure that on the expiry of the applicant's probationary period any uncertainty with regard to his legal position shall be removed by means of a decision of the appointing authority either to establish him or to dismiss him on lawful grounds. The Commission is not precluded from preparing a new report on expiry of the probationary period prior to taking a decision to either effect, provided that special circumstances exist to justify such a report.
- 19 As the Commission is required to adopt the measures necessitated by this judgment there is no need to give a decision on the applicant's subsidiary and additional claims.

Costs

- 20 Article 69 (2) of the Rules of Procedure provides that the unsuccessful party is to be ordered to pay the costs.

- 21 Since the applicant was granted legal aid by the Court in the amount of BFR 80 000, the Commission must be ordered to reimburse that sum to the Court and to bear the other expenses incurred by the applicant.

On those grounds,

THE COURT (First Chamber)

hereby:

1. Annuls the second probation report, dated 6 July 1979, and the decision to dismiss the applicant, dated 1 August 1979;
2. Orders the Commission to pay the costs, reimbursing to the Court the sum of BFR 80 000 granted to the applicant by way of legal aid.

Bosco

O'Keeffe

Koopmans

Delivered in open court in Luxembourg on 8 October 1981.

For the Registrar

H. A. Rühl

Principal Administrator

G. Bosco

President of the First Chamber