the end of his probationary period the probation report was supplemented by further comments made by his superiors to the appointing authority is not such as to affect adversely the probationary official where his right to a hearing was respected at every stage of the procedure and he had the opportunity, before the final decision was taken by the competent authority, to submit his point of view on all the criticisms of his behaviour during the probationary period.

3. Whilst the recruitment competitions are 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 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. At the end of the probationary period, the administration must 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 the negative factors revealed in the course of the probationary period.

4. There is a fundamental difference between a decision not to establish a probationary official and dismissal in the strict sense of a person who had been appointed an established official. Whilst in the latter case the grounds justifying the termination of the employment of an established official must be examined in detail, in decisions on the establishment of probationary officials, it is necessary to examine whether or not there are a number of positive considerations showing that establishment of the probationary official is in the interests of the service.

In Case 290/82

DÉSIRÉE TRÉFOIS, a former probationary official at the Court of Justice of the European Communities, residing at Muensbach (Luxembourg), represented by Georges Vandersanden of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Janine Biver, 2 Rue Goethe,

applicant,

v

COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES, represented by François-Xavier Zwickert, Director of Administration, assisted by Alex Bonn of the Luxembourg Bar, with an address for service in Luxembourg at the latter's Chambers, 22 Côte d'Eich,

defendant,

APPLICATION for the annulment of the decision of the President of the Court not to establish the applicant at the end of her probationary period,

THE COURT (Second Chamber)

composed of: K. Bahlmann, President of Chamber, P. Pescatore and O. Due, Judges,

Advocate General: P. VerLoren van Themaat
Registrar: H. A. Rühl, Principal Administrator

gives the following

JUDGMENT

Facts and issues

The facts of the case, the course of the procedure and the conclusions, submissions and arguments of the parties may be summarized as follows:

I — Summary of the facts

In June 1981 Mrs Désirée Tréfois, who had been a member of the auxiliary staff in the Translation Directorate of the Court of Justice since 1 August 1979, took part in internal competition No CJ 38/80 based on qualifications and tests for the recruitment of a clerical assistant in the Library Division of the Library and Documentation Directorate. As a result of that competition, she was placed first on the list of suitable candidates.

By decision of the President of the Court of 15 September 1981 Mrs Tréfois was appointed a probationary official in the

said post in Grade C 5, step 2, with effect from 1 August 1981.

Mrs Tréfois actually took up her new duties on 1 October 1981, the date on which she was transferred from the annex of the Library Division attached to the Translation Directorate in the Jean Monnet Building, where she had performed her duties until then, to the main building of the Court of Justice.

On 24 March 1982 the head of the Library Division drew up the report at the end of Mrs Tréfois's probationary period, recommending that she be dismissed at the end of her probationary period.

The report contains an assessment of the main duties carried out during the probationary period with six heads considered "satisfactory" and four heads considered "unsatisfactory"; it refers in particular to Mrs Tréfois physical unsuitability, frequent absences, limited interest and inadequate output, resulting from her absences.

In the statement of the grounds for those marks, the report makes the following comments:

"Her duties as library stockroom assistant consist first in the day-to-day movement and arrangement of books, which involves regularly moving trolleys from one floor to another and shifting books which are often cumbersome.

The large number of books to be handled daily requires a certain physical strength on the part of the person carrying out these duties; in my opinion Mrs Tréfois's strength is not sufficient.

The regular presence of the person carrying out the duties of stockroom assistant is essential both to permit access to the stockroom and to avoid backlogs building up in the handling of the books. Unfortunately, it has been noted that Mrs Tréfois is frequently absent for family or health reasons.

The work does not fully meet the aspirations of Mrs Tréfois, who has expressed a preference for secretarial work; this explains her very limited interest in the work.

For reasons relating to a lack of interest in the duties with which she is entrusted, the lack of continuity in the work and her physical unsuitability for the duties inherent in the post in question, I cannot propose that Mrs Tréfois be established.

It is possible, however, that Mrs Tréfois could work satisfactorily in a different post in the Court where the conditions required were less onerous and which involved duties better suited to her interests."

The report was communicated to Mrs Tréfois on 29 March 1982; on the same day she submitted her objections in writing and stated the reasons for which she was unable to accept any of the negative observations in the report.

On 7 April 1982, Mrs Tréfois was informed in a note from the Director of Administration that the appointing authority had decided not to establish her. The formal decision of the President of the Court, in his capacity as the appointing authority, to terminate Mrs Tréfois's probationary period without establishing her was taken on 5 May and communicated to her on 7 May 1982.

On 3 June 1982, Mrs Tréfois submitted a complaint under Article 90 (2) of the Staff Regulations against the decision to dismiss her and the probation report on her.

In a letter of 16 July 1982, Mrs Tréfois was sent a note addressed by the President to the Director of the Library and Documentation Directorate and memoranda in reply from the latter and from Mrs Tréfois's superior. On 29 July 1982 Mrs Tréfois submitted her comments on those memoranda to the President in writing.

Mrs Tréfois's complaint was rejected by the President of the Court on 23 September 1982; that decision was communicated to Mrs Tréfois on 27 September 1982.

II — Written procedure

On 11 November 1982; Mrs Tréfois brought this application for the annulment of the President's decision rejecting her complaint, of the decision terminating her probationary period without establishing her and, in so far as necessary, the probation report drawn up prior to that decision.

The written procedure followed the usual course.

The Court (Second Chamber), upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, decided to open the oral procedure without any preparatory inquiry.

The parties were requested to concentrate at the sitting on the question of the administration's discretion in relation to the establishment of officials at the end of the probationary period and on the corresponding delimitation of the Court's power of review. The applicant was asked to specify the grounds on which she objected to the decision of the President of the Court terminating her probationary period without establishing her.

III — Conclusions of the parties

The *applicant* claims that the Court should:

Declare her application admissible and well founded; consequently, annul the decision of 5 May 1982 terminating her probationary period without establishing her and, in so far as necessary, the probation report drawn up prior to that decision;

Annul the decision of the President of the Court of 23 September 1982 rejecting her complaint;

Order the examination of the applicant and the witnesses cited in the application, pursuant to Article 47 of the Rules of Procedure;

Order the defendant to pay the entire costs, including the fees of the applicant's Counsel.

The *Court of Justice* contends that the Court should:

Dismiss the application;

Make an appropriate order as to costs.

IV — Submissions and arguments of the parties during the written procedure

Both parties presented preliminary observations on the purpose of the probationary period in the recruitment

procedure and on the scope of judicial review in the matter.

The *applicant* claims that the decision terminating her probationary period without establishing her and the probation report itself are vitiated by infringement of essential procedural requirements, that the decision of the President of the Court rejecting her complaint was taken following a misuse of procedure and that the contested decisions are all contrary to the principle prohibiting discrimination on grounds of sex.

The *Court* considers that all the submissions put forward in support of the application are inadmissible or unfounded.

A — The purpose of the probationary period and review by the Court

The *applicant* accepts that, in order to be established, an official must first successfully complete a compulsory probationary period and that she herself had no vested right to be established. However, the refusal to establish her is subject to review by the Court. Although the scope of the Court's review is, since the matter falls within the administration's discretion, limited to review of the legality (review of the grounds, manifest error in the assessment of the law and facts, misuse of powers), it is wide enough to embrace an arbitrary attitude on the part of the head of administration. That was the position in this case.

The *Court* points out that according to the Staff Regulations recruitment involves an official first passing the competition for admission and then successfully completing the compulsory probationary period. Probationary officials have no vested right to be appointed permanently; the report at the end of the probationary period has the same importance for them and is just as uncertain as the decision of the Selection Board for the competition. A probationary official who has been given an unfavourable probation report is not entitled to bring a substantive action challenging the actual conclusions of the report, which constitute merely a synthesis of the evaluations of his work by his superiors; he may bring only an action challenging its legality, based on precise grounds for annulment and directed against the procedure and grounds on which the report is based.

B — Submission on the infringement of essential procedural requirements

The *applicant* submits that the statement of the reasons on which the decision terminating her probationary period without establishing her was based was inaccurate and that the decision was the result of an improper reporting procedure.

The *Court* considers that submission to be inadmissible or unfounded in its entirety.

The submission that the procedure for reporting on the probationary period was not correctly followed.

The *applicant* states that according to Article 34 of the Staff Regulations the probationary period must end, for an official in her grade, six months after the date on which she was appointed; furthermore, the probation report must be made not less than one month before the expiry of the probationary period.

(a) In this case, the applicant's superior, acting of his own accord and in

infringement of the exclusive jurisdiction of the appointing authority, set back the date of the end of the probationary period from 31 January to 31 March 1982. The fact that the applicant did not actually take up her duties until 1 October 1981 (rather than 1 August 1981) cannot justify that step: the applicant cannot be required to bear the consequences of delays resulting from the organization of the Court's departments; as regards the first two months of the probationary period, the opinion could have been asked of the Director of the Language Service, to which the annex of the Library where the applicant was carrying out duties identical to those she subsequently performed was then attached; a move from one department to another, without any change in the official's duties, is not enough to justify postponement of the probationary period; in any event, the date on which the probationary period starts cannot, as in this case, be altered without the official's being immediately informed of such amendment of the instrument formally appointing her as a probationary official.

(b) According to Article 34 (2) of the Staff Regulations, the probation report must be made not less than one month before the expiry of that period. In this case, the report was not made until 24 March 1982 and was not communicated to the applicant until 29 March, that is, at best, only two days before the end of the probationary period. It is true that according to the well-established case-law of the Court, although a delay in drawing up the probation report constitutes an irregularity in relation to the express requirements of the Staff Regulations, it is not of such a kind as to affect the validity of that report; however, before a decision dismissing him is taken, a probationary official should be allowed sufficient time to submit his comments and obtain the assistance of a lawyer. That was clearly not done in this case. Furthermore, because of the delay in drawing up the report, the appointing authority was itself compelled to extend the period prescribed for deciding not to establish the applicant.

It is not enough to state, in order to justify a failure to comply with the periods laid down by the Staff Regulations, that the action taken was in the interests of the complainant.

The *Court* contends that that complaint is inadmissible and in any event unfounded.

(a) As to the date of expiry of the probationary period, it was necessary, in view of the date on which the applicant actually took up her duties, to postpone the probationary period in the interests both of the institution and of the applicant herself. The latter has no grounds for criticizing a measure that does not adversely affect her; the submission is therefore inadmissible.

(b) The report at the end of the probationary period was indeed dated 24 March 1984, although it ought to have been drawn up by 28 February at the latest. However, according to the case-law of the Court, that delay in making the report is not of such a kind as to call in question its validity, particularly since in this case the reporting officer did not wish to give an opinion until he had had sufficient time to be able to make a comprehensive judgment.

The applicant's submission is not admissible, since it was not adequately set out in the original application. It is

also unfounded: the applicant was not required to submit her comments within a prescribed period; since the procedure is not contentious, the Staff Regulations do not provide for the assistance of an adviser.

Submission that the statement of reasons was inaccurate

The *applicant* states that the decision to terminate her probationary period without establishing her was taken essentially on the basis of the probation report; in order to determine the reasons upon which the contested decision was based, it is therefore necessary to refer to that report. The report makes three complaints concerning the applicant, which are unfounded and untrue; there is therefore no substantive or legal justification for the contested decision.

The *Court* stresses that the reporting officer's evaluation, upon which the probation report and its conclusions are based, may not be called in question in an application challenging the legality of the decision; the same applies to the reasons upon which it is based. The submission as worded is therefore inadmissible; the position would be different only if the contested measure were based on substantively inaccurate reasons and if the error contained in the reasons were manifest. The submission as drafted does not meet that requirement.

Lack of interest in the duties

The *applicant* claims that her "frequent absences", referred to in the probation report, were all justified; they were periods of annual leave or sick leave, which were duly applied for or supported by medical certificates.

The applicant states that, so far as absences from the office during working hours were concerned, she had not been accused of failing to perform her work satisfactorily.

The applicant's alleged preference for other duties does not demonstrate any lack of interest in her library duties and is not based on any objective criterion. In any event, if she did display any lack of interest, it would not lead to her discharging her duties improperly; it could have an influence on the report at the end of the probationary period only if it continued and was marked by behaviour affecting the quantity and quality of work.

The Court states that the applicant does not contest the truth of the complaints which were made against her, but seeks to justify her attitude; she is attempting to call in question and refute the reporting officer's criticisms.

In those circumstances, the reasons upon which the decision was based cannot be manifestly erroneous.

Lack of continuity in the work

The *applicant* points out that all her absences on family or health grounds were justified; furthermore, the Court has not inferred, let alone shown, that there was any deterioration in her work as a result.

The complaints regarding the applicant's absences from her work-place cannot be accepted, since they were made only as a result of the procedure after the probation report had been drawn up; moreover, they have no substantive foundation: the very nature of her duties frequently compelled the applicant to leave her office and in such cases she

duly indicated where she could be found for the time being. The applicant offers the evidence of witnesses on that point.

The *Court* states that the applicant is not disputing, but trying to justify the matters complained of. In fact, she is chiefly accused of being frequently absent not from her office but from her place of work.

Physical unsuitability for the duties involved in the post

The *applicant* considers that the requirement of particular physical suitability for carrying out the duties attaching to her post has no factual or legal basis. Legally, the qualifications required contain no specific provision and, in fact, the post held by the applicant does not require any special physical strength and, in any event, the appointing authority bears full responsibility for assigning an official, after a competition and a satisfactory medical examination, to a particular post.

The *Court* observes that that ground must be examined in conjunction with the others. The physical unsuitability of the applicant was raised essentially because of the backlogs of work, exceeding the normal volume of work, that she accumulated.

The applicant's line of argument, taking the different complaints in isolation, goes beyond claiming that the reasons are manifestly erroneous and is therefore inadmissible.

C — Submission of misuse of procedure

The *applicant* claims that the supplementary information requested by the President of the Court from the Director of the Documentation and Library Directorate and from the Head of the Library Division constitutes an illegal course of action.

The complaint under Article 90 (2) of the Staff Regulations is in the nature of an internal appeal to the authority that took the contested decision. That authority must obtain any information it considers useful and necessary before adopting its decision; it may not request supplementary information after the complaint has been submitted.

The President of the Court permitted the applicant's superiors to refute the arguments contained in her complaint, to widen the reasons for their unfavourable assessment and even to submit new reasons. The President of the Court was thus able to base his decision rejecting the complaint on considerations which he could not have put forward if those irregular steps, which constituted a misuse of procedure, had not been taken.

The *Court*, for its part, considers the procedure followed in this case to be wholly in accordance with the relevant provisions of the Staff Regulations.

A complaint is in the nature of an internal appeal, transferring the case from an ill-informed administrator to a better-informed administrator. The authority hearing such a complaint is entitled and even obliged to obtain all useful information before taking a decision; since the President of the Court took steps to investigate the

objections put forward by the applicant in her complaint, he cannot be accused of having obtained useful and necessary information too late.

The complaint provided for in Article 90 (2) of the Staff Regulations is in addition a means of redress that must be used before an appeal is filed with the Court; it is thus an administrative first instance, provided for in order to prepare for and disencumber the contentious procedure. The authority to which a complaint is submitted must give a reasoned decision and for that purpose it must carry out an investigation and hear both sides. The President of the Court duly complied with that obligation.

The applicant's argument also lacks any factual basis: the contested decision merely repeats and amplifies the criticisms set out in the probation report, which the applicant has perfectly well understood.

D — Submission of unlawful sex discrimination

The *applicant* takes the view that the main reason she was not established was that her superiors wanted a man to be appointed to that post; she proposes that, if necessary, a witness should give evidence on this point. The criticisms regarding her alleged physical suitability are explained by the same considerations. The work involved in the post in question is not particularly taxing; no such indication is given in the vacancy notice. Her superiors are vainly trying to amend the reasons they gave by alleging that the delay in carrying out work arose out of considerations relating to her physical unsuitability; a valid opinion on that matter can, in any event, be furnished only by a doctor, and not by her superior.

The circumstances in which the post previously held by the applicant was filled confirm that her superiors wished to replace her by a man and bear out the submission that she was discriminated against on the ground of sex.

The *Court* denies that it discriminated on grounds of sex. The criticism in the probation report that she was physically unsuitable cannot be isolated from the other complaints made against her, and in particular that of frequent absences and a lack of regularity in carrying out her duties. The applicant's offer of evidence must be rejected.

In any case, physical inaptitude, which is based on objective grounds, cannot form the basis for a charge of discrimination on grounds of sex.

V — Oral procedure

At the sitting on 15 September 1983, the applicant, represented by G. Vandersanden, and the Court of Justice, represented by A. Bonn, presented oral argument and answered questions put to them by the Court.

In relation to the appointing authority's discretion and the scope of the Court's powers of review in relation to the establishment of officials at the end of the probationary period, the *applicant* essentially argued that, although the competent authority has a discretionary power its decision is final and may not be based on any grounds other than those resulting from a comparison between the probation report and the observations of the official concerned. The Court's power to review the grounds for the administrative action is limited to error in law, substantively inaccurate or non-existent facts, and misuse of procedure or powers. Since the grounds for bringing an action to review legality are limited, they must be submitted by the Court to an especially exhaustive and careful investigation, in order to discover whether the administrative authority properly exercised the discretion conferred upon it and whether it adopted an arbitrary decision. The *Court of Justice* stated that it concurred in that analysis.

As regards the substance, the *parties* developed the submissions and arguments put forward during the written procedure.

The *Advocate General* delivered his opinion at the sitting on 20 October 1983.

Decision

1 By an application received at the Court Registry on 11 November 1982, Mrs Désirée Tréfois, a former probationary official at the Court of Justice of the European Communities in Grade C 5, brought an action for the annulment of the decision of 5 May 1982 terminating her probationary period without establishing her, the probation report drawn up prior to that decision and the decision of the President of the Court of 23 September 1982 rejecting her complaint.

2 According to the file, the applicant was first recruited as an auxiliary agent and assigned to the Translation Directorate of the Court of Justice; she then entered for internal competition No CJ 38/80 based on qualifications and tests, for the recruitment of a clerical assistant in the Documentation and Library Directorate (Library Division) and was placed first on the list of suitable candidates. Subsequently, the applicant was appointed a probationary official in that post in Grade C 5, with effect from 1 August 1981. In fact, she did not actually take up her duties until 1 October 1981.

3 On 24 March 1982, the Head of the Library Division, in his capacity as the direct superior of the applicant, drew up the report at the end of the probationary period provided for by the Staff Regulations. In the space for the assessment of ability, efficiency, and conduct in the service — in which the possible marks are: excellent, very good, good, satisfactory, unsatisfactory — the Head of the Library Division entered "satisfactory" for the knowledge needed for the post held, initiative, ability to organize, relations in the department, relations with others and punctuality. However, he entered marks of "unsatisfactory" for judgment and adaptability, mentioning "physical unsuitability" under sense of responsibility and devotion to duty, with the further mentions "frequent absences" and "limited interest", and for the quality of work and speed with which work is performed with the comment "the result of absences".

4 In the statement of reasons, after a description of the applicant's main duties, which involved the daily transportation and storage of books, the Head of the Library Division stated that "the large number of books to be handled daily requires a certain physical strength on the part of the person carrying out these duties; in my opinion Mrs Tréfois's strength is not sufficient". He added that in her duties of stockroom assistant, which required a regular attendance, in particular to avoid backlogs building up, it had been noted that the applicant "is frequently absent for family or health reasons" and that her "very limited interest in the work" was explained by the preference which she had expressed for secretarial work.

5 In conclusion, because of the applicant's lack of interest in her duties, absence of continuity in the work and her physical unsuitability for the duties inherent in the post of stockroom assistant, the Head of the Library Division proposed that the applicant should not be established.

6 That report was communicated to the applicant, and on 29 March 1982 she submitted her comments which were annexed to the report.

7 By decision of 5 May 1982, taken pursuant to Article 34 of the Staff Regulations and on the basis of the probation report, the President of the Court, in his capacity as the appointing authority, terminated the applicant's probationary period without establishing her.

8 On 3 June 1982, the applicant submitted a complaint under Article 90 (2) of the Staff Regulations, in which she set out her position on the various criticisms of her in the probation report.

9 On receiving that complaint, the President of the Court requested supplementary information from the Director of the Library and Documentation Directorate and the Head of the Library Division. In a memorandum dated 8 July 1982, the Head of the Library Division stated that during the probationary period the applicant's state of mind and efficiency at work were subject to frequent and unpredictable changes, she was absent from her workplace for hours without saying where she was going, that books piled up regularly without being replaced on the shelves and that replacement therefore required "a physical effort which can scarcely be asked of a woman", that books put on to the shelves were not arranged in any order, so that consultation became impossible until they were eventually sorted out and put back where they belonged, and finally that relations with the applicant were difficult both for her colleagues who had to stand in for her and for her superiors, who could not make her follow their instructions. Repeated warnings given to her had made no difference. The Head of the Library Division observed that it was in order to give her an opportunity to improve that he had not asked for her to be dismissed even before the end of the probationary period.

10 The Director of the Library and Documentation Directorate, in a memorandum of the same date, added that the applicant was careless, in particular in relation to entering cards showing which books had been borrowed and locking the library during the hours in which it was not supervised.

11 Those additional observations were communicated to the applicant on 16 July 1982. In a memorandum dated 29 July 1982 addressed to the President of the Court, she replied at length.

12 Having regard to all the documents put before him, the President of the Court on 23 September 1982 adopted a reasoned decision rejecting the applicant's complaint. In that decision, the President referred to the assessments of the applicant by her superiors and stated that the probation report contained no less than four marks of "unsatisfactory" compared with six others which were only "satisfactory". The President then set out in the following terms the reason for the decision taken: "Frequent absences from the department for reasons other than leave duly granted, backlogs of books to be replaced, lack of method, failure to take account of the warnings and reminders given by superiors."

13 The applicant bases her application on three submissions relating to the infringement of essential procedural requirements, misuse of procedure and unlawful sex discrimination. In fact, those three submissions cover two types of criticism of the successive decisions adopted in relation to the applicant: first, irregularities in the procedure which resulted in the decision not to establish her at the end of her probationary period, and secondly, various complaints concerning the assessments on which the decision was based. It is in that order that the complaints will be examined below.

Complaints in relation to procedure and form

14 The applicant complains first that her probation report was not drawn up within the period laid down in Article 34 (2) of the Staff Regulations, which provides that: "Not less than one month before the expiry of the probationary period, a report shall be made on the . . . probationer . . . ."

15 It is clear from the foregoing that the applicant actually began her probationary period on 1 October 1981. According to Article 34 (2), the probation report ought therefore to have been drawn up before 1 March 1982. In fact, it was drawn up on 24 March.

16 That delay is not, however, of such a kind as to affect the applicant adversely. In fact, the aim of the above-mentioned provision is to ensure that the decision whether or not to establish a probationary official can be made

before the expiry of the probationary period. In the applicant's case, that decision was made on 5 May 1982. That did not place the applicant at a disadvantage, since she remained in her post and was paid as a probationary official during that period. It therefore follows that the complaint must be rejected.

The applicant claims, secondly, that her probationary report, which formed the basis of the decision not to establish her, was later supplemented by fresh comments made by her superiors which in some respects "shifted" and enlarged upon the reasons previously put forward. That amounted to a misuse of procedure, which vitiated the decision taken.

17 That argument calls for the following remarks. Since the applicant availed herself of her right to submit a complaint against the decision not to establish her taken at the end of her probationary period, it was natural for the appointing authority to ask for explanations and supplementary information from the heads of the departments concerned.

18 In order to determine whether the contested measures are lawful, it is necessary to consider both the decision adopted on the basis of the probation report and the decision upholding the first decision taken in the light of further investigation, as a result of the applicant's complaint.

19 It should be stressed in that regard that the applicant's views in relation to both the probation report itself and the supplementary observations by the heads of department following her complaint were duly heard. Both parties were heard at every stage and the applicant had the opportunity, before the final decision was taken by the competent authority, of submitting her point of view on all the criticisms of her behaviour during the probationary period.

20 The complaint of misuse of procedure must therefore also be rejected.

Complaints concerning the assessment on which the decision not to establish the applicant was based

21 In the views expressed by the applicant during the administrative procedure and in her application, she was at pains to refute various criticisms made by her superiors regarding her conduct and her work during the probationary period. She contested in particular the accusation that she displayed a lack of interest in her duties claiming that that was a subjective assessment and only the actual performance of the duties entrusted to her should be taken into account. She also regarded as unjustified the complaint concerning her absenteeism, stressing, on the one hand, that her absences on family or health grounds were duly authorized and, on the other, that it was inherent in the nature of her duties themselves, which involved various responsibilities, that she was frequently on the move within the Court building. Finally, she regards as unjustified the complaint of physical unsuitability, since when she was recruited, the administration was perfectly aware of the nature of the duties to be carried out; the administration was influenced in its action by grounds based on discrimination against women performing certain types of work.

22 In order to decide on those complaints, it is necessary to set out the principles of the Staff Regulations in relation to recruitment and the probationary period.

23 Article 27 of the Staff Regulations provides that "Recruitment shall be directed to securing for the institution the services of officials of the highest standard of ability, efficiency and integrity . . .". There are two consecutive procedures for ascertaining whether those conditions are met, namely recruitment competitions and the completion of the probationary period before establishment.

24 Whilst the recruitment competitions are 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 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. At the end of the probationary period, the

administration must 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 qualitities and conduct of the probationary official, taking account of both the positive and the negative factors revealed in the course of the probationary period.

25 Since the decision not to establish a probationary official is generally, albeit improperly, described as "dismissal", attention should be drawn to the fundamental difference between that decision and dismissal in the strict sense of a person who has been appointed an established official. Whilst in the latter case the grounds justifying the termination of the employment of an established official must be examined in detail, in decisions on the establishment of probationary officials, it is necessary to examine whether or not there are a number of positive considerations showing that establishment of the probationary official is in the interests of the service.

26 It is in the light of those criteria that the grounds taken into consideration by the appointing authority, in order to justify its decision of 5 May 1982 terminating the applicant's probationary period without establishing her and its decision of 23 September 1982 dismissing her complaint, must be assessed.

27 Even though certain details in the statement of reasons, such as the determination of the true reasons for the applicant's absences, may be open to discussion, both the probation report and the supplementary observations by the heads of department paint a picture of a probationary official who, on the basis of a comprehensive assessment, does not satisfy the standards of ability and efficiency required by Article 27 of the Staff Regulations. The applicant's observations on a number of specific points are not of such a kind as to cast doubt on the correctness of all the assessments made by the heads of department in the exercise of their discretionary powers.

28 As for the observations on the applicant's unsuitability for the physical duties involved in the post of stockroom assistant, they do not appear, in spite of the unfortunate wording used by the author of the probation report, to be the result of a prejudice on the part of the administration in relation to the applicant's sex, but are the result of an individual assessment based on observation of the applicant as she carried out her daily duties. It therefore does not appear that the administration infringed the principle of equality of opportunity for male and female workers in also taking into account, at the end of a probationary period regarded as disappointing in every respect, the fact that the physical condition of the person concerned seemed ill-suited to the requirements of the post for which she had applied.

29 Thus it appears that the appointing authority did not, in assessing the outcome of the applicant's probationary period, exceed the limits of the discretionary power which it must be recognized as enjoying in relation to appointment and establishment, since the applicant has not succeeded in establishing that that assessment was vitiated by manifest errors of fact or reasons inconsistent with the objectivity of the administration in weighing up the abilities and the work performed by its probationary officials.

30 In consequence the submissions relating to the assessment of the facts on which the decision not to establish the applicant is based must also be rejected.

Costs

31 Under Article 69 (2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs.

32 However, under Article 70 of the Rules of Procedure, costs incurred by the institutions in proceedings by servants of the Communities are to be borne by those institutions.

On those grounds,

THE COURT (Second Chamber),

hereby:

1. **Dismisses the application;**

2. **Orders the parties to bear their own costs.**

Bahlmann Pescatore Due

Delivered in open court in Luxembourg on 17 November 1983.

For the Registrar
H. A. Rühl
Principal Administrator

K. Bahlmann
President of the Second Chamber

OPINION OF MR ADVOCATE GENERAL VERLOREN VAN THEMAAT DELIVERED ON 20 OCTOBER 1983 [1]

Mr President,
Members of the Court,

1. Introduction

In this case the applicant seeks the annulment of the decision of the President of the Court of 5 May 1982 terminating her probationary period without establishing her and, in so far as necessary, the probation report drawn up prior to that decision and of the decision of the President of the Court of 23 September 1982 rejecting the applicant's complaint.

I draw the Court's attention to those dates at this early stage, because on those dates the appointing authority

1 — Translated from the Dutch.