JUDGMENT OF THE COURT OF FIRST INSTANCE (First Chamber)
16 June 2000 *

(Officials – Action for annulment – Invalidity Committee – Retirement – Breach of essential procedural requirements – Misuse of powers – Non-material damage)

In Case T-84/98,

C, former official of the Council of the European Union, residing in Dublin (Ireland), represented by Séamus O Tuathail, Barrister of the Bar of Ireland, with an address for service in Luxembourg c/o Michael O'Toole, Irish Embassy, 28 Route d'Arlon,

applicant,

v

Council of the European Union, represented by Colin Robertson and Thérèse Blanchet, Legal Advisers, acting as Agents, with an address for service in Luxembourg at the office of Alessandro Morbilli, General Counsel of the Legal Affairs Directorate in the European Investment Bank, 100 Boulevard Konrad Adenauer,

defendant,

APPLICATION, first, for annulment of Council Decision No 677/97 of 11 July 1997 retiring the applicant on grounds of total permanent invalidity and for an order requiring the Council to pay compensation for the material and non-material damage suffered,

* Language of the case: English.

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

composed of: B. Vesterdorf, President, M. Vilaras and N. Forwood, Judges,

Registrar: H. Jung,

having regard to the written procedure and following the oral procedure of 22 March 2000,

gives the following

Judgment

Facts

1 The applicant, an official of the General Secretariat of the Council of the European Union since 16 February 1981, was employed in the English section of the Council's central typing pool.

2 By note of 17 November 1995 Mr Tarling, Director of the Personnel and Administration Directorate suggested to Dr Boussart, the Council's medical officer, that he should consider starting an invalidity procedure with respect to the applicant, having regard to 'the frequency and number of absences', namely 284 days in a period of 36 months up to the end of September 1995. On 20 December 1995, Dr Boussart answered that note, stating *inter alia* that 'after meeting her and her own doctor' it would be preferable to 'see how the situation evolved at the beginning of the year before reaching a decision' and that 'a change of post might have a favourable influence on her absenteeism having regard to her bad relations with her current professional colleagues'.

3 By note of 7 March 1996, Mr Tarling, referring to that note of Dr Boussart's, invited the applicant to apply 'for posts of her grade and category published under the mobility procedure'.

4 On 28 May 1996, Mr Tarling again wrote to Dr Boussart, asking him to 'form an opinion about the possibility of referring the [applicant's] case to the Invalidity Committee', adding that, despite his invitation to do so, the applicant had not submitted her candidature for any vacant posts under the mobility procedure.

5 By note of 12 June 1996, Dr Boussart informed Mr Tarling that 'a referral could be made to the Invalidity Committee in the case of [the applicant]'.

6 By letter of 14 June 1996, Mr Weinstock, Director-General of the Council's Personnel and Administration Directorate A, informed the applicant that, following the opinion of the medical officer, he had decided to refer her case to the Invalidity Committee, appointing Dr Boussart as one of the three doctors making up the Invalidity Committee. He also asked her to appoint a second doctor so that a third could be appointed by the other two. Copies of Articles 59 and 78 of the Staff Regulations and of Articles 7 and 9 of Annex II thereto were annexed to that letter.

7 By letter of 6 July 1996 to Mr Weinstock, the applicant, assuming that the decision to refer her case to the Invalidity Committee had been taken on the basis of the fourth paragraph of Article 59(1) of the Staff Regulations, stated that, since her absences during the period from 1 January 1993 to 30 June 1996 did not exceed the 12 months provided for by that article, the decision had no legal basis.

8 By letter of 12 July 1996, the applicant asked the Council to supply precise details concerning the arrangement for appointing a doctor of her choice. By letter of 19 July 1996, the Council informed the applicant that the doctor of her choice could contact Dr Boussart or the Council's officials in order to obtain information regarding the Invalidity Committee's procedure.

9 By letter of 14 August 1996, the Council again requested the applicant to appoint a doctor of her choice to the Invalidity Committee and, by letter of 26 August 1996, informed her that it would ask the President of the Court of Justice to nominate a doctor in accordance with Article 7 of Annex II to the Staff Regulations.

10 By letter to Mr Weinstock of 30 August 1996, the applicant stated that the Council had still not informed her of the legal basis on which her case was to be referred to the Invalidity Committee and repeated that the conditions laid down in the fourth paragraph of Article 59(1) of the Staff Regulations had not been satisfied. By note of the same day, the Assistant Director of Personnel and Administration Directorate A answered the applicant's abovementioned letter stating that the appointing authority may, on the basis of a medical opinion, set up an Invalidity Committee at any time without being required to wait until an official's absences totalled 12 months in a period of three years.

11 By letter of 3 September 1996, the applicant requested Dr Boussart to give her access to her medical file. By note of that date, he refused to grant that request, stating that her file could, however, be sent to a doctor of her choice.

12 By letter of 30 September 1996, addressed to Mr Weinstock, the applicant pointed out *inter alia* that there was no provision in the Staff Regulations entitling the Council to set up an Invalidity Committee at any time, and she again challenged the Council's calculation of her absences. She added that, in the absence of the necessary information, she was not in a position to appoint a doctor of her own choice to the Invalidity Committee. She therefore requested that that information be given to her and that she should be given until the end of October 1996 for that purpose. By note of 17 October 1996, the Council granted her the requested extension.

13 By letter to Mr Weinstock of 31 October 1996, the applicant stated that she still had not received from the Council the information necessary to enable her to appoint a doctor of her choice to the Invalidity Committee. She added that, as was apparent from her last annual medical examination, she was capable of performing her duties and that, in consequence, there was no reason to refer her case to an Invalidity Committee.

14 By note of 18 November 1996, Mr Weinstock informed the applicant that the information relating to her presences and absences was based entirely on information supplied by the unit in which she worked and informed her that, pursuant to Article 7 of Annex II to the Staff Regulations, he would ask the President of the Court of Justice to appoint a second doctor to the Invalidity Committee.

15 By letter of 7 March 1997, Dr Legein was informed by the Court of Justice that he had been nominated to represent the applicant on the Invalidity Committee.

16 By letters to Mr Weinstock of 7 and 10 April 1997, the applicant requested *inter alia* specific information as to the provision in the Staff Regulations which permitted the case to be referred to the Invalidity Committee and copies of correspondence between the Council and the President of the Court of Justice.

17 By letter of 21 April 1997, Mr Tarling informed the applicant that Dr Boussart and Dr Legein had agreed to appoint Dr Olmechette as the third member of the Invalidity Committee and that the Committee would meet on 11 June 1997.

18 By letter of 21 April 1997, Dr Legein invited the applicant to attend his surgery for a consultation on 7 May. By letter of 28 April 1997, Dr Olmechette also proposed that the applicant should undergo a medical-psychological examination in French at his surgery on 6 May.

19 By letters of 4 May 1997, addressed to Dr Legein and Dr Olmechette, the applicant stated that the establishment of an Invalidity Committee in her case had no legal basis and that no appointment could be arranged until the Council had supplied her with the information requested in her letters of 7 and 10 April 1997.

20 By letter of 25 May 1997 addressed to Dr Boussart, the applicant requested that her complete medical file should be sent to Dr Lone Petersen and that the latter should be informed of the precise grounds on which Dr Boussart had advised Mr Tarling, in his note of 12 June 1996, to refer her case to an Invalidity Committee (see above, paragraph 5).

21 By letter of 3 June 1997 addressed to Mr Weinstock, the applicant again claimed that the conditions of Article 59 of the Staff Regulations were not satisfied in her case, and requested the Council to inform her of the legal basis for the establishment of an Invalidity Committee.

22 By letter of the same date, addressed to Dr Boussart, the applicant repeated a request for her medical file to be sent to Dr Lone Petersen, and to be informed of the precise grounds on which Dr Boussart had proposed to Mr Tarling that an Invalidity Committee should be established in her case.

23 By letter of 4 June 1997 to Mr Weinstock, the applicant requested *inter alia* that she or her general practitioner should be given the precise reasons for her being obliged to undergo any medical examination other than the annual medical examination provided for in the Staff Regulations. If she were to be obliged to undergo any sort of psychological examination, she demanded to be accompanied by a third party of her choice and to be given sufficient advance notice of the date of the appointment in order to secure the presence of that person.

24 By letter of the same day, Mr Tarling informed the applicant that the Invalidity Committee was to meet on 9 July 1997.

25 On 6 June 1997, Dr Boussart sent the following letter to Dr Petersen:

'...

Further to your request of 30.6.97, please find herewith a copy of the objective facts in [the applicant's] medical file. I would inform you that since 1989 her annual examinations have been carried out by a general practitioner. I possess no information to communicate which might be useful in the treatment of your patient ...'.

26 It is apparent from the file that those 'objective facts' were blood and smear test results.

27 By letter of 10 June 1997, the Head of the Personnel Division of the Court of Justice informed the applicant that the President of the Court of Justice had nominated a psychiatrist 'having regard to the information supplied by the [Council's] medical service on the medical speciality required for consideration of her file'.

28 By note of 12 June 1997, Mr Tarling, referring to the applicant's note of 4 June 1997, replied *inter alia* that the annual medical examination which she had undergone had no bearing on the Invalidity Committee procedure inasmuch as such an examination did not necessarily demonstrate that the official concerned was fit for work. He added that it was essential that the applicant should keep the appointment with Dr Legein on 18 June 1997.

29 By letter of 9 July 1997, the applicant was informed of the conclusions of the Invalidity Committee. Those conclusions are as follows:

'The Invalidity Committee ... having examined [the applicant's] case ... has reached the conclusion that the person concerned is suffering from invalidity to be considered as total making it impossible for her to perform the duties corresponding to a post in her career bracket and, in consequence, it is obliged to suspend her from duties with the general secretariat of the Council of the European Union. [The applicant's] invalidity shall be reviewed in one year.'

30 By letter of 15 July 1997, the applicant was notified of the decision of the Secretary-General of the Council No 677/97 ('Decision No 677/97' or 'the contested decision') declaring her to be suffering from total permanent invalidity preventing her from performing her duties. That decision was worded as follows:

'The Secretary-General of the Council of the European Union,

Having regard to the Staff Regulations of Officials of the European Communities, and in particular Articles 53 and 78 thereof, and Articles 13 to 16 of Annex VIII thereto,

...,

having regard to the Invalidity Committee's report of 9 July 1997, received on the same date, recognising that [the applicant] fulfils the conditions laid down in the first paragraph of Article 78,

Whereas [the applicant] is therefore obliged to end her service with the Communities,

HAS DECIDED AS FOLLOWS:

1. It is hereby established that [the applicant] is suffering from total permanent invalidity preventing her from performing her duties.

2. [The applicant], born on 19 March 1942 in Dublin, is automatically retired as from 31 July 1997.

3. The Invalidity Committee shall be reconvened before 31 July 1998 to deliberate on the question of whether [the applicant] is still suffering from permanent invalidity considered as total invalidity preventing her from performing the duties corresponding to her career.'

31 By letter of 19 September 1997, the applicant asked Dr Boussart to explain to her the precise nature of the illness from which she allegedly suffered, its origin, the grounds on which the Invalidity Committee had based its decision in declaring her to be suffering from total permanent invalidity, and also any evidence or information which was taken into consideration by that committee. Finally, the applicant requested that the information be notified to her directly or, if that were not possible, that the information be communicated to Dr E. Conway McGee in Ireland.

32 On 24 September 1997, Dr Boussart sent the following letter to Dr Conway McGee:

'...

The Invalidity Committee in [the applicant's] case met on 9.07.97. Further to a request sent to me on 16.09.97, I forward the following information for your attention:

- the Invalidity Committee had concluded that she is unfit to fulfil the duties of her post as a result of a paranoid-type pathology;

- despite the poor prognosis, the Invalidity Committee did not wish to make a definitive decision;

- the case will be reviewed in one year, a period during which it is hoped that [the applicant] will be looked after by a specialist of her choice.'

33 On 15 October 1997, the applicant lodged a complaint pursuant to Article 90(2) of the Staff Regulations, attaching *inter alia* a report by Dr Berthold A. Mackert, dated 25 June 1997, and a specialist report by the same doctor of 7 October 1997, which he drew up after receiving the conclusions of the Invalidity Committee of 9 July 1997.

34 In his specialist report, Dr Berthold A. Mackert declares that, as a specialist neurologist and psychiatrist, he has treated the applicant several times as his patient and that she suffers from a neuro-organic pathology which appeared following an accident on 18 February 1997 taking the form of what is called a 'discal prolapse of the cervical column – at the C 6/7 level'. As a psychiatrist specialist, he categorically excludes any diagnosis of paranoia or the possibility that the applicant is suffering from neurotic problems. In his opinion, the diagnosis made by the Invalidity Committee is contrary to practice and to national and international medical law, in so far as the applicant has never been examined 'in person thoroughly and with recourse to the methods of psychiatry' by the doctors of that committee.

35 By letter of 12 February 1998, received by the applicant on 18 February 1998, the Secretary-General of the Council rejected her complaint.

36 By request lodged at the Registry of the Court of First Instance on 28 May 1998, the applicant brought the present proceedings.

Forms of order sought by the parties

37 The applicant claims that the Court should:

– declare this action to be admissible and well founded;

– annul Decision No 677/97;

– reinstate her in her former post or position at the Council, without any loss or diminution in her status, salary or incidental benefits;

– annul all subsequent decisions following on or giving effect in any way to Decision No 677/97, made by the Council, its servants or agents;

– annul the decision of 14 June 1996 of the Director-General of the Personnel and Administration Directorate of the Council to refer the applicant's case to an Invalidity Committee;

– declare the conclusions of the Invalidity Committee reached on 9 July 1997 null and void;

– order the Council to pay her all arrears of salary owing to her from 1 August 1997, including incidental benefits, together with interest at the rate of 10% per annum on those sums which should have been paid to her if Decision No 677/97 had never existed;

– order the Council to pay her the sum of BEF 3 000 000 by way of compensation for non-material damage;

– annul the findings of the Secretary-General of the Council of 12 February 1998 rejecting her complaint of 15 October 1997 and confirming the validity of Decision No 677/97;

– order the defendant to pay the costs.

38 The Council contends that the Court should:

- dismiss the application as unfounded;

- order the applicant to pay the costs.

39 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (First Chamber) decided to open the oral procedure. At the public hearing on 27 March 2000 the parties submitted oral argument and replied to the questions asked by the Court.

The claim for annulment of Council Decision No 677/97

The first plea: breach of essential procedural requirements

Arguments of the parties

40 The applicant maintains that, contrary to the requirements of the case-law on this question, the conclusions of the Invalidity Committee, which purport to provide the basis upon which Decision No 677/97 was adopted, and which merely state that she is suffering from invalidity considered as totally preventing her from performing the duties corresponding to a post in her career bracket, do not enable her to assess the considerations upon which the decision is based (Case T-165/89 *Plug* v *Commission* [1992] ECR II-367). In the absence of any reference whatsoever to any medical findings, it is impossible to establish a link between the medical findings, if any, of the Invalidity Committee and its conclusions. Furthermore, those conclusions are contradicted by the findings of Dr Berthold A. Mackert, as set forth in his reports of 25 June and 7 October 1997.

41 The Council maintains that a distinction must be drawn between the procedure before the Invalidity Committee and the findings made by that committee, on the one hand, and the procedure leading to the adoption of the contested decision, on the other. With regard to the procedure before the medical committee, the Council submits that the medical assessment made by that committee is not subject to review by the Court and

adds that, in accordance with the relevant case-law, that assessment was made in conditions that were regular. Moreover, not only were sufficient reasons given for the findings of the Invalidity Committee, but also the applicant was fully aware of the context and scope of those findings. It points out that it has not been established that Dr Mackert's report was put before the Invalidity Committee and that that report would in any event have constituted only one element among other medical facts which the Invalidity Committee had to take into consideration. Furthermore, the Council considers that findings of the Invalidity Committee do not require a statement of reasons similar to that in the contested decision.

42 With regard to the procedure leading to the adoption of the contested decision, the Council maintains that the reasons for that decision are clear and explicit in so far as they refer to the finding of the Invalidity Committee that the applicant suffers from total permanent invalidity preventing her from performing her duties.

Findings of the Court

43 It is established case-law that the provisions relating to the Medical Committee and the Invalidity Committee are designed to confer upon medical experts the task of definitively appraising all medical questions. Judicial review may not extend to medical appraisals properly so-called, which must be considered definitive, provided that the conditions in which they are made are not irregular. On the other hand, judicial review may extend to questions concerning the proper constitution and functioning of those committees, and also the regularity of the opinions which they issue. From that point of view, the Court has jurisdiction to examine whether the opinion contains a statement of reasons enabling the reader to assess the considerations on which the conclusions which it contains were based and whether it establishes a comprehensible link between its medical findings and the conclusions reached by the Committee (Case 277/84 *Jänsch* v *Commission* [1987] ECR 4923, paragraph 15, *Plug*, cited above, paragraph 75, and Case T-27/98 *Albert Nadone* v *Commission* [1999] ECR II-0000, paragraph 87).

44 In the present case, it must be observed that the opinion of the Invalidity Committee is marked by a conspicuous absence of reasoning, inasmuch as it does no more than find and simultaneously conclude that the applicant is suffering from an invalidity which is considered to be total and which prevents her from performing her duties.

Consequently, the Court is not in a position to check whether there is a comprehensible link between the medical findings of the Invalidity Committee and the conclusions reached by that committee.

45 The Council has attempted to justify this lack of reasoning by referring to a series of documents, annexed to its defence (see below, paragraphs 53 and 54), which, in its view, should serve as 'background' for the Court and enable it to have a 'better understanding' of the 'broader' dispute.

46 The Council cannot, however, make good the manifest lack of reasoning vitiating the opinion of the Invalidity Committee by producing, for the first time, before the Court evidence concerning the applicant's behaviour in the workplace which, it claims, demonstrates that she is suffering from 'paranoia-type illness'. Not only is it not apparent from the opinion of the Invalidity Committee that such evidence had actually been made available to it and taken into consideration but also the documents concerned have no connection with the procedure before that committee (the applicant's old staff reports) and some of them are neither dated nor signed and have not even been put on the applicant's personal file or brought to her attention in order for her to inspect them and defend herself.

47 Since the conclusions of the Invalidity Committee are vitiated by a manifest lack of reasoning, the contested decision based on those conclusions must, in consequence, be annulled (see *Plug*, cited above, paragraph 79).

48 Nevertheless, in view of the particular circumstances of the case, the other grounds of annulment must also be considered, or particularly as the applicant bases her claim for compensation for the damage she has allegedly suffered on those grounds.

The second plea: lack of competence

Arguments of the parties

– The appointing authority's power to refer a case to the Invalidity Committee

49 The applicant maintains that the fourth subparagraph of Article 59(1) of the Staff Regulations is the only provision which enables the appointing authority to refer a case to the Invalidity Committee where absences due to illness preventing an official from performing his or her duties are more than 12 months in a period of three years. She adds that, throughout the proceedings, she has denied that that condition was satisfied, since her absences due to illness did not exceed 12 months in a period of three years.

50 She adds that, contrary to the Council's submission, the only relevant absences for the purposes of the present action are the sick-leave absences. It is clear from the table of her absences, annexed to the defence, that her sick-leave absences in excess of 12 months concern only the period from 1990 to 1992. It is clear from Mr Tarling's note of 17 November 1995 that her case was referred to the Invalidity Committee for the reason that her absences came to a total of 284 days in a period of three years up to the end of September 1995. In any event, the appointing authority could not validly refer a case to the Invalidity Committee on the grounds of facts which had occurred three and a half years earlier.

51 Even assuming that the Council may refer an official's case to an Invalidity Committee at any time on the basis of a medical opinion, the applicant claims that in the circumstances of her case there was no medical opinion, since Dr Boussart's note of 12 June 1996 contains absolutely no reasoning in that regard.

52 The Council states that, while the applicant's many absences on medical grounds were undoubtedly an important factor in the decision to refer her case to the Invalidity Committee, the applicant's staff reports and the problems and serious disturbances which she created in her immediate working environment were also taken into consideration.

53 In that connection, the Council states that the applicant's staff reports for the periods 1989-1991, 1991-1993 and 1993-1995 show that she had relational problems with her colleagues and that she was not performing duties corresponding to a post in her career bracket. It acknowledges, however, that it is apparent from the 1985-1987 and 1987-1989 staff reports and from the opinion of the Reports Committee of 22 January 1997 that the applicant is 'an intelligent person who is capable of doing good work'.

54 With regard to the applicant's behaviour, the Council maintains that the information in its possession prompted it, as employer, to form the opinion that the applicant might be suffering from a pathological condition of a medical or psychiatric nature. In support of its contentions, the Council produces the following documents:

- a note of 9 June 1988 by the head of the English section of the typing pool addressed to the applicant and asking her, in view of her 'recent behaviour', no longer to 'act as a Team Leader on overtime';

- a note of 9 June 1988 from the same person, addressed to the appointing authority, requesting it to transfer the applicant 'to a working environment more suited to her temperament' and to refer her case to the Disciplinary Committee;

- a note of 24 June 1988 sent by the same person to the applicant, informing her that, having regard to her behaviour, she could no longer expect to be 'in a position of responsibility';

- an undated note by a translator/reviser explaining that, on mission to Lugano, the applicant, on the eve of the signing of the text of the Convention on Recognition and Enforcement of Judgments, signed on 16 September 1988, had threatened to walk out, leaving unfinished the text to be translated;

- a note of 11 January 1994 from Mr Tarling to the applicant, concerning partial authorisation of two days' unauthorised leave taken by the applicant on 17 and 20 December 1993;

- a note of 24 February 1994 from the head of the English section of the typing pool to her hierarchical superior, informing the latter that the applicant's capabilities no longer permitted her to take part in the mission in connection with the European Council meeting in Corfu in 1994;

– a note of 6 March 1994 from the applicant to Mr Motte, asking him to send her written notes in his possession, made by her hierarchical superior, and a note of the same date, addressed to her hierarchical superior, Mrs Ellis, on the same subject;

– a note of 13 March 1993 from the applicant to Mrs Ellis, challenging the latter's allegations concerning the quality of the applicant's work in the English section of the typing pool, and requesting a meeting to discuss the matter in order to avoid damage and further prejudice to her professional reputation;

– a handwritten unsigned note which, according to the Council, was placed 'in the file', dated 'January/February 1995', stating that, at the time of the move to the new Council building in Brussels, electricians refused to return to the applicant's office because she 'actually physically and verbally assaulted them!';

– a letter of 15 May 1995 sent by the applicant to one of her colleagues, marked 'Confidential', requiring her to confirm in writing within seven days the negative statements that the colleague had allegedly made concerning the applicant's work and informing her that, failing confirmation, she would inform her immediate superior. In the Council's view, such a letter would not be expected from 'a normally balanced person';

– finally, three handwritten, undated and unsigned notes, concerning the applicant's behavioural problems with her colleagues.

55 In its defence, the Council also refers to the fact that it is in dispute with the applicant over her pension rights, over an accident suffered by the applicant on 17 August 1991, over the arrangements for a new Invalidity Committee and over her staff report for the period 1995-1997. According to the Council, it is apparent from the case-file and, in particular, from (i) the applicant's extensive absences on sick leave covered by a medical certificate, (ii) her behaviour in the department, (iii) the fact that she challenged every administrative decision or matter concerning her, whether it were favourable, neutral or adverse, (iv) her obstructive attitude to the work of the Invalidity Committee, (v) the fact that, throughout the proceedings, she constantly requested extension of time-limits and waited until the last day before responding, while at the same time demanding instant responses, and (vi) the aggressiveness of her tone in both written and oral exchanges, that the applicant has suffered and is suffering from a pathological condition which prevents her from performing her duties and that that produces effects on her personal relationships.

56 The Council maintains that it is quite plain from Articles 13 and 15 of Annex VIII to the Staff Regulations that the appointing authority has a discretion in deciding whether to refer a case to the Invalidity Committee, which goes beyond the limits of Article 59 of the Staff Regulations and which is based on all the facts and circumstances of each case, including, as in the present case, the applicant's behaviour towards colleagues.

57 It thus rejects the applicant's argument that a case may be referred to the Invalidity Committee only where the sick leave taken by the person concerned exceeds 12 months in a period of three years, since such an interpretation would make it impossible for the Council to make a referral where an official's absences did not exceed the critical threshold of 12 months. In addition, it is clear from the file that during the period of 1990-1992 the applicant was on sick leave for 415.5 days (to which the Council adds six days' absence without a medical certificate), that is to say more than 12 months. During the period 1993-1995, she was absent on sick leave for 308 days (to which the Council adds 10 days' absence without a medical certificate). It is against that background that the Council decided to refer the applicant's case to the Invalidity Committee.

58 The applicant argues that the Council's references to her staff reports, to her alleged conduct towards her colleagues and to the 'other areas of dispute' are matters extraneous to the appointing authority's decision to refer her case to the Invalidity Committee. She adds that some of the facts mentioned by the Council are no more than hearsay, whereas others appear in unsigned documents, some of which were never communicated to her, so that, under Article 26 of the Staff Regulations, they cannot be relied upon against her in the present proceedings. Furthermore, she denies that her staff reports demonstrate that she had relational problems with colleagues or that her work was not commensurate with her grade.

59 With regard to the Council's claim that it appeared from her annual staff reports that she suffered from a pathological condition of a medical or psychiatric nature, the applicant replies that, following her annual medical examinations, she had never been informed that she had such a pathological condition, nor was she asked to undergo a medical examination to determine whether her state of health was such that she should take leave pursuant to Article 59(2) of the Staff Regulations. She states that it was not until she read the defence that she learnt for the first time that she was suffering from a pathological condition.

60 The applicant also denies that her alleged conduct towards her colleagues could properly be a factor in a referral to the Invalidity Committee. Such a matter could be dealt with only under a disciplinary procedure and not a medical procedure.

– No medical basis for the contested decision

61 The applicant states that she was never examined by any of the members of the Invalidity Committee. While in *Alfieri* v *Parliament*, the Court of Justice held that no provision requires the Invalidity Committee to carry out such an examination and there may be cases where it is possible to deduce the invalidity of the person concerned by simply reading the medical file (Case 3/66 *Alfieri* v *Parliament* [1966] ECR 437), that was because in that case the applicant, who had been absent on grounds of sickness for 1 666 days between 1959 and 1965, was absent because of 'serious illness' and, although he was not examined by the Invalidity Committee, his illness was sufficiently well known to the Committee for it to be able to reach a determination solely on the basis of his medical file. In the present case, nothing in the applicant's medical file makes it possible to conclude that she was suffering from total permanent invalidity preventing her from performing the duties corresponding to a post in her career bracket. She adds that, at the time when the appointing authority decided to refer the case to the Invalidity Committee, she was working and carrying out all duties corresponding to her category and grade.

62 The applicant maintains that it is clear from her letter of 30 September 1996 to Mr Weinstock that she was willing to appoint a doctor of her choice provided that she received the information requested in her letter to the Council of 12 July 1996.

63 The Council points out that the applicant refused, wilfully and knowingly, to respond to the invitations by the members of the Invalidity Committee to examine her and refers in this connection to the judgment of the Court of Justice in Case C-291/97 P *H* v *Commission* [1998] ECR I-3577. It maintains that the Invalidity Committee was entitled to deduce the applicant's invalidity from the facts of the case and, in particular, from the manner in which the applicant communicated with the Committee. With regard to the applicant's argument that, when the appointing authority decided to refer her case to the Invalidity Committee, she was performing all the duties corresponding to her category

and grade, the Council refers to the evidence of witnesses concerning the manner in which she performed those duties.

– Divergence between the findings of the Invalidity Committee and the contested decision

64 The applicant maintains that the findings of the Invalidity Committee on which the contested decision is based mention neither any permanent incapacity nor permanent invalidity allegedly affecting the applicant, so that there is no basis for the contested decision (see the judgment of the Court of Justice in Case 257/81 *K* v *Council* [1983] ECR 1, paragraph 11).

65 The Council maintains that the findings of the Invalidity Committee which refer to the 'total invalidity' affecting the applicant must be understood as referring to 'total permanent invalidity', which is the term used in the contested decision.

Findings of the Court

66 It is clear from the provisions of Article 59 of the Staff Regulations that the appointing authority may refer a case to the Invalidity Committee only where an official's cumulated sick leave totals 12 months or more in any period of three years, where the official concerned challenges his being required to take leave on the institution's initiative after examination by the institution's medical officer or where the administration challenges the medical certificates produced by the official concerned (fourth paragraph of Article 59(1), and Article 59(2) and (3) of the Staff Regulations).

67 Having regard to the serious consequences which referral to the Invalidity Committee may have for an official's professional career, it is essential that this power of the appointing authority should be strictly limited and expressly circumscribed. Consequently, to allow the appointing authority a discretion enabling it to refer a case to the Invalidity Committee at any time for reasons other than those expressly provided for in Article 59 of the Staff Regulations would run counter to the principle of legal

certainty underlying the spirit of that article and would render nugatory the procedural guarantees which that article confers on the official concerned.

68 That conclusion cannot be invalidated by the fact that the fourth paragraph of Article 59(1) of the Staff Regulations provides that the appointing authority 'may' refer a case to the Invalidity Committee. In the circumstances, the use of the verb 'may' must be understood to mean that, where an official's sick leave exceeds the period of 12 months, the administration is not automatically obliged to refer that official's case to the Invalidity Committee.

69 As regards the question whether the conditions laid down in the fourth paragraph of Article 59(1) of the Staff Regulations had actually been satisfied in the applicant's case, it must be stated that, in his note to Dr Boussart of 17 November 1995, Mr Tarling asked him to consider the possibility of referral to the Invalidity Committee inasmuch as, at the end of September 1995, her absences had reached 284 days in a period of three years, that is to say less than 12 months. It follows that the conditions laid down in the Staff Regulations for referral to the Invalidity Committee had plainly not been satisfied in the circumstances of the case.

70 The fact that in the period 1990-1992 the applicant's absences exceeded the critical period of 12 months is irrelevant here, since, as has just been pointed out, that period was not that taken into consideration in Mr Tarling's abovementioned note. In addition, as the Council acknowledged at the hearing, the critical period of three years to be taken into account for the purposes of application of the fourth paragraph of Article 59(1) of the Staff Regulations is the period preceding the decision to refer a case to the Invalidity Committee and not a period ending, as in this case, three years before the adoption of such a decision.

71 Even assuming that the referral of the case to the Invalidity Committee was made in accordance with the Staff Regulations, the fact still remains that the conclusions which that Committee reached are vitiated by illegality.

72 Although, according to case-law, no provision requires the Invalidity Committee to examine the official concerned where it is possible to deduce that person's invalidity simply by reading the medical file (*Alfieri* v *Parliament*, cited above), the fact remains that such an examination may be essential where it is impossible to deduce the invalidity of the person concerned from his or her medical file alone. In the circumstances of the instant case, it is apparent from the case-file that the Invalidity Committee found the applicant to be suffering from total incapacity without any of the three doctors who were its members ever having examined her in person. Apart from the results, which were moreover normal, of the applicant's annual medical examinations, no other similar examination or other relevant medical fact has been placed in the file on which the Invalidity Committee could have relied in reaching its conclusions.

73 The Council's argument that it was because the applicant refused to appear before the Invalidity Committee that the latter was unable to examine her is unfounded.

74 Admittedly, where the official concerned refuses to appear before an Invalidity Committee, the question of whether the documents in the possession of that committee enable it to make a decision concerning the official's state of health falls within the discretion concerning medical matters given to the members of the committee. However, the official in question may always adduce evidence that the committee has in fact exceeded the limits of its discretion (see *H* v *Commission*, cited above, paragraph 87).

75 In the present circumstances, it must be stated that, throughout the administrative procedure, the Council avoided informing the applicant, despite her persistent requests, of the specific provision in the Staff Regulations and any other relevant factors on which the decision to refer her case to the Invalidity Committee was based, which, in view of the serious consequences of such a procedure for the person concerned, constitutes a serious breach of the guarantees which Article 59 of the Staff Regulations confers on that person. The observance of medical confidentiality relied on by the Council in order to justify its conduct cannot dispense it from the obligation to inform the official concerned, even in general and abstract terms, of the sort of illness or pathology from which he is supposedly suffering, before the official decides to appear before the Invalidity Committee and appoints a doctor of his choice.

76 In consequence, in so far as the Council refused to inform her of the provision in the Staff Regulations providing the basis for referring her case to the Invalidity Committee and what the general nature of her presumed invalidity supposedly was, the applicant was entitled to refuse to appear before it so long as those elementary guarantees of her rights under the Staff Regulations were not respected.

77 Even if the applicant's refusal to appear before the Invalidity Committee were not justified, the Council cannot maintain, in any event, that the Committee could properly give a decision on her case by relying on her medical file. As has already been held (see above, paragraph 72), none of the evidence put before it suggests that there was any medical file on the applicant other than the one made up of the results of her annual medical examinations. It must be pointed out in this connection that Dr Boussart, the Council's medical officer, initially refused to send the applicant her medical file. Subsequently, when she finally gave him the name of her doctor so that her medical file could be sent to that doctor, Dr Boussart sent only the applicant's blood analysis and smear test results, which were moreover normal, stating that this was the only 'objective' information in the file. According to Dr Boussart, as the applicant had her annual medical examinations carried out by 'external' doctors, he did not hold the results. However, that assertion is shown to be unfounded by the fact that, as the applicant points out in her pleadings without being contradicted by the Council, the results of annual medical examinations carried out by 'external' doctors are communicated to the medical service of the institution concerned, that is, in this case, Dr Boussart.

78 What is more, there exists a patent contradiction between the fact that the applicant's medical file made available to the Invalidity Committee contained only her blood analysis and smear test results and the fact that, as the Council stated in its pleadings, other factors, such as her staff reports, were also taken into account by the Committee in concluding that the applicant was affected by invalidity. As has already been found (see above, paragraph 46), that evidence was never communicated to the applicant or to the doctor appointed by her.

79 On the other hand, the applicant's argument that there is a discrepancy between the conclusions of the Invalidity Committee and the contested decision, inasmuch as the conclusions referred to 'total incapacity' whereas the contested decision refers to total permanent invalidity, is unfounded. That difference in language which, having regard

to the content and meaning of the opinion of the Invalidity Committee, could be the result of a mere oversight in drafting, is in any event irrelevant in the circumstances since both the findings of the Invalidity Committee and the operative part of the contested decision state that '[the applicant's] invalidity shall be reviewed in one year'. Although Article 78 of the Staff Regulations applies only if the official's invalidity is permanent, such a finding is not incompatible with future improvements in the official's condition and does not therefore exclude regular medical examination of the official (see, to that effect, Articles 14 and 15 of Annex VIII to the Staff Regulations).

80 It follows from all the foregoing that the plea must be upheld.

Third plea: misuse of powers

Arguments of the parties

81 The applicant states that it is clear from the case-file that the Invalidity Committee was convened by the Council not for the purpose of investigating whether she was suffering from a total permanent incapacity preventing her from carrying out her duties, but as a means of compulsorily retiring her. She states that the initiative to refer her case to the Invalidity Committee came from Mr Tarling and not from the medical officer. She adds that, far from suggesting that she was incapable of working, Dr Boussart, in his note of 20 December 1995 to Mr Tarling, had stated that 'a change of post might have a favourable influence on her absenteeism having regard to her bad relations with her current professional colleagues'. That reply was annexed to the note of 7 March 1996 in which Mr Tarling invited the applicant to apply 'for posts of her grade and category under the mobility procedure'. According to the applicant, it is clear from that note that in March 1996 Mr Tarling considered her to be capable of working as an official, which is inconsistent with the fact that, less than three months later, he asked Dr Boussart to take a decision as to referral of her case to the Invalidity Committee.

82 In that connection, she states that not only was Mr Tarling obviously incapable of assessing her state of health, but in his letter of 28 May 1996 to Dr Boussart he also mentioned her failure to apply for two posts as a reason for which Dr Boussart might consider establishing an Invalidity Committee in her case. Failure to apply for a post is not evidence that she was incapable of discharging her duties.

83 The Council denies that its purpose was to retire the applicant compulsorily. It explains that, if it suggested to her that she should seek a transfer to another post, it was in order to exclude the possibility of relational problems with her colleagues. It points out that, at the material time, it had the options of dismissing the applicant for incompetence (Article 51 of the Staff Regulations), compulsorily resigning her (Article 49 of the Staff Regulations) or suspending her from her duties on grounds of total permanent invalidity. It states that it none the less preferred to treat the applicant's case as a medical case and that it went to great lengths to afford her all assistance for that purpose.

Findings of the Court

84 According to settled case-law, a decision is vitiated by misuse of powers only if it appears, on the basis of objective, relevant and consistent evidence, that the disputed decision was taken for purposes other than those stated (see *H* v *Commission*, cited above, paragraph 59).

85 First of all, it is clear from the note of 20 December 1995 from Dr Boussart to Mr Tarling that, at the material time, it was considered that the establishment of an Invalidity Committee in the applicant's case was premature and that 'a change of post might have a favourable influence on her absenteeism having regard to her bad relations with her current professional colleagues'. That note does not, however, indicate the medical reasons for which a mere change of post might at that time have been sufficient for not convening the Invalidity Committee.

86 Second, it was only when the applicant informed Mr Tarling of her decision not to apply for vacant posts in her grade that Mr Tarling decided to ask Dr Boussart to decide whether to convene the Invalidity Committee.

87 Third, the only objective information in the medical file put before the Invalidity Committee and disclosed by the Council's medical officer to the doctor appointed for that purpose by the applicant consisted of blood analyses and smear test results, which were in fact quite normal.

88 Fourth, in its pleadings, the Council declared that at the material time it had the options of (i) dismissing the applicant for incompetence, (ii) referring her case to the Disciplinary Committee or (iii) establishing the Invalidity Committee. Thus, according to the Council, the allegedly professional and/or medical problems of the applicant could at once be solved either through disciplinary proceedings or through the establishment of an Invalidity Committee.

89 Finally, the Council systematically, throughout the procedure, refused to inform the applicant of the specific provision in the Staff Regulations and the medical reasons justifying the establishment of the Invalidity Committee. Furthermore, as the Council stated in its pleadings, the decision to refer the case to the Invalidity Committee was not based only on the number of the applicant's sick-leave absences but also on other factors, such as her staff reports for the years 1989-1995, her allegedly bad relations with some of her colleagues and 'the manner in which the applicant communicated' with the Invalidity Committee, factors of which the applicant was never made aware during the procedure. All those circumstances demonstrate that the Council used its powers for a purpose other than that for which they were conferred and thus committed a misuse of powers (*Plug* v *Commission*, cited above, paragraph 91).

90 It follows from all the foregoing that Council Decision No 677/97 by which it retired the applicant on its own initiative on grounds of total permanent invalidity is vitiated by a breach of essential procedural requirements, by a lack of a legal basis and by a misuse of powers and must, in consequence, be annulled.

The applicant's other claims for annulment

91 First of all, it must be stated that claims for annulment like claims seeking annulment of 'all subsequent decisions giving effect in any way to Decision No 677/97 or following on from it' do not satisfy the requirements of Article 44(c) of the Rules of Procedure, according to which the application must contain *inter alia* a 'summary of the pleas in law on which the application is based', which is not the case in the present instance. In any event, the effect of annulling Decision No 677/97 is to remove the legal basis for decisions which the appointing authority might eventually adopt on the basis of the

annulled decision (see, by analogy, the judgment of the Court of First Instance in Case T-197/98 *Rudolph* v *Commission* [2000] ECR-SC II-0000, paragraph 93). It should be added that, at the hearing, the Council's agent stated that, if Decision No 677/97 were to be annulled, the Council would have to re-examine all other decisions which might have been taken on the basis of the annulled decision.

92 With regard, second, to the claim for annulment of the conclusions ('opinion') reached by the Invalidity Committee on 9 July 1997, it is settled case-law that the opinion delivered by the Invalidity Committee constitutes a preparatory act forming part of the compulsory retirement procedure. Since preparatory acts cannot be the subject of an action for annulment, it is only in connection with an action brought against the decision taken at the conclusion of that procedure that the applicant can contest the legality of earlier steps which are closely linked to it (Case T-196/95 *H* v *Commission* [1997] ECR II-403, paragraphs 48 and 49). It follows that, in so far as the action seeks annulment of the opinion of the Invalidity Committee of 9 July 1997, it is inadmissible. Since the opinion of the Invalidity Committee is a preparatory act, the same holds good *a fortiori* for the decision of the Director-General of the Council of 14 June 1996 to refer the applicant's case to the Invalidity Committee, so that the claims relating thereto must also be held to be inadmissible (order in Joined Cases 78/87 and 220/87 *Santarelli* v *Commission* [1988] ECR 2699).

93 Third, with regard to the claims for annulment of the appointing authority's decision of 12 February 1998 rejecting the applicant's complaint, it must be pointed out that any decision simply rejecting a complaint only confirms the act or failure to act complained of and is not, by itself, a decision open to challenge. It is only when this decision upholds all or part of the complaint of the person concerned that it will, in appropriate circumstances, constitute by itself a decision against which an action can be brought. Since the decision of the appointing authority of 12 February 1998 does not uphold in whole or in part the applicant's complaint, the claims against that decision must also be declared inadmissible (order in Case T-195/96 *Alexopoulou* v *Commission* [1998] ECR-SC II-117, paragraph 48).

94 Finally, since the Court of First Instance has no jurisdiction to issue directions to Community institutions, the action must also be declared inadmissible in so far as it seeks an order that the Council should reinstate the applicant in her former post or position. It is for the institution which issued the act annulled to take the measures required to comply with a judgment (Case T-183/95 *Carraro* v *Commission* [1998] ECR-SC II-329).

The claims for compensation for material and non-material damage allegedly suffered

Arguments of the parties

95 If the contested decision is annulled, the applicant requests to be put in the position in which she would have found herself if the decision had never existed. That means, *inter alia*, her reinstatement in her post with all the rights and benefits pertaining thereto and payment of all arrears of salary accruing after 1 August 1997, the date on which her salary ceased to be paid, together with interest at a rate of 10%.

96 The applicant also claims compensation for the considerable non-material damage which she claims she has suffered on account on the state of uncertainty and anxiety in which she was placed by the procedure which led to the adoption of the contested decision and to the consequences thereof. In particular, besides the difficulties which she had in defending herself against an illegal procedure, she also suffered the trauma of losing her job and the stigma of being branded an invalid when she is willing to discharge her duties as an official of the Council. In consequence, she claims BEF 3 000 000 as compensation for non-material damage (judgment of the Court of Justice in Case 111/86 *Delauche* v *Commission* [1987] ECR 5345, and *Plug* v *Commission*, cited above).

97 The Council maintains that the claim for damages is unfounded, the applicant alone being responsible for creating the situation. An award of damages would amount to unjust enrichment.

Findings of the Court

98 It is settled case-law that the Community can incur non-contractual liability only if a set of conditions relating to the illegality of the conduct alleged against the institution concerned, the occurrence of actual damage and the existence of a causal link between the conduct complained of and the harm alleged are fulfilled (Case T-129/98 *Sabbioni* v *Commission* [1999] ECR-SC II-0000, paragraph 96).

99 Since in the present case it has been established that the Council acted unlawfully (see above, paragraph 90) and the existence of a causal link is not contested either, the Court must examine the extent of the material and non-material damage suffered by the applicant.

100 Since the material damage suffered by the applicant as a result of the adoption of the contested decision is the difference between the remuneration which she received before her retirement and that granted to her on the basis of the contested decision, the Council must be ordered to pay that amount and any other amount corresponding to the benefits which the applicant received before her retirement, together with interest at an annual rate of 5.5%.

101 As regards the claim for compensation for the non-material loss suffered, it must be remembered that, according to case-law, the annulment of a measure may in itself constitute compensation and, in principle, sufficient compensation for any non-material harm which the person concerned may have sustained, in particular if the measure did not involve an injurious assessment with respect to the applicant (see, most recently, Joined Cases T-282/97 and T-57/98 *Giannini* v *Commission* [1999] ECR-SC II-151, paragraph 40). However, in so far as the contested decision concludes that the applicant is suffering from total permanent invalidity and is incapable of performing the duties connected with her post, it involves an unfavourable assessment of her abilities (Case C-343/87 *Culin* v *Commission* [1990] ECR I-225) and therefore constitutes an act seriously damaging her character and professional reputation, so that the non-material damage cannot be indemnified merely by annulling Decision No 677/97.

102 It must be added that, through its improper conduct, the Council has also kept the applicant in a situation of uncertainty and anxiety for more than a year as to the real reasons for referring her case to the Invalidity Committee.

103 The Council must consequently be ordered to pay the applicant, as compensation for the non-material loss sustained, the sum of BEF 2 000 000 (see, most recently, Case T-48/97 *Frederiksen* v *Parliament* [1999] ECR-SC II-0000, paragraph 110), together with interest at an annual rate of 5.5%.

Costs

104 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs, if they have been asked for in the successful party's pleadings. Since the Council has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber)

hereby:

1. **Annuls Council Decision No 677/97 of 11 July 1997 by which it retired the applicant on its own initiative on grounds of total permanent invalidity;**

2. **Orders the Council to pay the applicant the difference between the salary which she received before her retirement and that granted to her on the basis of the contested decision, and any other amount which the applicant received before her retirement, together with interest at an annual rate of 5.5%;**

3. **Orders the Council to pay the applicant the sum of BEF 2 000 000 as compensation for the non-material damage caused to her, together with interest at an annual rate of 5.5% until the date of payment;**

4. **Dismisses the remainder of the action;**

5. **Orders the Council to pay the costs.**

Vesterdorf Vilaras Forwood

Delivered in open court in Luxembourg on 16 June 2000.

H. Jung
Registrar

B. Vesterdorf
President