OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN DELIVERED ON 30 JUNE 1983

My Lords,

The applicant in this case, Hilde de Bruyn, was engaged on the 1 March 1981 as a probationary official in the Dutch language translation service of the European Parliament in Luxembourg at Grade LA 7. The report made at the end of her probationary period was unfavourable and her employment was terminated with effect from the 28 February 1982. Happily the Court has been told today that she has now obtained other employment.

It is necessary to refer briefly to an event which occurred shortly after her arrival and which has featured in subsequent arguments addressed to the Court.

On Friday, 3 April Miss de Bruyn left her place of work and went to Athens. She did not apparently request permission to go, nor did she give any explanation, other than saying to her colleagues that she was feeling unwell. She has claimed that her failure to ask for permission was due to the fact that as a newcomer she was unaware of the requirements for obtaining leave. In addition, she has now given two different explanations as to why she went to Athens. In the first place she said that she went there for a surgical operation which had been arranged before she began to work at the Parliament. Secondly, she claims, in her pleading, that because she was feeling unwell she wanted to consult her doctor in Athens. Whatever the right explanation, once she was in Athens she sent to the Parliament two consecutive medical certificates made out by a doctor in Athens. The first stated that she would be unfit for work by reason of ill-health for a 10-day period starting on the 6 April, and the second certificate extended that period until the 27 April. On the 28 April she returned to work.

On the 2 June 1981 a note signed by the applicant's Head of Division, Mr Van Mulders, and two revisers was sent to the Director of the Language Service and communicated to the applicant. In the note it was said that she should take more care to observe the rules of the administration and that she should get to know the terminology more quickly. On the other hand, her knowledge of modern Greek was said to be good. The note concluded by saying that a well-informed judgment on the applicant could not be given in view of her long absence from work on the ground of her illness.

On the 7 September 1981 the applicant received a further note from Mr Van Mulders informing her that her work had not been satisfactory and that her probationary report might therefore be negative. Mr Van Mulders also stated in the note that he would be prepared to explain to the applicant orally the complaints which had been made about her. She did, in fact, take up this offer although she says that she was only told

in "a fatherly way" that she should read the newspapers and get to know the institution better. She came away with the impression that if she worked hard all would be well.

The applicant did not receive a fuller note sent by Mr Van Mulders to Mr Vinci giving further details of the impression which he had formed. Subsequently, and very fairly, Mr Van Mulders asked that the applicant's probationary period be extended by a month because of the sick leave which she had taken. This request was not accepted because Article 34 (1), second paragraph of the Staff Regulations only provides for such an extension in cases where a probationary official has been prevented by sickness or accident from performing his duties for at least one month. In the present case the applicant had only been away for a period of 24 days.

The probationary report was made out as to the first part on the 21 September 1981. That part of the report primarily contains information of a general nature about the applicant, such as her name, her date of birth and her professional qualifications. In that part of the report the only assessment of her relates to her knowledge of languages. On that item the report is clearly in the applicant's favour and, indeed, her knowledge of modern Greek is said not merely to be good but to be very good.

The second part of the report, it appears, was made out by Mr Van Mulders. For certain items, namely speed of execution, relations within the service and relations with those outside the service, the applicant was said to be fair. She was, however, said to be unsatisfactory with respect to all the other headings, namely the knowledge necessary for her work, judgment and ability to adapt, initiative, ability to organize, sense of responsibility and devotion to her work, quality of work and punctuality. It was, therefore, recommended that she be dismissed at the end of the probationary period.

That draft report was forwarded to the Director General, Mr Palmer, on the 28 October 1981 together with a note signed by Mr Van Mulders and countersigned by a reviser and by a language adviser. The note set out the observations or comments, for which only a small space was provided on the report form, and which were required to be added in order to explain why the applicant was graded unsatisfactory under the various headings. The complaints listed against the applicant were as follows: lack of insight and general culture leading to a failure to understand texts properly, nonchalant and thoughtless conduct; her blunders, it was said, almost upset the smooth-running of the service on several occasions; lack of initiative and dedication to her work; it was said that she had never managed to acquire an adequate understanding of how the institutions worked or the most elementary concepts and terms of the Parliament. It was said that she was slow in her work, she did not work hard enough, was not punctual and, finally, that there was, in her work, a lack of order. The report was signed by Mr Palmer on the 28 October and received by Miss de Bruyn on or about the 5 December.

By letter of 11 December 1981 Miss de Bruyn contested the allegations in the report, and on the 8 February 1982 she

complained of the uncertainty in which she found herself. Finally, by letter of the 9 February 1982 the Secretary General informed her that she was dismissed as from the 28 February. Following a formal complaint in accordance with Article (2) of the Staff Regulations, which was rejected, she lodged the application in the present case on the 23 August 1982.

In essence, she seeks the following relief. Firstly, annulment of the probationary report; secondly a declaration that her dismissal was null and void; thirdly, a declaration that she is entitled to arrears of remuneration, emoluments and allowances; and fourthly, damages.

The Parliament does not contest the admissibility of the application in so far as it relates to the claim for annulment.

Counsel for Miss de Bruyn has taken many points on her behalf, which I deal with *seriatim* even if not in the order taken by him.

He says first that the probationary report was drawn up on the 21 September 1981, namely two months and nine days before the end of the probationary period. The applicant contends that the report should have been drawn up one month before the end of the probationary period, that is the 30 November 1981. Accordingly, it is argued that the report which was in fact made should be set aside. I would not accept that argument. In the first place, it seems clear that the first part of the report was made out on the 21 September. There has been some argument as to when precisely the second part of the report was made out. The Court has been told at the oral hearing that the second part of the report was in fact made out on or shortly before it was dated and signed on the 28 October, and I would accept that date as being the relevant date.

More important, Article 34 (2) of the Staff Regulations provides that the report shall be made "not less than one month before the expiry of the probationary period". It is clear from that provision that it is the latest time, at which the report has to be made, not the earliest time which is prescribed. Clearly, the report must not be made so early that there is no fair chance to assess the probationer unless his work is obviously inadequate for the purposes of Article 34 (2), second paragraph. In my view there is no rigid rule that the report must be made one month before the end of the probationary period.

In addition, the applicant contends, and has contended today, that the report should have been drawn up at a later date because of the sick leave and the annual leave which she had taken. As I already indicated, her sick leave was not long enough to entitle her to an extension of the probationary period under Article 34 (1) of the Staff Regulations; and, as the Court has indicated in Case 92/75 *van de Roy* v *Commission* [1976] ECR 343, the period of the probation is not to be extended to compensate for annual leave. Accordingly, it seems to me that there is nothing in the argument that the making of the report should have been put back on the basis that she had taken approximately one month's annual leave.

The next argument put forward by the applicant is that Mr Van Mulders, as Head of Division, was not competent to make out the report. As the Court pointed out in Case 99/77 *D'Auria* v *Commission* [1978] ECR 1267, the Staff Regulations do not state who is to make out and sign the probationary report so that this matter is governed by the internal rules of each institution. The

internal rules of the Parliament appear to indicate that this task is to be carried out by Directors and it is said, on the applicant's behalf, that Mr Van Mulders was a Head of Division.

The Court has, however, been told that at the relevant time the translation service had no Director. In addition, although the report was made out by Mr Van Mulders, there is no doubt that it was signed by Mr Palmer, the Director General. In my view, in this case, even if there was any irregularity, it is in these circumstances cured. In the reply the objection which is taken is in fact narrowed down to the contention that Mr Van Mulders merely failed to indicate that he was acting on behalf of the Director. This, it is said, is sufficient to justify the annulment of the report. In view of Mr Palmer's signature of the report that point, it seems to me, is of no consequence.

The next point which is taken concerns the contents of the report and the note of the 28 October. The applicant's principal objections are first that these comments are subjective, and secondly that the reasoning is inadequate. The distinction between "subjective" and "objective" comments is not always an easy one to draw. Clearly as is contended, a report must not be merely subjective in the sense that it is based on prejudice or mere emotional reaction or on animosity. But so long as it is based on ascertained facts there is necessarily a value judgment involved in many of the headings of the assessment and, in my view, it is not a ground for annulment that a report is subjective in this latter sense. Nor, in the ordinary way, is it for the Court to substitute its own value judgment for that of the official making the report. In any event, it seems to me that many of the comments are at least as objective as subjective in their nature. I would, accordingly, reject this point also.

As to the allegations of inadequate reasoning, two points are taken. First, it is said that the reasons are insufficiently detailed or precise, and, then, each of them is attacked on its merits. There is, in my view, some force in the contention that the comments are put in very general terms. "Lack of insight and general culture", "nonchalant and thoughtless behaviour", "lack of order" are general phrases which give, in themselves, little idea of what precisely is complained about. It would, in my view, have been very much better if, in simple language, the practical difficulties had been spelled out, not least because of the consequences for the probationer's career. On the other hand, taking the report as a whole, it seems sufficiently to be said that Miss de Bruyn had not really made the necessary efforts to understand the work that she was doing, that her work was not organized and that she had, as for example in going to Athens without giving proper notice or making proper enquiry, caused organizational problems in the service. Accordingly, despite some justified criticism of the generality of the report I do not consider that the applicant has shown that the reasoning is so inadequate that the Court should annul the decision.

As to the allegation that the separate items are each unjustified on their merits, it does not seem to me, in the light of what I have said, that, even if it were possible, it would be right, on the

material available, for the Court to assess the merits of the various complaints which are made. There is, however, one matter which is taken as a general argument which, perhaps, I should refer to. That argument is to the effect that the applicant's diploma and her success in the competition for entry into the Parliament show that the first point (lack of insight and general culture leading to a failure to understand the text properly) cannot be well-founded and, in any event, such an opinion reverses the decision of the jury so that the report, as a whole, ought to be set aside. If that argument were right it would effectively undermine, as the Parliament points out, the purpose of probationary periods, namely to provide a safety net for the administration when a candidate, good at the examination, falls short in practical work.

Then the applicant says that the first part of the report contains an error in that it states that she had studied for two years when in fact she had studied for a period of four years. That is true, as the Parliament concedes. It is contended that if he had known that she had taken four years for her degree rather than two Mr Palmer would not have found it possible to accept that she was lacking in insight and general culture. For my part, I cannot believe that this error had any influence on the individuals involved in drawing up the report, or the decision to dismiss her. In my view, this was an immaterial error and cannot constitute the basis for annulment.

Then the applicant points to an inconsistency in the report. On the one hand, in the report, the applicant's speed of execution was said to be fair; on the other hand, the note of the 28 October 1981 annexed to the draft report states that she was slow in her work. These statements, as is accepted, are plainly inconsistent. Nevertheless, it is equally plain that the decision to dismiss Miss de Bruyn rests on a number of other factors not necessarily dependent upon this one so that, in my view, this inconsistency does not constitute a sufficient ground to annul the report and the dismissal.

The applicant complains that Mrs Kroon, a reviser, was not consulted about the report. She had apparently revised some of Miss de Bruyn's translations at the beginning of her probationary period and was, according to Miss de Bruyn, the only reviser with a knowledge of Greek. Moreover, she was one of the signatories of the note of the 2 June 1981. However, Mrs Kroon's expertise lay principally in her knowledge of Greek and the probationary report states that the applicant's knowledge of Greek was very good. Consequently, it is hardly likely that the report would have been more favourable to the applicant had Mrs Kroon been consulted. What is more, the Court is told that Mrs Kroon was on sick leave for long periods during the applicant's probationary period so that she was not in a good position to assess her. Accordingly, in my view, this argument also must be rejected.

Then it has been stressed in the course of the written pleadings that the Parliament failed to comply with its obligation to provide proper assistance to the applicant during her probationary period. She does not, in this connection, rely on any particular provision of the Staff Regu-

lations and it would not be possible for her to rely on Article 24 since the Court has already held that the obligation to provide assistance laid down in that Article is concerned with the defence of officials by the institution against the acts of third parties and not against acts of the institution itself, the review of which is governed by other provisions of the Staff Regulations (Case 178/80 *Bellardi-Ricci* v *Commission* [1981] ECR 3187, para. 23).

It might well be wrong for an institution to dismiss a probationary official on the grounds of insufficient knowledge of the working of the institution when that knowledge could only be gained in post and with assistance and instruction from colleagues and superiors and when the latter had failed to give the necessary instruction or help. There is some dispute between the parties in this case as to how much assistance was given to the applicant, but it seems clear that some advice was given to her and she was sent the revised version of her translations which should have enabled her to realize what was wrong and to improve her knowledge. I do not consider that the applicant has adduced sufficient evidence to make out her allegation in this case.

There is a further contention that the Parliament has infringed the principle of legitimate expectation. It seems to be however that the notes of 2 June and 7 September 1981 gave sufficient warning to the applicant that her work and conduct were wanting and that a marked improvement was called for. I would accordingly reject this argument also.

Finally, the applicant alleges that there has been in this case a misuse of powers. It is said that she was dismissed, not, in truth, because of her own work or conduct but because it was decided to make her post available for a Mr Vermeulen, a freelance translator who had a particularly good knowledge of Greek and that, accordingly, Miss de Bruyn had to be removed. However, it seems clear on the facts that Mr Vermeulen began work as an official in the Dutch Translation Service before the end of the applicant's probationary period, at which time three other posts were still vacant and available. Moreover, he was appointed pursuant to a different competition which laid down different conditions of entry. If, of course, it had been established that this was the reason for the termination of Miss de Bruyn's appointment, different considerations would apply. I am not satisfied, on the information available, that there is any substance in the broad allegations which have been made under this head.

Accordingly, even though irregularities of form or clear errors of material fact, or misdirection in law, or excessive powers may justify the Court in annulling such a decision as is in question here, I conclude that the application for annulment should be dismissed.

The same must apply to the applicant's claim for past remuneration and for damages.

In accordance with Article 70 of the Rules of Procedure, each of the parties should bear their own costs.