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.

— Order a new promotion procedure to be commenced in order to fill the vacant post with effect from 1 October 1971.

I shall now consider the attitude to be taken to these claims.

1. A first and indeed the main complaint in the proceedings is to the effect that the contested decision was adopted although at the time the applicant, one of the two candidates for the vacant post, had not yet returned the only existing periodic report concerning him or the comments which he intended to make on it and that the appointing authority thus did not have these factors at its disposal in its consideration of the comparative merits of the officials. He alleges that this is to be considered as an infringement of Article 45 of the Staff Regulations in conjunction with Article 43 thereof.

In this connexion it is important to bear in mind the following: as became clear in the proceedings, during the period from 16 June to 30 July 1971 the applicant was either taking his annual holiday or on leave for further training and instruction. It appears that he made a brief return to Luxembourg on 19 July 1971 solely to submit his written application from which it follows that despite his absence he had become aware of the vacancy notice. On 15 July 1971, that is, during his absence, the report for the years 1969 and 1970 was transmitted to him with the request to return it before 20 July 1971 after appending any observations he might have. The applicant is clearly not satisfied with this report; in particular he considers that he has discovered contradictions in its appraisal of him. He consequently wished to clarify it and to provide a detailed vindication. He maintains that, with this end in view, even before the start of his leave and immediately after his return from it, he requested his superior officer to transmit to him certain documents (translations made by the applicant) but that he did not obtain them immediately. In any event it is clear from the file that on 29 September 1971 the applicant addressed a letter to his superior in which as an incidental matter (since the main purpose of the letter related to another matter) he requested the transmission of his translations with any corrections which might have been made. Then on 26 October 1971 the applicant drew up the comments provided for on the periodic report but, instead of transmitting them together with the report directly to the appointing authority he brought it before the Court of Justice, together with his application, on 8 November 1971 only. During this period the decision as to promotion had long since been adopted and it is therefore certain that this was done without taking into account the comments appended by the applicant to this report. It is not quite clear whether the decision was adopted without taking into account the report either. I shall shortly return to this point.

Various inquiries and considerations seem called for.

It cannot be doubted that promotions can only take place after consideration of the comparative merits of the candidates concerned and on the basis of the periodic reports relating to them. This is already clear from the wording of Article 45 of the Staff Regulations of Officials. The Court has already delivered numerous judgments to this effect (Cases 94 and 96/63 [1964] ECR 297 and 97/63 [1964] ECR 515). In addition it may be thought right that the comments submitted by the persons concerned on their reports are relevant to the adoption of decisions on promotion. They frequently contain justifications and clarifications on matters of fact as against the necessarily subjective appraisals of superiors and can thus have an effect on the emphasis to be attached to the latter. At least they form part of the personal file which must be taken into consideration in promotions.

With regard to the periodic report on the applicant it is not, as I have already said, quite clear whether proper account was taken of it by the appointing authority in adopting the decision of promotion. The defendant, the Parliament, indeed gave an assurance in the proceedings that it was taken into consideration. Nevertheless it is not quite clear whether, for example, a copy of the report retained by the ap-

plicant was to hand and could be referred to or whether the appointing authority merely obtained its knowledge of the contents of the report by asking the Secretary-General who had signed it on 13 July 1971. If only the latter, then a large measure of doubt must in fact exist as to whether this is sufficient; it can scarcely be credited that the Secretary-General, without written records, could have precise knowledge of the contents of the report such a considerable time after signing it and that he was able to impart this to the appointing authority for the adoption of its decision. Ultimately, this question can indeed remain open since in my opinion other considerations permit a reliable appraisal of the first complaint, and furthermore not merely with regard to taking account of the periodic report but also with regard to the comments formulated by the applicant with regard to his report which were incontestably left out of account.

Even if the appointing authority was indeed entirely ignorant of the contents of the report as well as of the comments drawn up with regard thereto by the applicant, this stems unequivocally from the wholly unjustified conduct of the applicant himself. It is indeed difficult to reproach the applicant for having failed to return the periodic report together with his comments, as was requested in the letter of the Director General of Administration of 15 July 1971, within a period of five days since for the period in question he was on leave and it is clear that on 19 July 1971 he was only very briefly in Luxembourg. Nevertheless after his return from leave, that is to say immediately after 2 August 1971, he should have taken pains to exercise all the necessary despatch in preparing his comments and in thereupon delivering them immediately to the Administration together with the report. There was a good reason for doing so because the applicant was a candidate for promotion and had therefore cause to obtain for the appointing authority all the necessary information for this purpose, that is, including the periodic report together with any comments, that is to say, information which he knew was of decisive importance in the consideration of the comparative merits of the candidates. When one considers the content of the comments which were subsequently submitted, in my opinion it is scarcely credible that it was impossible for him to do this within the time remaining prior to the adoption of the decision of promotion. If serious reasons for the delay really existed however, the applicant should at least have informed the appointing authority of them so as to obtain an extension of the time-limit and to stop the appointment procedure. In fact nothing of the sort was done. Thus, whilst the Staff Regulations themselves do not prescribe a time-limit for the return of the periodic report, the applicant lays himself open to the reproach that even if he had not failed to comply with an instruction from his superior to return the report he had at any rate failed to observe the fundamental duty of loyalty and cooperation owed by all officials as it is defined in the case-law of the Court (cf. for example Case 3/66). In any case it must be presumed that in the special procedure to decide upon a promotion in which the applicant was an interested party, it was *incumbent* upon him to do everything to ensure that the necessary decisions were taken in a regular fashion. Since the applicant did not act accordingly it was in fact possible for the appointing authority to adopt the view that he had no objections to submit in connexion with his periodic report and perhaps even that he was not interested in maintaining his candidature. Whoever neglects the defence of his own interests and without an acceptable justification remains inert in proceedings which are essentially dependent on his own initiative cannot be heard to complain that the Administration has failed to conduct the proceedings properly on the ground that it did not do everything to take due account of the applications submitted. In this connexion particular reference must be made to the decisions of the Court in comparable cases in which it was likewise emphasized that failure to have regard to documents does not constitute a procedural defect when it may be ascribed to the applicant.

In this respect I refer for example to the judgments in Case 3/66 ([1966] ECR 437), Case 3/67 ([1968] ECR 25) and Case 76/69 ([1971] ECR 298).
The only conclusion thus remaining is that, in view of the behaviour of the applicant himself, or, if I may express it thus, because he has forfeited his rights in the matter, no ground for the annulment of the contested decision can be based on any possible failure to consider the periodic report on the applicant and the actual failure to consider the comments submitted by the applicant in response thereto.

2. I can considerably curtail my remarks on the second complaint, that of failure to provide a statement of reasons (the infringement of Article 25 of the Staff Regulations). As the Court is aware, it is asserted in this respect that it does not suffice that the contested decision merely refers to a proposal of the Secretary-General and to Article 45 of the Staff Regulations of Officials. Instead it is alleged that a pertinent statement of reasons was necessary, that is to say a declaration that the appointing authority took the relevant periodic reports into consideration, gave consideration to the comparative merits of the candidates and regarded those of the person appointed as being superior.
It must be replied to this assertion on the one hand that the information required by the applicant is in fact sufficiently supplied by the reference in the decision to Article 45 of the Staff Regulations of Officials since the said provision requires exactly those measures of which the applicant complains that there was no mention. It is of course even more relevant that the case-law of the Court has long since established that positive decisions such as promotion which do not constitute decisions having an adverse effect do not require a statement of reasons nor is any such required concerning what may be regarded as an implied rejection of other candidates in a decision of promotion. In this connexion I refer to the judgments in Case 27/63 ([1964] ECR 129), Joined Cases 94 and 96/63 ([1964] ECR 297), Joined Cases 27 and 30/64 ([1965] ECR 481) and Case 21/68 ([1969] ECR 86).
It is accordingly clear that the second complaint of the applicant likewise cannot succeed in bringing about the annulment of the contested decision.

3. In the third place the applicant complains of an infringement of the Decision of the Bureau of the European Parliament of 12 December 1962 on the designation of the appointing authority. He states that in accordance with that decision the Bureau must be informed before decisions are taken regarding the filling of posts in Catagory A and thereby also with regard to the filling of posts in the Language Service (L/A), but that it is not clear from the contested decision that this occurred.
Before I consider this complaint I should like to call to mind the contents of the said decision, which has already played a part in earlier proceedings instituted between the same parties. The following, so far as it is relevant to the present case, was stated:

'... les pouvoirs dévolus par les statuts des fonctionnaires à l'autorité investie du pouvoir de nomination et par le régime applicable aux autres agents à l'autorité habilitée à conclure les contrats d'engagement sont exercés:

1. en ce qui concerne le statut et ses annexes: ... (c) par le président, sur proposition du secrétaire général, pour l'application aux fonctionnaires de la catégorie A jusqu'au grade 7 inclus et du cadre linguistique jusqu'au grade 6 inclus, des dispositions des articles 1, 7, 11, 12, 13, 15, 16, 22, 28(a), 29, 30, 31, 32, 34, 38, 39, 40, 41, 45, 48, 49, 50, 51, 54, 59(1), 78, 87, 89, 90, ainsi que pour l'application des dispositions de l'article 1 de l'annexe III et des articles 7 et 11 de l'annexe IX en ce qui concerne les mêmes fonctionnaires; toutefois, il convient d'informer au préalable le bureau des décisions ayant trait au pourvoi des emplois de la catégorie A'.

If the wording and substance of this decision are followed and if further the

explanations furnished by the defendant in this connexion are borne in mind, appraisal of the third complaint should likewise occasion no difficulties.

It is clear that in the decision of the Parliament a distinction is drawn between Category A and the separate Language Service ('Cadre Linguistique'). A differentiation of this nature in rule for the implementation of the Staff Regulations of Officials the purpose of which is to distribute and delegate the powers of the appointing authority certainly cannot be contested since the Staff Regulations themselves refer to a special 'Cadre Linguistique', even though only Category A is recognized in Article 5 and the special Language Service is treated as 'equivalent to' Category A. It is thus difficult to object that advance notice to the Bureau of the European Parliament is required only in connexion with filling posts in Category A but not for the filling of posts in the Language Service. Furthermore there is a good reason for this differentiation. In my opinion it is fully comprehensible that the Bureau should wish advance notice with regard to the filling of posts with political duties and political influence. No such necessity however exists with regard to the filling of posts in the Language Service the duties of which are rather of a technical nature.

If the decision of the Parliament which the applicant invokes is given a literal and reasonable interpretation it accordingly follows that here too there is no illegality and therefore no ground for annulling the contested decision.

4. It remains lastly to consider the complaint of misuse of powers. Under this head the applicant maintains that the contested decision was not adopted in the interest of the service but exclusively in order to favour a particular person.

In this connexion the Parliament has first of all put forward doubts as to its admissibility. It notes the failure to give a precise statement of reasons for the complaint or to adduce valid evidence and for this reason asks that the fourth complaint be disregarded. I was initially inclined to concur in the opinion of the Parliament having regard to the meagre statements made in the application under the heading 'Misuse of powers'. Nevertheless in his reply the applicant subsequently referred to other statements in the application to provide a basis for his complaint, establishing that his statement of facts contained a sufficient body of evidence, so that it appears to me at least doubtful whether the complaint of misuse of powers is now clearly inadmissible. I consequently think it right that in every instance objective consideration should be given to the question whether the assertions made by the applicant in the present context are capable of providing a basis for his application for annulment.

First of all there is the alleged endeavour of the Administration of the Parliament to keep secret the notice of competition for the post to be filled. The applicant construes as such an endeavour the fact that the posting took place whilst he himself—a person clearly interested in the promotion—was on leave, as the Administration knew. In this connexion the Parliament has indeed rightly remarked that the notice was properly posted and complied with the terms of the agreement concluded with the Staff Committee, that is to say, before 15 July. It may also be considered that the staff as a whole are aware of properly posted notices of competition and that interested parties who are away are in general sufficiently notified through close colleagues. Indeed, in spite of his absence, the applicant in fact learned of the notice of competition and was able to submit his application in Luxembourg within the appropriate period on 19 July. The circumstance which has just been considered can thus scarcely represent sufficient evidence within the meaning of the applicant's complaint.

Two other factors mentioned in the present connexion have already been sufficiently treated in earlier remarks. This is so first of all with regard to the fact that the contested decision was adopted without taking into consideration the comments which the applicant drew up regarding his periodic report. Although in this respect the applicant claims that it was impossible for

him to transmit his remarks to the appointing authority before the adoption of the contested decision, it must be said that having regard to the relevant time-limit, which has already been mentioned, this does not appear credible. In addition, as I have already said, it might at least have been expected of him that he would notify the appointing authority of any reasons which he might have had for delay. Likewise all that is necessary has already been said with regard to the alleged failure to observe the decision of the Parliament regarding the designation of the appointing authority. In fact it cannot be accepted in this connexion that the Bureau of the Parliament should have been notified prior to the adoption of the contested decision. As a result both the circumstances treated must likewise be eliminated as evidence for the existence of misuse of powers.

There thus remains only the reference by the applicant to the judgment in the proceedings between the same parties in Case 48/70 ([1972] ECR 175) in which as the Court is aware an interim decision adopted in favour of the official now promoted was annulled. The applicant wishes to infer from this that the Court had already found at this point that the interim decision was not adopted in the interests of the service and instead had as its aim to confer an unjustified advantage upon the official in question. This is however not really correct as the remark cited by the applicant is worded in the conditional tense and has significance only within the context of consideration of the *admissibility* of the application. Nothing may be inferred from it is the present context and in particular it is incapable of demonstrating that the contested decision of promotion too was adopted with a view to conferring an advantage upon the official inquestion. Next with regard to the alleged failure to implement this judgment, that is to say the omission to require repayment of the differential allowance accorded in pursuance of the interim decision, the applicant himself was obliged to admit in the oral procedure that a request for repayment was rightly not made as the conditions contained in Article 85 of the Staff Regulations of Officials were not fulfilled. We may thus consider that the applicant has dropped this point and thereby abandoned the corresponding part of his application which at the same time allows the finding to be made that, in this respect too, evidence of misuse of powers is lacking.

In accordance with all those findings the complaint of misuse of powers likewise collapses.

5. I can accordingly sum up my opinion as follows:

The application submitted by Mr Bernardi is indeed admissible but is completely unfounded. It must accordingly be dismissed with the result that the applicant, in accordance with Article 70 of the Rules of Procedure, must bear the costs he has incurred in the proceedings.