JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)
1 April 1992 *

In Case T-26/91,

Leonella Kupka-Floridi, former probationer at the Economic and Social Committee, resident in Amsterdam (Netherlands), represented by G. Vandersanden, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of A. Schmitt, 62 Avenue Guillaume,

applicant,

v

Economic and Social Committee, represented by M. Bermejo Garde, acting as Agent, assisted by D. Waelbroeck, of the Brussels Bar, and, in the oral procedure, by D. Pardes, of the Brussels Bar, with an address for service in Luxembourg at the office of Roberto Hayder, a representative of the Legal Service of the Commission, Wagner Centre, Kirchberg,

defendant,

APPLICATION for the annulment of the decision of the Secretary-General of the Economic and Social Committee of 27 June 1990 to dismiss the applicant at the end of her probationary period,

THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES
(Third Chamber),

composed of: B. Vesterdorf, President, A. Saggio and J. Biancarelli, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 12 February 1992,

gives the following

* Language of the case: French.

Judgment

Facts and procedure

1 The applicant, a successful candidate in Competition LA/301 (87/C/101/05) organized by the Council for the purpose of constituting a reserve list for Italian translators, was recruited as probationer in grade LA7 at the Economic and Social Committee on 1 October 1989.

2 The applicant's end of probation report, the first page of which is dated 14 May 1990 and which was signed on 31 May 1990 by her assessor, was sent to her on 1 June 1990. The report proposed that she should not be established for the following reasons:

'During the relevant period, Mrs Kupka has not shown that she has the basic knowledge, methodical approach and abilities necessary for translating Committee documents. Although she has several languages, her grasp of language is insufficient; her ability to use Italian with skill and precision is particularly inadequate.

Mrs Kupka's willing efforts over the last few months have not been sufficient in spite of numerous observations which have been made to her about her work and repeated explanations which have been given to her.

Finally, Mrs Kupka has not sufficiently shown herself to be available to discuss matters and to confer with the revisers and her colleagues.

To conclude, the quality of Mrs Kupka's translations does not suggest that she possesses the abilities, basic knowledge and talent required to work as a translator at the Committee.'

That probation report was also signed by Mr Pertoldi, head of the Italian Translation Division and Mrs Kupka-Floridi's immediate superior, and by three revisers.

3 On 8 June 1990, Mrs Kupka-Floridi sent the assessor her comments on the probation report, in accordance with the second subparagraph of Article 34(2) of the Staff Regulations of Officials of the European Communities (hereinafter 'Staff Regulations').

4 On 19 June 1990, she requested a meeting of the Reports Committee, a joint committee which may be set up under Article 9(5) of the Staff Regulations which provides that its opinion is to be sought on, among other things, action following completion of probationary service. In this case, such a committee was set up by Decision No 76/83A of the President of the Economic and Social Committee of 25 February 1983, which governs the procedure before the committee.

5 At its first meeting on 22 June 1990 the Reports Committee heard the applicant, who had been invited on that same day to appear before it, 'literally at a moment's notice' in her own words. Having requested that her work be assessed by an expert, which was refused on the ground that it was impossible, Mrs Kupka-Floridi obtained, according to the information provided in the application, an assurance that the committee would discuss her work with the revisers. There was a second meeting of the committee on 25 June 1990. Mrs Kupka-Floridi did not take part: she had been invited to attend ten minutes before the start of the meeting and by then it was too late to cancel an external appointment arranged for the same time.

6 The Reports Committee gave its opinion on 26 June 1990, confirming unanimously the unfavourable conclusion contained in the end of probation report. The opinion records that after hearing the applicant, her assessor, her immediate superiors, namely Mr Pertoldi and two revisers, Mrs Apollonio and Mr Giordano, as well as an official called by Mrs Kupka-Floridi and an official from the Directorate of Personnel and Finance Administration, and after reviewing the various

documents which had been sent to it by the Secretary-General, the committee came to the following conclusions:

'— the procedure followed in this case complied with the Staff Regulations and the procedural requirements there laid down;

— the conditions of work during the probationary period reveal no anomaly or special circumstances worthy of note;

— taking account both of the documents submitted to it and of the credibility of the testimony taken, including that of the employee concerned, the committee considers that the end of probation report is generous to Mrs Kupka-Floridi up to a point while being very explicit in describing the inadequacies unanimously noted by her assessor and superiors.'

7 On 27 June 1990, the Secretary-General of the Economic and Social Committee decided to dismiss Mrs Kupka-Floridi at the end of her probationary period, on the basis of the end of probation report and the opinion of the Reports Committee.

8 On 24 September 1990, Mrs Kupka-Floridi lodged a complaint against that decision. Following the dismissal of that complaint by decision of 18 January 1991, she sought, by application lodged at the Registry of the Court of First Instance on 23 April 1991, the annulment of the abovementioned decision of 27 June 1990. The written procedure followed the normal course. Upon hearing the report of the Judge-Rapporteur, the Court decided, in accordance with Article 53 of its Rules of Procedure, to open the oral procedure without any preparatory inquiry. At the request of the Court in the course of the procedure, the Economic and Social Committee produced before the hearing the list summarizing the documents sent by the Secretary-General of the Economic and Social Committee to the Reports Committee referred to in point 4 of the Reports Committee's opinion, the documents mentioned in that list and Decision No 363/82A of the Economic and

Social Committee implementing general provisions concerning the compilation of end of probation reports. In response to the Court's request that it produce the minutes of the two meetings of the Reports Committee, the secretary of that committee stated in a note of 22 January 1992 that 'in accordance with the practice which has always been followed, the deliberations of the Reports Committee are not comprehensively minuted. The report of 26 June 1990 is the only document drawn up by the Reports Committee.' The oral procedure took place on 12 February 1992. At the hearing, the Court heard Mr Pertoldi, summoned by the Court of its own motion pursuant to Article 68(1) of its Rules of Procedure, as witness to the circumstances in which the applicant served her probationary period. The President declared the oral procedure closed at the end of the hearing.

Forms of order sought

9 The applicant claims that the Court should:

— annul the decision of the Secretary-General of the Economic and Social Committee of 27 June 1990 to dismiss the applicant at the end of her probationary period;

— order the defendant to bear all the legal consequences of that annulment, in particular the possibility for the applicant to serve a second probationary period at the end of which her qualifications will be reassessed;

— order the defendant to pay the applicant's salary and all the benefits provided for by the Staff Regulations with effect from 30 June 1990 until the date of reinstatement, with interest at the current rate;

— order the defendant to pay all the costs.

In her reply, she claims in addition that the Court should:

— order the appointment of an expert to assess the quality of the handwritten translations which she produced during the probationary period and her knowledge of Italian.

The defendant contends that the Court should:

— dismiss the application as unfounded;

— order the applicant to pay her own costs.

The claim for annulment

10 The applicant relies in support of the form of order sought on four pleas alleging contravention of essential procedural requirements, infringement of the rights of the defence, breach of the duty to have regard for the interests of officials and the existence of a manifest error in assessing the facts.

The plea alleging contravention of essential procedural requirements

Arguments of the parties

11 The first plea comprises three parts: contravention of the second paragraph of Article 25 of the Staff Regulations, disregard of the memorandum sent by the Secretary-General on 19 October 1989 to Mr Vermeylen and disregard of the applicant's rights during the procedure before the Reports Committee.

12 With respect to the first limb of this plea, the applicant points out that the probation report, dated 14 May, was not sent to her until 1 June 1990 in contravention of the second paragraph of Article 25 of the Staff Regulations which

provides: 'Any decision relating to a specific individual which is taken under these Staff Regulations shall at once be communicated in writing to the official concerned'. She maintains in particular that, since her probationary period expired on 30 June, communication of the probation report on 1 June must be considered to be out of time given that Article 34(2) of the Staff Regulations provides: 'Not less than one month before the expiry of the probationary period, a [probation] report shall be made on the . . . probationer'. She adds that her absence for one day because of illness did not prevent the appointing authority from immediately communicating her probation report to her in writing. The defendant itself furthermore acknowledged that the second paragraph of Article 25 of the Staff Regulations had been contravened in a memorandum from Mr Vermeylen to the Secretary-General stating that because of Mrs Kupka-Floridi's absence through illness he had still not been 'able to present her with her probation report within the prescribed period'.

13 The defendant for its part considers that the first limb of the first plea must be rejected. It claims that an interval of a fortnight between drawing up and communicating the probation report cannot in any circumstances be regarded as excessive, and that communication of the report on 1 June 1990 was in fact within the period stipulated in Article 34(2), namely one month before the expiry of the probationary period. In any event, that article expressly provides that the time-limit set applies solely to the drawing up of the report and not to its communication to the person concerned. In this case, communication of the probation report on 1 June 1990 enabled the applicant fully to elaborate her observations on it, which were sent to the assessor on 8 June 1990.

Furthermore, the defendant contends that, even if there had been a delay in delivering the probation report, this could not justify annulling the contested decision. It observes that, according to settled case-law, irregularities in the procedure for notifying a decision are extraneous to the decision and therefore cannot invalidate it (judgments of the Court of Justice in Case 48/69 *ICI* v *Commission* [1972] ECR 619, at paragraph 39; Case 185/73 *Hauptzollamt Bielefeld* [1974] ECR 607, at paragraph 6; Case 125/80 *Arning* v *Commission* [1981] ECR 2539 and Case 111/83 *Picciolo* v *Parliament* [1984] ECR 2323, at paragraph 25). The defendant points out, moreover, that the Court of Justice has held that a delay in communicating the probation report is not a reason for annulling the decision not to establish the probationer concerned (judgment in Joined Cases 10 and 47/72 *Di Pillo* v *Commission* [1973] ECR 763, at paragraphs 2 to 6).

14 The second limb of the first plea alleges disregard of the internal memorandum sent by the Secretary-General to Mr Vermeylen on 19 October 1989, which is worded as follows:

'2. In the light of the importance of the probationary period, I should be grateful if you would record on a regular basis — using objective and verifiable criteria — details of all assessments, favourable and unfavourable, of the probationer's abilities, output and conduct.

This information will enable the conclusion reached in the probation reports to be substantiated.

'3. If any difficulties arise, you should initially have a discussion with the probationer and subsequently ensure that he receives an explanatory memorandum if necessary. If they continue, it may be appropriate to notify the Secretary-General.'

15 The applicant notes that Mr Vermeylen did not follow those instructions. She maintains that he had no discussion with her and did not send her any explanatory memorandum. Nor did he notify the Secretary-General.

The applicant considers that the defendant failed to satisfy an essential procedural requirement in not complying with the abovementioned memorandum. In support of this proposition, she submits that the memorandum was an internal directive prescribing a rule of conduct from which the administration could not depart without giving reasons, since otherwise, according to the case-law of the Court and in particular the judgment in Case 148/73 *Louwage* v *Commission* [1974] ECR 81, at paragraph 12, the principle of equal treatment would be infringed.

16 The defendant rejects the applicant's argument. It submits that the abovementioned memorandum of 19 October 1989 was not binding in any way. It is clear from its

very wording that the memorandum was merely recommending a particular course of action in the event of difficulties. It is accordingly not an internal directive conferring rights on officials and binding on the administration, as stated by the Court in *Louwage*.

In addition, the defendant states that the applicant was on several occasions given very specific warnings by her superiors about the inadequacies of her work. In particular, she was told that numerous corrections in style and terminology had to be made to her translations. According to the defendant, once the number of imperfections has reached a certain ceiling it is no longer possible 'systematically' to indicate the errors made during a nine-month period, as the applicant would have liked. The revisers were, moreover, disposed to stop discussing the changes made to the applicant's translations with her, particularly since, as indicated by the probation report, she did not accept criticism. In addition, Mr Pertoldi sent her a written memorandum indicating his dissatisfaction after she refused work.

17 In the third limb of the first plea, the applicant claims that the procedure followed before the Reports Committee contravened Article 2 of Decision No 76/83A of the Economic and Social Committee, which provides that the time-limit for reaching a decision may not be less than seven working days. According to the applicant, the committee, convened on 19 June 1990, met on 22 and 25 June and gave its opinion on 26 June, which is less than seven working days after it had been convened. The applicant considers that she was within her rights to expect, by virtue of the principle of protection of legitimate expectations, a rigorous application of the abovementioned article, the purpose of which, in her view, is to enable the committee to work without undue pressure while seeking as much information as possible, and to give probationers the opportunity to put their case before the committee.

18 The defendant disputes the applicant's interpretation of Article 2 of Decision No 76/83A. It contends that the minimum period of seven days was fixed solely for the benefit of the Reports Committee and not for that of the probationers concerned. The committee was accordingly free to reach a decision within a shorter period, without this meaning that the decision was made under pressure.

Legal assessment

19 As regards the first limb of the first plea, concerning the alleged contravention of the second paragraph of Article 25 of the Staff Regulations in that the applicant's probation report was not communicated to her at once, the Court notes, first, that it is clear from the documents before it that the probation report was in fact finalized on 31 May 1990 and not on 14 May 1990 as the applicant maintained before the Court, in contrast to her complaint which expressly mentions that the report was drawn up on 31 May 1990. Although the first page is dated 14 May 1990, the report was not finalized by the assessor until 31 May 1990 after being prepared and signed by Mr Pertoldi and three revisers on 30 May 1990: this is confirmed by the dates beside those signatures on page seven of the report. Furthermore, it is clear from the memorandum sent on 31 May 1990 to the Secretary-General by the applicant's assessor, Mr Vermeylen — confirmed by the defendant's observations made before the Court and not disputed by the applicant — that on 30 May she was 'officially informed of the unfavourable tenor of her probation report, which her assessor ... would deliver to her on 31 May'. Since the applicant took sick leave on that date, her probation report was handed to her on the next day, 1 June 1990, by her assessor. In those circumstances, the fact that the defendant did not communicate the applicant's probation report to her at once in accordance with the second paragraph of Article 25 of the Staff Regulations cannot give rise to any complaint.

As regards the complaint that communicating the probation report on 31 May 1990 contravened Article 34(2) of the Staff Regulations, it is sufficient to note, in the light of the facts set out above, that the applicant's probation report was finalized on 31 May 1990, one month before the expiry of the probationary period on 30 June 1990. Moreover, the report was ready as from 30 May 1990; it had been prepared by Mr Pertoldi, after consulting the revisers and in conjunction with Mr Vermeylen. In those circumstances, the applicant's allegation that the defendant expressly admitted that it did not send her probation report to her within the prescribed period cannot call in question the conclusions drawn from the facts which have been established.

20 Furthermore, the Court points out that the contested decision was adopted on 27 June 1990 on the basis in particular of a proper probation report and observations

submitted by the applicant on 8 June 1990 on her report in accordance with the second subparagraph of Article 34(2) of the Staff Regulations. Since the applicant was given the opportunity to put forward her views on the report, as required, the contested decision could not in any event have been invalidated solely because it was allegedly communicated out of time (see the judgment of the Court of Justice in Case 98/81 *Munk* v *Commission* [1982] ECR 1155, at paragraphs 8 and 9).

21 The first limb of this plea must accordingly be rejected.

22 In connection with the second limb of this plea, concerning the alleged disregard of the internal memorandum on the 'assessment of probationers' sent to the applicant's assessor in accordance with a well-established practice at the Economic and Social Committee, it must be ascertained whether the guidelines set out in that memorandum were followed in this case.

23 It should be noted at the outset that the Head of the Italian Translation Division, Mr Pertoldi, was entitled as supervisor of the applicant during her probationary period to discharge the responsibilities connected with supervision of a probationary period, including those specified in that memorandum, sent on 19 October 1989 to Mr Vermeylen, the applicant's assessor, who was appointed pursuant to Decision No 363/82A of the Economic and Social Committee implementing general provisions concerning the compilation of end of probation reports. Mr Vermeylen had, in accordance with the case-law of the Court of Justice, entrusted responsibility for supervision of the applicant's probation to Mr Pertoldi who, as her immediate superior, had a close working relationship with her (see the judgments of the Court of Justice in Case 99/77 *D'Auria* v *Commission* [1978] ECR 1267, at paragraph 12, and Case 3/84 *Patrinos* v *Economic and Social Committee* [1985] ECR 1421, at paragraph 23). Accordingly the applicant cannot complain that Mr Vermeylen did not personally monitor the course of her probation, since that responsibility fell on Mr Pertoldi.

24 So far as concerns the requirement set out in the abovementioned memorandum that there should be a discussion with the probationer in the event of difficulties, the Court notes that it is clear from the evidence given by Mr Pertoldi at the hearing — and indeed from the applicant's complaint — that Mr Pertoldi did in fact have a discussion with the applicant at the beginning of March 1990, approximately five months after her probationary period had started. Furthermore, it is clear from a set of convergent factors that, contrary to the applicant's allegations, that discussion covered the difficulties arising during the probationary period and the possibility of an unfavourable probation report. After receiving the abovementioned internal memorandum of 19 October 1989, Mr Pertoldi had a discussion with Mr Brüggemann, a member of the Personnel Division, in order to ascertain the steps to be taken in the event of an unsuccessful probationary period. According to Mr Pertoldi's evidence before the Court, as borne out by the annex to Mr Vermeylen's memorandum of 31 May 1990 to the Secretary-General which is on the file, he was advised simply to have a discussion with Mrs Kupka-Floridi with a view to giving her an oral warning. It is accordingly clear from the chronological sequence of the events mentioned above that the applicant's supervisor during her probationary period followed the first guideline, set out in the abovementioned memorandum, in warning her during their discussion in March that there was a risk of an unfavourable probation report. Similarly, if the applicant's statements are compared with the evidence given by the witness at the hearing, it is clear that the applicant's assertion that Mr Pertoldi gave her grounds for hoping for a successful outcome to her probationary period could refer only to the fact that, while warning her of the risk that her probationary period might be unsuccessful, Mr Pertoldi quite properly did not at the beginning of March exclude the possibility of a favourable probation report if the applicant's performance improved significantly.

25 As for the other two guidelines in the abovementioned memorandum, it should be noted that they are simply recommendations in so far as they leave the decision as to whether to give a written warning and to inform the Secretary-General to the discretion of the probationer's supervisor or the assessor. The abovementioned memorandum simply envisaged sending an explanatory memorandum 'if necessary', and that 'it may be appropriate' to notify the Secretary-General. That being so, it should be noted that Mr Pertoldi considered it preferable in the circumstances of this case and following his discussion with Mr Brüggemann not to give the applicant a written warning in order to avoid the risk of such a warning being interpreted as prejudicing the final probation report. In addition, Mr Vermeylen did not consider it appropriate to advise the Secretary-General of the difficulties arising during the probationary period before the probation report had been drawn up.

26 In those circumstances, and without its being necessary for the Court to decide whether the memorandum of 19 October 1989 amounted to an internal directive, the second limb of this plea must, in any event, be rejected.

27 The third limb of this plea concerns the alleged contravention of Article 2 of Decision No 76/83A of the Economic and Social Committee. That article provides that 'at the request of the official concerned the committee shall be convened by the Secretary-General ... who shall set the period within which it must reach a decision; that period may in no circumstances be less that seven working days'. As the defendant points out, it is clear that that provision was adopted for the benefit of the Reports Committee to facilitate the proper conduct of its work and is not in any circumstances intended to confer rights on the probationer concerned who accordingly may not rely on it before the Court. Moreover, it is in any event clear from the wording of the provision that it is directed specifically at the Secretary-General, who is responsible for setting the period within which the committee must deliver its opinion. The provision is intended to ensure that the Reports Committee has sufficient time to carry out its work, it being understood that it may deliver its opinion before the end of that period if it considers that it is sufficiently well-informed. In this case, it should be noted that the period set by the Secretary -General was seven days and that the Reports Committee was entitled to deliver its opinion on the sixth day, when it considered that it had the necessary information to reach a decision in full knowledge of the facts.

28 The third limb of this plea must accordingly be rejected.

The plea alleging infringement of the rights of the defence

Arguments of the parties

29 The applicant submits that the rights of the defence have been disregarded in three ways. First, she was not given a sufficient period to put her case before the Reports Committee. Secondly, the second meeting of that committee was not adjourned even though the applicant was prevented for a valid reason from attending. Finally, the minutes of the committee meetings were not sent to her.

30 So far as concerns the first of those three points, the applicant alleges that by requesting on 19 June 1990 that the Reports Committee be convened, she had expressed the wish that it should not meet before a period of eight days so that she could be sure of satisfactorily putting her case. The meeting took place three days later, on 22 June at 10.00 hrs, with no advance notice to the applicant. Similarly, she states, she was summoned on 25 June 1990 at 17.20 hrs to attend a committee meeting arranged for 17.30 hrs. The applicant considers that this lack of any advance notice cannot be treated as even 'a very brief period', which, according to the Court of Justice in Joined Cases 10 and 47/72 *Di Pillo*, cited above, cannot vitiate the dismissal. It is incompatible with the adversary nature of the procedure as is apparent from the actual wording of Decision No 76/83A which provides in particular for the person assessed to be consulted. It is thus contrary to the principle of protection of legitimate expectation, the applicant's right to a fair hearing and the principle of good administration.

31 So far as concerns the second point, the applicant submits that the failure to adjourn the second meeting of the Reports Committee, which was held in her absence on 25 June 1990, was in breach of the right to a fair hearing particularly since at the first meeting, following the refusal of her request for an expert's opinion, she had given reasons for holding a second meeting with a view to discussing the quality of her work with the revisers.

32 Thirdly, the applicant complains that the defendant did not allow her to see the minutes of the committee proceedings. She accordingly did not know whether Miss J. Hughes, whom she had asked to be called, was heard and, if so, how her evidence appeared in the minutes. Neither did she know the identity of the official from the Directorate of Personnel and Finance Administration, whom the Reports Committee claims to have heard. Finally, the list of documents sent to the committee by the Secretary-General, to which the opinion of the committee referred, was not sent to the applicant. Accordingly, the Court having requested the defendant to produce those documents — as the applicant had sought in her application — and the defendant having replied that in accordance with the usual practice of the Reports Committee no minutes of its proceedings had been drawn up, the applicant argued at the hearing that her right to a fair hearing had been clearly and seriously disregarded, in so far as the lack of minutes prevented any review of the committee's proceedings.

33 The applicant also complains in her reply that the defendant did not send her, before this action was started, the documents annexed to the defence, namely the memoranda concerning her exchanged between her superiors. The failure to send the applicant those documents, inasmuch as they refer to her abilities, conduct and output, was contrary to Article 26 of the Staff Regulations and the applicant's right to a fair hearing. Accordingly those documents cannot be relied upon as against her. Moreover, they conflict with certain favourable assessments contained in the probation report. In the alternative, the applicant maintains that, even if those documents had been sent to her, she would nonetheless have been confronted with a *fait accompli*, both because 'most of the documents concern [her] medical problems (annexes 3, 5, 6 and 7 to the defence), which are irrelevant to any criticism of her abilities, and because the documents were not drawn up until the end of the probationary period'.

34 The defendant disputes the validity, in law or in fact, of the second plea. It points out that the procedure before the Reports Committee is prescribed by Decision No 76/83A, which makes no provision for notice of meetings to be given to the probationer concerned. That procedure is not adversary. The defendant argues that the Court of Justice has accepted that an institution is entitled to dismiss a probationer without seeking the opinion of a reports committee provided that it has not set up such a committee, which is not mandatory under the Staff Regulations (judgment in Case 99/77 *D'Auria*, cited above, at paragraph 24). The defendant also relies on the judgment of the Court of Justice in Joined Cases 10 and 47/72 *Di Pillo*, cited above, according to which, although the institution 'has to communicate the end of probation report to the probationer concerned so that he can formulate his observations . . . it is not bound to give him also an opportunity to state his views on the intention to dismiss him as a result of the unfavourable nature of the report . . . If, in such circumstances, the [institution] nevertheless invites the probationer to submit his comments, thereby observing the code of good personnel administration, the fact of giving him only a very brief period to reply cannot vitiate the dismissal'. In the light of all those factors, the defendant considers that it does not follow at all from the fact that Article 2 of Decision No 76/83A provides for the person assessed to be 'consulted' that the procedure before that committee is adversary, particularly when the probationer has already had the opportunity to submit his comments on the unfavourable probation report (Opinion of Mr Advocate General Trabucchi in *Di Pillo*, cited above, at p. 776). As for the facts of this case, the defendant maintains that the applicant was able to make her point of view known in the form of extensive written observations given

to the assessor on 8 June 1990. In addition, she was heard by the Reports Committee, as was an official called by her.

35 So far as concerns the documents annexed to the defence, the defendant maintains that, with the exception of an annex which is simply a request for a medical examination, all the annexes which were not sent to Mrs Kupka-Floridi post-dated her unfavourable probation report. It points out that the rights of the defence required only those documents with a decisive influence on the contested decision to be communicated to the applicant and included on her file (judgments of the Court of Justice in Case 21/70 *Rittweger* v *Commission* [1971] ECR 7, at paragraph 35, and Case 88/71 *Brasseur* v *Parliament* [1972] ECR 499). Moreover, the failure to communicate the annexes in dispute cannot amount to a breach of an essential procedural requirement since they did not have a decisive effect on the decision. In this case, several of the annexes related to purely administrative matters and accordingly did not have to be included in the applicant's personal file.

Legal assessment

36 So far as concerns the complaint relating to the applicant's being called before the Reports Committee without notice in disregard of the allegedly adversary nature of the procedure before that committee, it should first be noted that Decision No 76/83A of the Economic and Social Committee, which lays down the procedure before that body and expressly provides for the assessor and the person assessed to be consulted, does not stipulate any period of notice for this. The purpose of consultation is to enable the committee objectively to ascertain the point of view of the person concerned so that it may give its opinion in full knowledge of the facts.

It should be emphasized that, without its being necessary for the Court to rule on whether the principle of *audi alteram partem* applies before the Reports Committee, that principle has in any event been complied with in this case. The applicant submitted her written observations on the probation report to the assessor on 8 June 1990 in accordance with the first subparagraph of Article 34(2) of the Staff Regulations, and those observations were forwarded to the Reports Committee once the matter had been brought before it. Furthermore, it is apparent from the

documents in the file that at its first meeting the committee heard the applicant and that at its second meeting it also heard the employee whom the applicant had requested it to hear. It follows that when it gave its opinion the Reports Committee had full knowledge of the applicant's position, both through her written observations and after hearing her at its first meeting.

In those circumstances, the Court finds that in any event the failure to give the applicant notice when it called her had no effect on the content of the opinion given by the Reports Committee. It cannot accordingly vitiate the procedure before that committee.

37 So far as concerns the complaint relating to the failure to adjourn the second meeting of the Reports Committee, it is sufficient to note that, after hearing the applicant at its first meeting, the committee was entitled to decide that it was sufficiently well-informed as to the applicant's situation and not to adjourn its last meeting. Furthermore, the applicant does not give specific reasons justifying a second meeting to put her point of view against that of the revisers on the quality of her work.

38 So far as concerns the complaint concerning the failure to communicate the minutes of the Reports Committee meetings, it should be emphasized that, in accordance with the case-law of the Court of Justice, forwarding the opinion of the Reports Committee to the probationer constitutes a sufficient safeguard of the rights of the defence (see the judgment in Case C-17/88 *Patrinos* v *Economic and Social Committee* [1989] ECR 4249, summary publication). The question whether the proceedings of the Reports Committee were properly conducted may be assessed by the probationer and by the Court on the basis of the opinion alone, without its being necessary for the minutes of those proceedings to be made available. It is common ground in this case that the applicant received a copy of the opinion issued by the Reports Committee.

39 As for the last complaint, concerning the failure to send the applicant the documents annexed to the defence before these proceedings were instituted, it should be noted that the only document among them which pre-dated the

probation report and of which the applicant was not informed is a memorandum from Mr Vermeylen of 27 March 1990 requiring a medical examination to be carried out in connection with the applicant's absence on grounds of illness in connection, it is expressly stated, with an unfavourable probation report. The remaining documents consist of exchanges of memoranda between signature of the probation report and the applicant's dismissal. In two of them, dated 19 and 20 June 1990, Mr Pertoldi informs Mr Vermeylen and the Head of the Personnel Division of the applicant's absence on grounds of illness. The other two annexes are memoranda from Mr Vermeylen to the Secretary-General dated 31 May and 15 June 1990 which refer to the applicant's reactions on being notified that her probation report was unfavourable. In addition, the abovementioned memorandum of 31 May 1990 also mentions a memorandum sent to Mrs Kupka-Floridi by Mr Pertoldi after she refused work as well as her lack of command of Italian, and it contains comments on her alleged refusal to discuss matters with the revisers. However, there is nothing in the comments concerning the applicant's linguistic abilities in particular which is not to be found in the observations set out in the probation report.

In those circumstances, the Court finds that the contested decision is not based on any information in those documents which relates to the applicant's conduct and which is not referred to or set out in the probation report, as the foregoing analysis under the third plea indicates. The contested decision is based on the deficiencies which the applicant has demonstrated in the 'use [of] Italian with skill and precision'. It follows that the factors relating to the applicant's sick leave during her probationary period, her alleged resistance to discussion, occasional refusals of work given to her or her conduct on being officially notified that her probation report was unfavourable had no effect on the contested decision. The failure to provide her with the abovementioned documents accordingly did not prejudice the applicant's right to put her case before the contested decision was adopted and therefore, in accordance with settled case-law, cannot invalidate it (see, in particular, the judgments of the Court of Justice in Case 21/70 *Rittweger*, at paragraphs 29 to 41, Case 88/71 *Brasseur*, at paragraph 11, both cited above, and Case 233/85 *Bonino* v *Commission* [1987] ECR 739, at paragraph 11).

40 The second plea must accordingly be set aside and, in consequence, all the claims for annulment must be rejected.

The plea alleging breach of the duty to have regard for the interests of officials

Arguments of the parties

41 In her third plea, the applicant claims that during her probationary period she did not receive appropriate comments, instruction and advice from the revisers or from her superiors. Only Mr Pertoldi, head of the Italian section, monitored the applicant's progress — and then only for the first two weeks of her probationary period — and gave her some encouragement. At the beginning of May 1990, he indicated to her that, provided that she continued to work seriously, she would certainly be established. For their part, the revisers, contrary to what is stated in the probation report, corrected her style and terminology without providing explanations to her and without even returning her corrected texts. In order to see the revised texts, therefore, the applicant emphasizes that she had to go and look for them in the archives. She complains in particular that the revisers and the assessor, Mr Vermeylen, did not systematically indicate to her the areas in which there was room for improvement. Moreover, no departmental memorandum on that point was sent to her. Furthermore, the applicant alleges that there is a contradiction in the probation report, which indicates that she was not sufficiently available to discuss matters and to confer with the revisers and her colleagues although her ability to adapt to the requirements of the department and her relations with others were described as good in the analytical assessment in that report.

Finally, the applicant maintains that the defendant disregarded its duty to have regard for the interests of officials in not ensuring that she was placed in a position enabling her to demonstrate her abilities to the full. The defendant acknowledged that the applicant's knowledge of Dutch was not used during her probationary period. It accordingly seems that only the interests of the service were taken into account to the detriment of those of the applicant. That fact lies to a large extent at the root of the contested decision.

42 The defendant considers that it did have regard for the interests of the applicant. It emphasizes first that the purpose of the probationary period is not to train the probationer but solely 'to enable the administration to make a more concrete assessment of [his] suitability for a particular post, the manner in which he performs his duties and his efficiency in the service', as the Court of Justice held in Case 290/82 *Tréfois* v *Court of Justice* [1983] ECR 3751. It notes further that the

duty to have regard for the interests of officials must be reconciled with the requirements of the proper functioning of the department and must accordingly be kept within reasonable limits (Case 61/76 *Geist* v *Commission* [1977] ECR 1419).

So far as concerns this case, the defendant points out that there is no dispute whatsoever that the probationary period followed the normal course. In particular, the probationer's physical working conditions were satisfactory and she had no cause for complaint that the workload was either insufficient or excessive. The defendant considers, furthermore, that it had no obligation to use the applicant's knowledge of Dutch. It takes the view that in accepting her duties at the Economic and Social Committee the applicant had to adapt to the specific requirements of the department which recruited her. The defendant also rejects the complaint that the applicant was not made sufficiently aware of the inadequacies of her work. It points out that the Court of Justice has held that 'the administration is under no obligation to warn a probationary official at any particular time that his services are unsatisfactory' (judgment in Case 3/84 *Patrinos*, cited above, at paragraph 19). It notes that in any event 'numerous observations . . . [were] made [to the applicant] about her work and repeated explanations [were] given to her', in the words of the probation report.

Legal assessment

43 Before ascertaining whether the applicant was in a position to complete her probationary period in normal conditions in accordance with the relevant provisions of the Staff Regulations, the purpose of the probationary period must first be considered. It follows expressly from the definition in the Staff Regulations of the purpose of the probation report, set out in the first subparagraph of Article 34(2), that the requirement for a probationary period, at the end of which a probation report must be drawn up, is designed to ascertain 'the ability of the probationer to perform the duties pertaining to his post and also . . . his efficiency and conduct in the service'. Under that same provision, if the probationer's 'work has not proved adequate' he is to be dismissed. In contrast to recruitment competitions designed to permit the selection of candidates on the basis of general criteria directed to the candidate's future suitability, the purpose of the probationary period is thus to enable the administration to make a more concrete assessment of the candidate's suitability for a particular post, the manner in which he performs his duties and his efficiency in the service, as the Court of Justice pointed out in its judgment in Case 290/82 *Tréfois*, cited above, at paragraph 24.

44 However, although the probationary period, which must enable the probationer's suitability and conduct to be assessed, cannot be considered to be equivalent to a training period, the fact remains that he must be put in a position during that period to demonstrate his abilities. That condition cannot be separated from the concept of probationary period and is implicit in Article 34(2), cited above, as confirmed by the case-law of the Court of Justice (see, in particular, the judgments in Case 10/55 *Mirossevich* v *High Authority* [1954 to 1956] ECR 333, particularly at p. 342 et seq., and Case 3/84 *Patrinos*, cited above, at paragraph 20). In addition, it satisfies the requirements relating to respect for the general principles of proper administration and equal treatment, and also the duty to have regard for the interests of officials, which 'reflects the balance of the reciprocal rights and obligations established by the Staff Regulations in the relationship between the official authority and the civil servants', as the Court of Justice held in Joined Cases 33 and 75/79 *Kuhner* v *Commission* [1980] ECR 1677, at paragraph 22. In accordance with the settled case-law of the Court of Justice, that means in practice that the probationer must be given not only adequate physical conditions but also appropriate instructions and advice in the light of the duties performed to enable him to adapt to the specific needs of the post he fills (see, in particular, the judgment in Case 3/84 *Patrinos*, cited above, at paragraph 21).

45 In this case, the Court notes that normal conditions obtained during the applicant's probationary period on the basis of the objective criteria applicable to the translation division concerned, as regards both distribution of the work and supervision. It is clear from hearing Mr Pertoldi that there was no difference between the treatment of the applicant and that of the probationers who preceded her, and the applicant, while pleading such discrimination, has produced in support of that allegation nothing to corroborate it or to enable its validity to be assessed.

46 On this point, it should be noted first that the applicant indicates neither the type nor the amount of work which she was asked to do nor the physical conditions in which it was to be done. So far as concerns the complaint that her knowledge of

Dutch was not used, thereby preventing her in disregard of her interests from demonstrating her ability in this area, it should be noted that the duty to have regard for the interests of officials could in no circumstances result in consideration of the applicant's special qualifications with regard to Dutch taking priority over requirements relating to the rational organization of the work within the division concerned. Translations were given to the applicant on the basis of the needs of the department and reflected the duties which she had been appointed to perform in her capacity as probationer.

47 Secondly, the Court notes in the light of the information in the file and the evidence of the witness at the hearing that during her probation the applicant received guidance and advice from her probation supervisor and the revisers to enable her to adapt to the specific translation requirements of the Economic and Social Committee. Her progress during the first two weeks of her probation was monitored by Mr Pertoldi, who regularly informed her of the working methods of the Economic and Social Committee and of the way in which a translation should be approached depending on the type of document in question. Furthermore, it is clear from his replies to the questions put by the Court, which have not been disputed by the applicant, that on several occasions Mr Pertoldi gave her technical advice and indicated the areas in which there was room for improvement, mainly on the basis of suggestions which had been made to him by the revisers responsible for checking her work. It seems that the revised texts were, in principle, given back to the applicant by the revisers, who frequently discussed them with her before returning them. So far as concerns urgent texts — which, according to Mr Pertoldi, represent a minimal percentage of the total workload of the division — Mrs Kupka-Floridi could in any event ascertain the corrections made to the translations which were either returned to her or filed in the archives to which she had unrestricted access. Together, the documents on the file and Mr Pertoldi's replies to the questions put by the Court show that discussions with the revisers did not become less frequent until a certain amount of tension had built up, resulting from her having disputed criticism of her work. Such disputes were corroborated by the probation report, drawn up by Mr Vermeylen and signed by Mr Pertoldi and by three revisers, which refers to 'the numerous remarks . . . made [to Mrs Kupka-Floridi] about her work and the repeated explanations which were given to her'. Similarly, the opinion of the Reports Committee, adopted unanimously, concludes that 'the working conditions in which the probationary period ran its course reveal no anomaly or specific circumstances worthy of mention'.

48 Thirdly and finally, so far as concerns the allegation that the applicant was not informed of the possibility of an unfavourable probation report, it is sufficient to note that, according to the Court's findings in connection with the second limb of the first plea, the applicant was duly warned by her probation supervisor, Mr Pertoldi, during a discussion in March 1990 of the inadequacies of her performance and the risk of an unfavourable probation report if they continued. Furthermore, in the course of various technical and linguistic discussions with Mr Pertoldi or with the revisers during the probationary period the applicant's attention was drawn to the major problems relating to the quality of her work. Finally, it should be noted that the duty to have regard for the interests of officials does not require a probation supervisor to warn the probationer in writing that the probation report could be unfavourable. The applicant's right to serve her probationary period under normal conditions was sufficiently safeguarded by an oral warning enabling her to adapt and improve her performance in line with the requirements of the department.

49 In the light of all the foregoing considerations, the Court finds that the applicant's probationary period followed the normal course. The third plea must accordingly be rejected.

The plea alleging a manifest error in assessing the facts

Arguments of the parties

50 In her fourth plea, the applicant maintains that the probation report contains errors of judgment, based on inaccurate or inaccurately interpreted facts, revealing in certain cases contradictions between the analytical judgments and the general assessment. She considers that she was a 'victim of failure to integrate her in the translation department of the Economic and Social Committee, which was not of her doing'. She stresses the conflict between her alleged resistance to discussion with the revisers and with her colleagues and the assessment of her 'ability to adapt to the requirements of the service' and 'relations with others' under the relevant headings in the probation report as 'good'. As for the assessment 'fair' under 'ability to work as part of a group', the applicant points out that she was never

asked to work in a group. Furthermore, she claims that the complaint that she does not have a good command of Italian can hardly be well founded, given that she is Italian, that her mother tongue is Italian, that she lived in Italy until she was 29 and that, in the end of probation report, her 'knowledge necessary for the duties performed' was assessed as 'fair' ('discreto') and not as 'inadequate'. The same holds true for the assessment that she lacked the basic knowledge, methodical approach and ability necessary for translating Economic and Social Committee documents. Such criticisms conflict with the assessment 'fair' under the headings 'knowledge necessary for the duties performed', 'comprehension' and 'speed of execution', and with the assessment 'good' under the heading 'sense of organization'. Furthermore, the applicant claims that the criticisms are belied by her qualifications, several years' professional experience of translation into Italian and her inclusion in a list of suitable candidates following a competition for the recruitment of translators.

51 The defendant, for its part, denies the allegation that the assessments and observations in the probation report are inaccurate. It maintains, first, that 'it is for the competent administrative authority to use its power of assessment as regards the ability of the person concerned to perform the duties entrusted to him, subject to . . . review by the Court of the manner in which that has been done in the event of manifest error' (judgment in Case 98/81 *Munk*, cited above, at paragraph 16; see also the judgments in Case 347/82 *Alvarez* v *Parliament* [1984] ECR 1847 at paragraph 16, and in Case 3/84 *Patrinos*, cited above). On this point, the defendant maintains that the applicant has not shown that there was any manifest error in the assessment of her basic knowledge, her working methods, her translation skills and above all her ability to translate into Italian with precision, taking into account the specific responsibilities of a translator at the Economic and Social Committee. The end of probation report also bears, besides the signature of the Director of the Translation Division, those of the Head of the Italian Translation Section and the revisers, who had all been consulted. The report was unanimously upheld by the Reports Committee which even called it 'generous' to the applicant. As for the applicant's request for an expert's opinion, the defendant maintains that it is not justified given that there is no evidence at all of a manifest error. Moreover, that request for an expert's opinion appears for the first time as a claim in the reply, contrary, in its view, to Article 48 of the Rules of Procedure of the Court of First Instance.

Legal assessment

52 It should be noted first that, by virtue of the principles laid down by the Staff Regulations governing recruitment and probation, the administration has a wide discretion when it comes to assessing the abilities and performance of a probationer in accordance with the interests of the service. Accordingly it is not for the Court to substitute its own judgment for that of the institutions in so far as concerns their assessment of the outcome of a probationary period and their appreciation of the suitability of a probationer for a permanent appointment in the Community civil service, unless there has been a manifest error of assessment or an abuse of power, as the Court of Justice pointed out in its judgment in Case 3/84 *Patrinos*, cited above, at paragraph 25 (see also the judgments in Case 98/81 *Munk*, cited above, at paragraph 16; Case 290/82 *Tréfois*, cited above, at paragraph 29, and Case 347/82 *Alvarez*, cited above, at paragraph 16).

53 Hence, it is appropriate in this case to ascertain whether the assessments in the light of which the decision not to establish the applicant was taken are, as she maintains, vitiated by a manifest error. In that regard, it should be noted that that decision, which is based on the unfavourable conclusion in the probation report, confirmed unanimously by the Reports Committee in its opinion, is principally based on the fact that the applicant has not demonstrated that she has the 'ability to use Italian with skill and precision', as the probation report expressly indicates under 'general assessment'. In the light of the assessment set out in the probation report and the explanations confirming it provided by the probation supervisor in reply to the questions put by the Court, that assessment would seem to refer in part to the applicant's inability to grasp linguistic nuances, in particular in the case of documents such as opinions which are repeatedly amended in the course of being drafted and which represent, quantitatively, more than one-third of the workload of the department. It also refers to the difficulties the applicant had in understanding the meaning of Economic and Social Committee documents, reflected in the purely literal and often meaningless translations produced by her. Those assessments were expressed, in the analytical part of the applicant's probation report, as 'inadequate' under 'written expression', 'judgment' and 'quality of work' during the probationary period.

54 In the light of all the above considerations, the Court finds that the contradictions which the applicant alleges are contained in the probation report have not been

established. In particular, the assessment of the applicant's 'knowledge necessary for the duties performed' as 'fair' does not refer to her command of Italian, which is specifically dealt with under the heading 'written expression'. It refers to her knowledge in other areas and in particular her ability to research documents, as is clear from the statements made by the witness during the hearing. As to the applicant's 'comprehension', also asssessed as 'fair' in the analytical part of the probation report, this does not refer to the ability to render faithfully the sense of a document when translating it into Italian. This latter ability is covered in the probation report under the heading 'judgment', and was assessed as 'inadequate'. Furthermore, the applicant's lack of command of Italian is not at all in conflict with the assessment of her 'sense of organization' and her 'punctuality of performance' as 'good', and her 'speed of execution' as 'satisfactory'. Similarly, the adverse assessments concerning the applicant's linguistic knowledge are not in conflict with 'good' for 'sense of responsibility', 'sense of initiative' and 'relations with others' or with 'fair' for 'sense of team work', with which they are wholly unrelated. Finally, the training, professional experience and inclusion of the applicant in a list of suitable candidates after a competition organized by the Council to recruit translators is not a guarantee of the specific linguistic abilities required in a translation department of the Economic and Social Committee. Accordingly they cannot be in conflict with the adverse assessment in the probation report of the applicant's command of Italian in the light of the actual requirements of the department. It is clear from the very purpose of the probationary period, as defined by the Court in its case-law cited above (see paragraph 31), that the administration must, at the end of the probationary period, 'be in a position to determine, without being bound by the assessments made at the time of recruitment, whether the probationary official deserves to be established in the post to which he aspires. That decision involves a comprehensive assessment of the qualities and conduct of the probationary official, taking account of both the positive and negative factors revealed in the course of the probationary period' (judgment in Case 290/82 *Tréfois*, cited above, at paragraph 24).

55 In those circumstances, it should be noted that in view of the applicant's failure to adduce any proof whatsoever that there was a manifest error of assessment

concerning the value of her work during the probationary period, the request for an expert's opinion which she submitted cannot be accepted.

56 It follows from the foregoing that it has not been established that the contested decision is vitiated by a manifest error of assessment. The fourth plea must therefore be rejected.

The claim for an order that the applicant may serve a further probationary period

57 It should be noted that in any event claims for an order that the administration should offer the applicant the possibility of serving a second probationary period in the event of the annulment of the contested decision must be held inadmissible in that the Court cannot direct injunctions to the administration in accordance with settled case-law (see, in particular, the judgments of the Court of Justice in Joined Cases 63 to 75/70 *Bode* v *Commission* [1971] ECR 549 and Case 225/82 *Verzyck* v *Commission* [1983] ECR 1991, at paragraphs 19 and 20).

The claim for compensation

58 This claim is based solely on the alleged unlawfulness of the decision to dismiss the applicant at the end of her probationary period. It is linked to the claim for annulment which has itself been rejected, and the claim for compensation must therefore be rejected as well.

59 It follows that the application must be dismissed.

Costs

60 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. However, Article 88 of those Rules provides that in proceedings brought by servants of the Communities the institutions are to bear their own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby:

1. Dismisses the application;

2. Orders the parties to bear their own costs.

Vesterdorf Saggio Biancarelli

Delivered in open court in Luxembourg on 1 April 1992.

H. Jung
Registrar

B. Vesterdorf
President