procedure may fulfil its purpose, it is necessary that the appointing authority should be in a position to know in sufficient detail the criticisms made by the aggrieved official of the contested decision.

A submission not put forward in the complaint submitted prior to the commencement of proceedings must be dismissed as inadmissible if the official concerned was in a position to make that submission in his complaint.

# JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)
27 November 1990 *

In Case T-7/90,

**Dorothea Kobor,** an official of the Commission of the European Communities, residing at Goetzingen (Grand Duchy of Luxembourg), represented by Louis Schiltz, of the Luxembourg Bar, with an address for service in Luxembourg at his Chambers, 83 boulevard Grande-Duchesse Charlotte,

applicant,

v

**Commission of the European Communities,** represented by J. Griesmar, Legal Adviser, acting as Agent, with an address for service in Luxembourg at the office of Guido Berardis, a member of the Commission's Legal Department, Wagner Centre, Kirchberg,

defendant,

APPLICATION seeking the reversal of the Commission's decision of 10 March 1989 fixing the partial permanent invalidity rate for the applicant at 14%,

THE COURT OF FIRST INSTANCE (Third Chamber),

composed of: C. Yeraris, President of Chamber, A. Saggio and K. Lenaerts, Judges,

H. Jung, Registrar

* Language of the case: French.

having regard to the written procedure and further to the hearing on 24 October 1990,

gives the following

## Judgment

### Facts and procedure

1 The applicant is an official of the Commission of the European Communities. After being involved in a horse-riding accident in Budapest on 7 June 1986 she now disputes the permanent partial invalidity rate determined in her case by the Commission at the conclusion of the procedure provided for by Articles 16 to 23 of the Rules on the Insurance of Officials of the European Communities against the Risk of Accident and of Occupational Disease (hereinafter referred to as 'the Rules').

2 The first medical certificate, drawn up by the doctor treating the applicant, Dr Kayser, and dated 16 June 1986, gave the following diagnosis: fracture of the L1 vertebra and fracture of the left external malleolus.

3 Following a radiography examination on 12 November 1986, a new medical certificate was drawn up by Dr Kayser on 18 November 1986. This refers to the discovery of a 'previous fracture of the upper part of the left cotyla which, in my view, must certainly be related to the accident of 7 June 1986'.

4 On 5 June 1987, Dr Kayser drew up a certificate which gave details of all the effects of the accident and the resultant permanent partial invalidity. This fixed a rate of 25% for the fracture of the L1 vertebra, 10% for the fracture of the left external malleolus and 10% for the fracture of the upper part of the left cotyla.

5 Following an examination of the applicant on 26 February 1988, Dr De Meersman, the doctor appointed by the Commission, drew up a report dated 29 February 1988 fixing an overall permanent partial invalidity rate of 14%, 12% of which was in respect of the fracture of the L1 vertebra and 2% in respect of the fracture of the malleolus.

6 On the basis of that report and in accordance with its conclusions, the Commission notified the applicant, on 7 July 1988, of its draft decision, in accordance with the first paragraph of Article 21 of the Rules.

7 On 20 July 1988, the applicant requested that the Medical Committee be convened, in accordance with Articles 21 and 23 of the Rules.

8 On 13 January 1989, the Medical Committee, composed of Dr De Meersman, Dr Kayser and Professor Van der Ghinst — appointed by agreement between the first two — examined the applicant and studied her radiography file.

9 On this basis, the report of the Medical Committee, dated 17 January 1989 and signed by the three doctors, concluded by a majority decision that the overall invalidity resulting from the accident was to be fixed at 14%.

10 On 10 March 1989, the Commission adopted the decision which is the subject of the present action, and which confirmed, on the basis of the report of the Medical Committee, the draft decision of 7 July 1988.

11 By letter of 27 April 1989, which was registered on 3 May 1989, the applicant lodged a complaint against the Commission decision of 10 March 1989, and enclosed with her letter a statement from Dr Kayser, dated 18 April 1989, in which he stressed that the appointment of Professor Van der Ghinst had been proposed by Dr De Meersman, that the rate of 14% was attributed only for the fracture of the L1 vertebra, that his own specialist report of 5 June 1987 had not

been taken into account during the discussions of the Medical Committee and, finally, that the report drawn up by the Medical Committee should have included reference to the fact that the applicant had been obliged, subsequent to 1 January 1988, to interrupt her full-time employment on at least seven occasions, each time for a period of 10 days. The plaintiff's complaint also included an additional medical report, dated 24 April 1989, drawn up by a medical specialist, Dr Hedrich, which confirmed the medical certificate made out by Dr Kayser on 18 November 1986.

12 By letter of 27 June 1989, a copy of which was sent to Dr De Meersman, the Commission requested Professor Van der Ghinst to specify whether the permanent partial invalidity of 14% related solely to the injury to the L1 vertebra or whether it covered both that injury and the injury to the malleolus.

13 By letters of 3 and 18 July 1989, Dr De Meersman and Professor Van der Ghinst each stated that the rate of 14% consisted of 12% for the fracture of the L1 vertebra and 2% for the fracture of the malleolus.

14 By a letter of 7 November 1989, which was communicated to the applicant on 10 November 1989, the Commission rejected the applicant's complaint.

15 Those are the circumstances under which the applicant, by way of an application lodged at the Registry of the Court of First Instance on 7 February 1990, brought the present proceedings before the Court.

**Conclusions of the parties**

16 The applicant claims that the Court should:

(i) declare the application formally admissible and within the time-limits;

(ii) prior to any other decision, order the Commission to surrender the letters of 3 and 18 July 1989 to which it refers in the contested decision;

(iii) declare the action well founded as to its substance;

(iv) consequently fix the permanent partial invalidity rate at a minimum of 45%, that is 25% for the L1 fracture, 10% for the fracture of the malleolus and 10% for the fracture of the upper part of the left cotyla;

(v) declare that, on the sums representing the invalidity percentage in excess of 14% (which have already been paid), the Commission owes to the applicant interest for late payment, if not by way of damages, at the rate of 9% with effect from 5 June 1987, or with effect from 6 June 1988 until final settlement;

(vi) order the Commission to pay the costs.

In the alternative:

(i) appoint an expert, to be selected from a foreign medical faculty, with the task of studying the medical file and examining Mrs Kobor, as well as of fixing the rate of the permanent partial invalidity which she has suffered as a result of her accident on 7 June 1986 and the date on which the injuries which she suffered healed;

(ii) in this case, reserve the costs.

The Commission contends that the Court should:

(i) dismiss the application;

(ii) make an appropriate order as to costs.

**Substance**

17 The applicant essentially relies on five submissions to support her request that the contested decision be reversed.

*The composition of the Medical Committee*

18 At the hearing the applicant stated that she was abandoning the submission alleging the irregular composition of the Medical Committee.

*The account taken of the fracture of the upper part of the left cotyla*

19 The applicant claims that the Medical Committee failed to take account of the sequelae of the fracture of the upper part of the left cotyla, which, according to the medical certificate drawn up by Dr Kayser on 5 June 1987, must certainly be attributed to the accident in which the plaintiff was involved on 7 June 1986. During the hearing, the applicant pointed out in this regard that her objection to the opinion of the Medical Committee was that it took no account of those sequelae or at least gave no reasons for its refusal to take account of them, even though Dr Kayser had formed the view that they ought to give rise to a permanent partial invalidity rate of 10%.

20 The Commission points out that neither the report drawn up by Dr De Meersman nor the opinion of the Medical Committee established that there had been a fracture of the upper part of the left cotyla, although both do refer to pain in the left hip which they attribute respectively to a thickening of the left cotyloid supercilium and to oesteophytic arthrosis and ovalization of the head of the femur, indicative of incipient coxitis, and which they consider to have no connection with the applicant's accident. The Commission submits that the views expressed with regard to the pain in the left hip constitute medical appraisals which must, according to established case-law, be regarded as definitive if made under proper conditions (see, most recently, the judgment of the Court of Justice in Case 2/87 *Biedermann* v *Court of Auditors* [1988] ECR 143, paragraph 8, and of the Court of First Instance in Case T-31/89 *Sabbatucci* v *Parliament* [1990] ECR II-265, paragraph 32).

21 It must be stated that the Commission was quite correct to point out that the Medical Committee had good reason to take the view that the pain suffered by the applicant in her left hip was attributable, not to the accident of 7 June 1986, but to oesteophytic arthrosis and ovalization of the head of the femur which indicated incipient coxitis. In attributing this pain to an origin other than the applicant's accident, the Medical Committee gave reasons for its opinion which were sufficient in law.

22 It is also necessary to point out that that attribution of cause constitutes an appraisal of a purely medical nature to which the review by this Court may not extend provided that it was made under conditions which were not irregular (judgment in Case 2/87 *Biedermann* v *Court of Auditors* and in Case T-31/89 *Sabbatucci* v *Parliament*, cited above). It follows that this submission cannot be accepted.

*The account to be taken of the applicant's pre-existing injuries*

23 The applicant claims that the conduct of the activities of the Medical Committee and the Commission was irregular in so far as the report drawn up on 29 February 1988 by Dr De Meersman, on which the Commission based its draft decision of 7 July 1988, incorrectly refers to pre-existing injuries of the applicant, in the light of which a partial permanent invalidity rate of only 14% was fixed for her. She also concludes from the fact that the rate decided on by a majority of the Medical Committee was also 14% that Dr De Meersman failed to realize that he was making a mistake by referring to pre-existing injuries. Finally, the applicant mentions that the Commission, in its confirmatory decision of 10 March 1989, stated that the draft decision of 7 July 1988 would henceforth apply as the definitive decision of the appointing authority without any alteration.

24 During the course of the hearing, the applicant was requested by the Court to point out the passages in the report drawn up by Dr De Meersman in which he took account of pre-existing injuries, but failed to do so. She merely quoted the following passage from the draft decision of the Commission of 7 July 1988:

'The doctor appointed by the institution has concluded, following the specialist medical report drawn up on 19 February 1988 (sic) on your state of health that the parts of the body affected by the accident had already been affected previously. Under the applicable rules, where limbs or organs have already been previously affected, account may be taken for the purposes of indemnification only of the difference between a person's condition prior to the accident and his or her condition after the accident. In the opinion of the doctor consulted, it is therefore necessary to grant compensation on the basis of a permanent partial invalidity of 14% in respect of sequelae which were regarded as healed on 26 February 1988.'

From this the applicant deduces that there must have been informal contacts between the Commission and Dr De Meersman between 29 February and 7 July 1988. She also believes that the reference in the draft decision to rules governing compensation for limbs already affected by disability allows the conclusion to be drawn that those rules were in fact applied.

25 It follows from the foregoing that the applicant's complaint relates only to the wording of the first paragraph of the Commission's draft decision, as confirmed by the definitive decision.

26 The Commission, both in its rejoinder and during the hearing, admitted the drafting error in the passage in its draft decision set out above. It takes the view, however, that the error is irrelevant, in so far as neither the report drawn up by Dr De Meersman nor the opinion of the Medical Committee made any reference whatever to any pathological condition affecting the parts of the body injured at the time of the accident. From this the Commission concludes that the applicant is wrong in contending that the rate of 14% fixed for her was calculated on the basis of pre-existing injuries.

27 It should be mentioned that the contested decision is based exclusively on the opinion of the Medical Committee, the conclusions of which it adopts verbatim, even though it confirmed formally the Commission's defective draft decision. The examination by the Court must therefore be limited to considering whether the Medical Committee reached its conclusions in a proper manner.

28 In this regard it must be noted first of all that the applicant has neither alleged nor shown that the drafting error made by the Commission in its draft decision could have influenced the medical assessments made by the Medical Committee and on which the contested decision was based.

29 Secondly, it must be noted that the drafting error made by the Commission in its draft decision occurred subsequent to the report drawn up by Dr De Meersman

and prior to the opinion of the Medical Committee. That opinion confirmed the views set out in the first report, in so far as those views take no account whatever of pre-existing injuries in those parts of the plaintiff's body which were affected by her accident. It follows from this that the opinion of the Medical Committee was not influenced as to its content by the Commission's mistake and that consequently the Commission's definitive decision, based on that opinion, was also not influenced by that mistake.

30 It follows from the foregoing that, even had there been no mistake on the Commission's part, the contested decision could not have been any different. The Court is required to consider procedural irregularities, however, only if in the absence of such irregularities the administrative proceedings could have led to a different result (judgment in Case 30/78 *Distillers Company* v *Commission* [1980] ECR 2229, paragraph 26). It follows that this submission must also be rejected.

*The scale applied for determining the partial permanent invalidity rate*

31 The applicant claims that the report drawn up by the Medical Committee is vitiated by a lack of reasoning in so far as it does not specify the scale which was applied in order to determine her rate of partial permanent invalidity, although the scale referred to in Article 12(2) of the Rules could not have been used since the injuries suffered by the applicant are not included therein, and the method of evaluation by way of analogy to that scale could not have been applied in the present case. The applicant also criticizes the opinion of the Medical Committee for having unjustifiably favoured the official Belgian scale for invalidity rates and ruled out the use of the *Padovani* scale for work-related accidents and occupational disease, which, as is well known, is regularly applied in the Grand Duchy of Luxembourg, the applicant's domicile and place of employment.

32 The Commission contends that this submission is inadmissible on the ground that it was not made at the stage prior to the commencement of proceedings.

33 At the hearing the applicant pointed out that the allegation of a lack of reasoning could not have been included in the complaint made prior to the commencement of proceedings since the lack of reasoning became evident only after she had read the letter from the Commission of 7 November 1989 rejecting her complaint. That

letter, she contends, was the first document which made it clear that the Medical Committee had, in view of the fact that the applicant's sequelae were not mentioned in the Community scale, applied national scales which were not otherwise identified.

34 According to the well-established case-law of the Court, the purpose of the pre-litigation procedure is to permit an amicable settlement of differences which have arisen between officials or servants and the administration. In order that such a procedure may fulfil its purpose, it is necessary that the appointing authority should be in a position to know in sufficient detail the criticisms made by the aggrieved official of the contested decision (see, most recently, the judgment of the Court of First Instance in Case T-57/89 *Alexandrakis* v *Commission* [1990] ECR II-143, paragraph 8).

35 It must be noted in the present case that upon reading the Commission's draft decision of 7 July 1988, the report drawn up by Dr De Meersman on 29 February 1988, the Commission decision of 10 March 1989 and the opinion of the Medical Committee of 17 January 1989, the applicant could not have been unaware that the sequelae which affected her were not included in the Community scale and that, given this fact, the degree of her invalidity had to be determined by analogy with the Community scale, by virtue of the third paragraph of the provisions set out at the end of that scale. The applicant was therefore in a position to include, in the complaint made prior to the commencement of proceedings, a submission alleging a failure to state reasons by which the application of that third paragraph was allegedly vitiated.

36 Without there being any need to examine or not whether the submission in question is well founded, it is therefore necessary to rule that, as the applicant admitted during the hearing, the submission was not contained in the complaint and that it must accordingly be declared inadmissible.

*Breakdown of the rate of 14% fixed for the applicant's partial permanent invalidity*

37 The applicant inquires whether it is possible to speak of a majority opinion of the Medical Committee if its report is based on a fundamental ambiguity. She argues that since the opinion does not give any breakdown of the partial permanent invalidity rate as between the fracture of the L1 vertebra and the fracture of the

malleolus, it is ambiguous because, according to Dr Kayser's letter of 18 April 1989, Professor Van der Ghinst had suggested fixing a rate of partial permanent invalidity between 14 and 15% for the fracture of the L1 vertebra and was not in favour of fixing any partial permanent invalidity in respect of the fracture of the malleolus, whereas Dr De Meersman, in his report of 29 February 1988, had fixed a rate of 12% for the fracture of the L1 vertebra and 2% for the fracture of the malleolus. The applicant also complains that the Commission sought explanation on this matter only from Professor Van de Ghinst and Dr De Meersman, and did not seek the opinion of Dr Kayser. The applicant believes that this constitutes an irregularity in the procedure of the Medical Committee.

38 The Commission contends that the letters of 3 and 18 July 1989 from Drs De Meersman and Van der Ghinst render the applicant's arguments nugatory: it is clear from those letters that the overall invalidity resulting from the accident of 7 June 1986 justifies the determination of a rate of 14%, with 12% for the fracture of the L1 vertebra and 2% for the malleolus; it had no reason in June 1989 to ask the doctor treating the applicant the questions which it had asked the two other doctors in its letter of 27 June 1989 since the doctor treating the applicant had already replied in advance in his letter of 18 April 1989 that, in his view, the partial permanent invalidity rate of 14% determined by the Medical Committee related only to the injuries to the spine.

39 The only relevant issue raised by the applicant's argument is whether or not the opinion of the Medical Committee was in fact adopted by a majority decision.

40 In the opinion it is stated:

'Following the examination, the somatic examination and a consideration of the radiograph file, the Medical Committee decided by a majority decision that the overall invalidity resulting from the accident of 7 June 1986 ought to be fixed at fourteen per cent (14%).'

41 The three doctors constituting the Medical Committee thus stated unanimously that the opinion of the Committee had been adopted by a majority of its members, as is attested by their three signatures appearing at the end of the opinion. It ought to be pointed out that such a determination cannot be called in question by a subsequent letter from one of the members of the Medical Committee. It follows that this submission cannot be accepted.

42 It follows from all the foregoing that the application must be dismissed and that it is therefore unnecessary to consider the applicant's alternative claim and her claim for interest on overdue payments.

## Costs

43 Under Article 69(2) of the Rules of Procedure of the Court of Justice, which are applicable *mutatis mutandis* to the Court of First Instance by virtue of the third paragraph of Article 11 of the Council Decision of 24 October 1988, the unsuccessful party is to be ordered to pay the costs if they are asked for in the successful party's pleadings. However, Article 70 of those Rules provides that, in proceedings brought by servants of the Communities, the institutions are to bear their own costs. Furthermore, the Court may, under the first paragraph of Article 69(3), order that the parties bear their own costs in whole or in part where the circumstances are exceptional. Since the Commission was partly responsible for these proceedings owing to the inaccurate drafting of its draft decision of 7 July 1988 and the inappropriate wording of the contested decision, the Court of First Instance considers that, in addition to its own costs, the Commission should be ordered to pay half of the costs incurred by the applicant. The applicant is ordered to pay the other half of her own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby:

**(1) Dismisses the application;**

**(2) Orders the Commission to pay its own costs and half of the applicant's costs. The applicant shall bear the other half of her own costs.**

Yeraris Saggio Lenaerts

Delivered in open court in Luxembourg on 27 November 1990.

H. Jung
Registrar

C. Yeraris
President