JUDGMENT OF THE COURT (FIRST CHAMBER)
13 JULY 1972[1]

# Giorgio Bernardi
# v European Parliament

**Case 90/71**

Summary

1. *Officials — Proceedings for annulment — Complaint of irregularities resulting from applicant's own behaviour — Inadmissibility*
   *(Staff Regulations of Officials of the European Communities, Article 91)*

2. *Officials — Promotion — Statement of reasons with regard to unsuccessful candidates — Not required*
   *(Staff Regulations of Officials of the European Communities, Article 45)*

1. A party cannot invoke before the Court irregularities which may have been the consequence of his own behaviour.

2. The appointing authority has no duty as against unsuccessful candidates to provide a statement of the reasons on which decisions of promotion are based.

In Case 90/71

GIORGIO BERNARDI, an assistant translator with the European Parliament, residing at 5 rue Eugène-Welter, Luxembourg-Howald, represented by Italo d'Avanzo, Advocate, of the Rome Bar, with an address for service in Luxembourg at the Chambers of Victor Biel, 71 rue des Glacis,

applicant,

v

EUROPEAN PARLIAMENT, represented by its Secretary-General, Hans Robert Nord, assisted by Alex Bonn, of the Luxembourg Bar, with an address for service in Luxembourg at the Chambers of the said Alex Bonn, 22 Côte-d'Eich,

defendant,

Application for the annulment of the decision of the President of the European Parliament dated 7 September 1971 posted up on 8 October 1971, promoting Mrs Anna-Maria Dell'Omodarme to the career bracket of a translator in Grade L/A 6,

1 — Language of the Case: French.

THE COURT (First Chamber)

composed of: J. Mertens de Wilmars, President, A. M. Donner (Rapporteur) and R. Monaco, Judges,

Advocate-General: K. Roemer
Registrar: A. Van Houtte

gives the following

## JUDGMENT

## Issues of fact and of law

### I — Statement of facts and of the course of the procedure

The facts underlying the dispute and the course of the procedure may be summarized as follows:

On 7 July 1971 the Administration of the European Parliament published Vacancy Notice No 542 with regard to a post of translator which had become vacant in the Italian translation section. The closing date for applications was fixed for 20 July 1971.

Two applications were submitted, on 14 July by Mrs Dell'Omodarme and on 19 July by Mr Bernardi.

On the report of the Secretary-General, the President of the Parliament appointed Mrs Dell'Omodarme on 7 September 1971. This decision was posted up from 8 to 22 October 1971.

On 8 November 1971 Mr Bernardi lodged the present application for the annulment of the decision of the President of the Parliament of 7 September 1971 promoting Mrs Dell'Omodarme.

The written procedure followed the normal course. On hearing the report of the Judge-Rapporteur and the views of the Advocate-General, the Court (First Chamber) decided to dispense with a preparatory inquiry and to open the oral procedure.

The parties presented oral argument at the hearing on 17 May 1971.

The Advocate-General delivered his opinion at the hearing on 28 June 1972.

### II — Conclusions of the parties

The applicant claims that the Court should:

— Accept the present application as to its form and rule that it has been submitted within the prescribed period;

— Rule that the application is admissible as to the substance since the applicant has an existing and legitimate interest in instituting proceedings before the Court;

— Declare the application well founded and justified and consequently rule that the decision of the President of the European Parliament dated 7 September 1971 promoting Mrs Dell'Omodarme is null and void;

— Consequently rule that the vacancy notice published on 7 July 1971 is still valid and order that there shall be a new promotion, in accordance with Article 45 of the Staff Regulations, as from 1 October 1971;

— Order the Parliament to bear the costs;

Alternatively:

— Take formal note that the applicant

offers to prove by all legal means, including inquiry, that the procedure laid down by Article 45 of the Staff Regulations was not properly followed and more particularly that consideration of the comparative merits was not effected on the basis of the periodic reports made with regard to him.

The *defendant* contends that the Court should:

— Rule that the application is admissible as to form;

— Reject the submissions on the substance as inadmissible or unfounded;

— Declare the alternative offer of proof made by the applicant to be inadmissible;

— Refuse to allow the aims and conclusions of the applicant;

— Give a ruling on the costs in accordance with the appropriate provisions.

## III — Submissions and arguments of the parties

The submissions and arguments of the parties may be summarized as follows:
The *applicant* explained that his application on the following submissions:

1. *Illegality in relation to Article 45 of the Staff Regulations of Officials*

The *applicant* maintains that since his periodic report was not available to the Administration, the contested decision is unlawful from the point of view of the consideration of comparative merits required by Article 45 of the Staff Regulations. This report was sent to him on 15 July 1971 for him to submit any observations he might have.
Since a number of severe appraisals of his work appeared in the concluding observations in the said report it was essential that the applicant should be able to provide a full reply. He retained the periodic report for this purpose. Immediately after his holiday, on 9 August 1971, he requested the return of documents necessary to enable him to reply to certain allegations made in the report. In a note of 26 October 1971 annexed to the application, he brought his observations on the report to the attention of the Court and thereby to the attention of his Administration. The defendant should have requested the return of the report in the course of the promotion procedure. Its negligence proves that the European Parliament did not observe the provisions of Article 45, in particular the requirement as to consideration of the comparative merits of officials eligible for promotion.
The defendant cannot claim that it took the periodic report into consideration because of the fact that the Secretary-General had signed it on 13 July 1971. A comparative consideration which complies with Article 45 of the Staff Regulations is only possible on the basis of reports subscribed by the officials concerned and containing any comments they may wish to make.
The *defendant* observes that the periodic report was transmitted to the applicant on 15 July 1971 with a request to return it within five days. The report is still in the possession of the applicant. It is impossible to justify such a delay either by the alleged absence of the applicant or by his need to draw up comments on the report. The submission of his application on 19 July 1971 by a registered letter posted in Luxembourg itself constitutes sufficient proof that he could have returned the report before the consideration of the comparative merits of the applicants. In addition the applicant cannot sustain his assertion to the effect that he proceeded to draw up his comments immediately after his return to Luxembourg on 2 August 1971 (not on 9 August 1971), since he only took the appropriate steps on 29 September 1971 and it was only by a note dated 26 October 1971, addressed to the Court of Justice but not to his own Administration, that he submitted his comments on the periodic report. This behaviour is explained by the applicant's aim, namely to halt the appointment procedure in progress. He took the view, which moreover is incorrect, that by re-

taining the report he made it impossible for this procedure to continue.
The fact that the Administration did not effect a comparative consideration of the reports is explicable solely by the fact that the applicant improperly retained his own report. It was consequently impossible to make a comparative consideration of the reports and the Administration was thereby relieved of its obligation in this respect.
Furthermore, since the Secretary-General had signed the applicant's report on 13 July the Administration was acquainted with it. For this reason the applicant is wrong when he argues that the periodic report was not taken into consideration in the decision. The Administration cannot be held responsible for its ignorance of the applicant's comments since they were made only after the adoption of the relevant decision.

2. *Insufficiency of reasons*

The *applicant* considers that the decision in dispute did not contain a sufficient statement of reasons. The decision must contain a reference to the periodic reports and to the consideration of comparative merits. A mere reference to Article 45 of the Staff Regulations is insufficient to prove that the provisions of that article were observed. In this instance the Administration is subject to a formal obligation, referred to in Article 45, and this means that it must furnish a statement of reasons for the decision of promotion so that it is possible to consider the legality of the decision.
The *defendant* maintains that the argument of the applicant is contrary to the case-law laid down by the Court of Justice (judgment of 6 May 1969 in Case 21/68, *Huybrechts* v *Commission* [1969] ECR 97). The contested decision contains a proper statement of reasons in that it refers to the Staff Regulations and in particular to Article 45 thereof.

3. *Misuse of powers*

(a) Failure to give advance notice of the contested decision to the Bureau of the European Parliament

The *applicant* observes that the contested decision was not notified in advance to the Bureau of the Parliament, which constitutes an infringement of the decision of the said Bureau of 12 December 1962 REV. 175/63 PE (BUR) 9012 which provides in sub-paragraph (c) 'The Bureau shall be informed in advance of decisions concerning posts to be filled in Category A'. Such an irregularity must entail the annulment of the decision in dispute. It is impossible to accede to the view that officials of Gategory L/A do not form part of Category A since Article 5(2) of the Staff Regulations provides that post of translators and interpreters shall be grouped in a Language Service comprising six grades equivalent to Grades 3 to 8 of Category A.
The *defendant* states that the decision of the Bureau of the Parliament of 12 December 1962 lays down that the Bureau shall be informed in advance only of decisions filling posts in Category A. Since the contested decision relates to an appointment to Grade L/A it is clear that advance notice in not required. Article 5 of the Staff Regulations must be interpreted in accordance with its objective, in particular with that of treating the Language Service as equivalent to Grades 3 to 8 of Category A with regard to salary and other pecuniary advantages.
The decision of 12 December 1962 established the same appointing authority for officials in Category A in Grades 3 to 7 inclusive and those in the Language Service up to and including Grade 6. Nevertheless it restricted the requirement that the Bureau be informed in advance to decisions filling posts in Category A.
Since there is no requirement that the Bureau be informed the defendant refrains from expressing a view on the problem of what legal consequences would follow from any infringement of the provisions of the decision of 12 December 1962.

(b) Missuse of powers strictly so-called

The *applicant* maintains that in creating a vacancy in the interest of a candidate whom it evidently wished to favour, the Parliament was clearly acting contrary to Articles 4 and 7 of the Staff Regulations.

In fact Mrs Dell'Omodarme was accorded advantages which were not justified by the interests of the service. The behaviour of the Parliament in the appointment procedure provides a body of evidence that the outcome of this procedure was fixed in advance. The period during which the vacancy notice was posted up was arranged in such a way that it was to be expected that the applicant would not apply for the post, since on the one hand he had left Luxembourg on 7 July 1971 for his holiday in Italy on the very day when the notice was published and on the other the Administration could not but be aware that on the closing date for applications, 20 July 1971, he would still be on holiday. Consequently, the posting of the vacancy notice must be characterized at the least as an attempted subterfuge which, in view of the fact that the Parliament had already failed in a first case against the applicant (judgment of the Court of Justice of 16 March 1971 in Case 48/70, *Bernardi* v *European Parliament* [1971] ECR 195) relating to the annulment of two interim appointments of Mrs Dell'-Omodarme to the grade to which she has now been promoted, can only be intended to facilitate the promotion of that lady. In his reply the applicant further asserts that the adoption of a decision of promotion on the basis of an incomplete and unsigned periodic report without notifying the Bureau of the Parliament constitutes a misuse of powers, the probable object of which is thereby to revive the situation declared unlawful by the Court.

The *defendant* maintains that the submission by the applicant of his application on 19 July suffices to prove that he knew of the vacancy notice. The Parliament formally rebuts the accusation that it has endeavoured to perpetrate a subterfuge. It had neither the time nor the inclination to indulge in such underhand dealings.

## Grounds of judgment

1 By an application lodged at the Registry on 8 November 1971 the applicant has brought before the Court an application for the annulment of the decision of the President of the European Parliament of 7 September 1971, posted up on 12 October 1971, promoting Mrs Dell'Omodarme to the career bracket of translator in Grade L/A 6

2 In support of his application the applicant claims that there has been an infringement of Articles 25 and 45 of the Staff Regulations of Officials and of the Decision of the Bureau of the Parliament of 12 December 1962 on the establishment of appointing authorities following the entry into force of the Staff Regulations of Officials and that there has also been a misuse of powers.

### The submission of infringement of Article 45 of the Staff Regulations

3 Article 45 of the Staff Regulations provides that promotion shall be made in particular after consideration of the comparative merits of the officials eligible for promotion and of the report on them.

4 The applicant, who had applied for the promotion in dispute, relies on the fatc that in the present case the comparative consideration was incomplete since the Administration did not have at its disposal as far as he was concerned the periodic report, provided for in Article 43 of the Staff Regulations, for the year 1969 to 1970.

5 In fact when the proposed report on the applicant was sent to him by letter of 15 July 1971 he retained it in order to draft his comments so that during the period in which the contested decision was being drawn up the competent authority did not have a report on the applicant at its disposal.

6 The proposed report was notified to the applicant on 15 July 1971 with a request to return it within a maximum period of five days duly signed and with any comments he might have.

7 Instead of complying with this request the applicant, by letter of 29 September 1971, requested the production of certain documents which he required in order to draw up his comments.

8 Instead of returning the proposed report and his comments to the competent Administration the applicant annexed them to his application initiating the present proceedings on 8 November 1971.

9 Assuming that a proposed periodic report communicated to the person concerned in order to obtain his signature and comments may already be considered, before it is returned, as a report capable of being subjected to the comparative consideration referred to in Article 45 of the Staff Regulations, it is in any event clear from the foregoing that the 'report' could not feature in the said comparative consideration for the sole reason that the applicant retained it for four months.

10 In those circumstances, the applicant cannot invoke before the Court irregularities which may have been the consequence of his own behaviour.

11 Consequently the submission must be dismissed.

The submission of infringement of Article 25 of the Staff Regulations

12 Article 25 of the Staff Regulations provides that any decision adversely affecting an official is to state the reasons on which it is based.

13 The applicant asserts that the decision to promote another candidate adversely affects him and claims that the reasons on which it was based should accordingly have been stated.

14 It must be stated that it was unnecessary to provide a statement of reasons for the decision with regard to the person to whom it was addressed, that is to say, with regard to the successful official, who cannot be adversely affected by it.

15 Under Article 45 of the Staff Regulations the appointing authority has no duty as against the unsuccessful candidates to provide a statement of the reasons on which decisions of promotion are based and moreover the recitals of such a statement of reasons might be prejudicial to the latter.

## The submission of infringement of the decision of the Bureau of the Parliament

16 The decision of 12 December 1962 states in particular that with regard to the application of Article 45 of the Staff Regulations to officials in Category A as far as Grade 7 inclusive and in the Language Service as far as Grade 6 inclusive, the President shall, acting on the proposal of the Secretary General, exercise the powers conferred by the Staff Regulations on the appointing authority.

17 The same provision adds *in fine* that the Bureau shall nevertheless be notified in advance of decisions relating to posts in Category A.

18 The applicant asserts that the Bureau was not notified in advance of the contested decision and maintains that this fact renders the decision unlawful.

19 Since the provision invoked distinguishes first of all between officials in Category A and those in the Language Service it follows that the proviso *in fine* relating to decisions concerning posts in Category A must be interpreted as not referring to posts in the Language Service.

20 The submission must thus be rejected.

## The submission of misuse of powers

21 The applicant maintains that the behaviour of the Administration in the promotion in dispute was prompted by the desire to rule out any application which he might make.

22 In this connexion he refers to the fact that the vacancy notice was posted up from 7 to 20 July 1971 during which period he was on holiday.

23 He alleges that this period of posting was selected deliberately so as to prevent him from submitting his application.

24 Furthermore both the documents produced in the course of the written procedure and the observations submitted by the applicant at the hearing were couched in terms which pre-suppose a malicious attitude on the part of the Administration towards him and a clear intention to handicap him.

25 The vacancy notice was properly posted.

26 Furthermore, the very fact that the applicant submitted his application on 19 July 1971 shows that he was not handicapped by the choice of the period of posting.

27 In addition none of the factors ascertained in the case confirms the allegations of the applicant.

28 Consequently the submission is unfounded and the application must be dismissed.

## Costs

29 Under the terms of Article 69(2) of the Rules of Procedure the unsuccessful party shall be ordered to pay the costs.

30 The applicant has failed in his application.

31 However under Article 70 of the Rules of Procedure, in actions by officials of the Communities, institutions shall bear their own costs.

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the opinion of the Advocate-General;
Having regard to the Staff Regulations of Officials, especially Articles 25 and 45;
Having regard to the Protocol on the Statute of the Court of Justice;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities,

THE COURT (First Chamber)

hereby:

**1. Dismisses the application;**

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

Mertens de Wilmars Donner Monaco

Delivered in open court in Luxembourg on 13 July 1972.

A. Van Houtte
Registrar

J. Mertens de Wilmars
President of the First Chamber

## OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 28 JUNE 1972[1]

*Mr President,*

*Members of the Court,*

The applicant in the proceedings on which I shall comment today has been in the service of the European Parliament since 10 October 1966. He was initially employed as a member of the auxiliary staff, then from 1 March 1967 he was employed as a member of the temporary staff; he acquired the status of an official with effect from 1 March 1969. At present the applicant is employed as an assistant translator in Grade L/A7 in the Italian section of the translation directorate of the European Parliament.

In this directorate a post as a translator in Career Bracket L/A6-L/A5 in the Italian section was advertised from 7 July 1971 by Vacancy Notice No 542. It was to be filled through transfer or promotion. Applications were to be submitted by 20 July 1971. Applications for the post were submitted by the applicant and Mrs Dell'Omodarme, another assistant translator of Italian mother tongue in the translation directorate of the Parliament. The position was filled by means of a Decision of the President of the Parliament of 7 September 1971 promoting the other candidate to Grade L/A6 with effect from 1 October 1971. On 8 October 1971 that decision was communicated to the staff of the Parliament by posting.

The lawfulness of the decision is at issue in the present proceedings; that is to say, the applicant considers that there are various grounds for doubting the legality of the decision adopted. He accordingly applied to the Court by an application submitted on 8 November 1971.

He claims that the Court should take the following action:

— Declare null and void the decision of the President of the European Parliament of 7 September 1971;

— Order the Parliament to apply Article 85 of the Staff Regulations of Officials;

1 — Translated from the German.