

OPINION OF MRS ADVOCATE GENERAL ROZÈS
DELIVERED ON 3 MARCH 1983 ¹

*Mr President,
Members of the Court,*

The Court has received an application lodged by Franco Colussi for the annulment of a decision of the President of the European Parliament whereby another person was promoted to the post of Linguistic Adviser in the Italian division.

I — The facts are as follows:

On 14 July 1980 the European Parliament published Vacancy Notice No 2690 with a view to filling seven posts of "Linguistic Adviser" in Grade L/A 3, one post for each official language with the exception of Greek, the seventh post having been allotted to the Terminology Division.

In March 1978 the seven posts concerned were added by the Parliament to the detailed list of posts in the Directorate General of Sessional and General Services. They were, however, held in reserve in order to enable the directly-elected Parliament to develop its activities and to provide for the normal discharge of its duties in its normal meeting places immediately on its election by direct universal suffrage. The new Parliament would be free to dispose of these posts according to its needs.

In accordance with Article 29 (1) (a) of the Staff Regulations, it was intended to fill these posts by transfer or promotion.

Three Grade L/A 4 revisers including Mr Colussi submitted applications before the closing date.

On 3 September 1980, Mr Colussi submitted his application and addressed a letter to the Directorate General of Personnel in which he supplemented his references and, in particular, drew attention to the fact since 1978 he had been the holder of a degree in law.

On 1 October 1980 he submitted a *request* to the President of the European Parliament, within the meaning of Article 90 (1) of the Staff Regulations, to the effect that the vacancy notice be amended so as to exclude any discrimination or uncertainty and that the selection be made on the basis of a genuine comparison of qualifications and merits and not principally by reference to the age of the candidates.

On 1 December 1980, the President of the European Parliament appointed another candidate.

Franco Colussi acknowledges that he learned of that appointment on 21 January 1981; at any event, it was posted up from 23 January to 5 February 1981 and he received confirmation that he had been unsuccessful in the form of a statement to that effect on his application form on 28 January 1981.

By letter of 15 April 1981, registered on 21 April 1981, Franco Colussi submitted a *complaint* within the meaning of Article 90 (2) of the Staff Regulations against the rejection of his request of 1 October 1980; the complaint was also directed against the fact that he had not been

¹ — Translated from the French.

successful. That complaint was rejected by the President of the European Parliament on 4 September 1981.

On 27 November 1981, Franco Colussi introduced the present application, by which he asks the Court essentially to annul the rejection of his complaint and the appointment of the successful candidate.

II — Admissibility

The action was brought within the prescribed period. The European Parliament does not question its admissibility. It acknowledges that the applicant's complaint was directed against the implied rejection of his request concerning the vacancy notice, against the promotion of the other candidate and against the fact that he was not himself appointed.

Nevertheless, it considers that the argument concerning the invalidity of the vacancy notice is inadmissible inasmuch as it had not been raised in the conclusions presented in the application.

III — Discussion

I have changed the order of the various arguments concerning the form and the substance of the case which the applicant has advanced in support of his action.

A — Submissions regarding the form

Franco Colussi disputes the authority of the various bodies which took a hand in the promotion procedure. He maintains that it is not established that Parliament delegated the exercise of its power of promotion to its Bureau and that, in addition, it is not proved that the Bureau

sub-delegated its powers to the President.

He adds that even assuming that the President had the necessary authority, it is not established that the President conducted both the required comparative examination of the merits and the periodic reports himself. Moreover, it is not proved that the Bureau was informed in advance of the decision regarding promotion taken by the President. Finally, he notes that the authority which considered the complaint was the same as that which was responsible for the act adversely affecting him, which is contrary to one of the rules of fair treatment.

I do not think that any of those allegations may be accepted.

(a) Under the terms of Article 2 of the Staff Regulations, each institution must determine who within it shall exercise the powers conferred on the appointing authority.

Both in the version in force at the time of the disputed promotion and in earlier versions, Article 49 of the Rules of Procedure of the European Parliament determines the role of the Secretary General, of the President and of the Bureau. In particular the latter is required to decide "the number of staff and lay down regulations relating to their administrative and financial situation", after consulting the appropriate committee of Parliament.

By that body's Decision No 175/62 of 12 December 1962, the powers conferred by the Staff Regulations on the appointing authority as regards the application of Articles 29 and 45 in particular to officials in Category A up to Grade A7 inclusive and officials of the languages staff up to Grade 6 are vested in the President, on a proposal from the Secretary General.

Those provisions show that the Bureau was entirely competent to choose the appointing authority, and, in consequence, the President designated in that capacity was himself competent to decide as to the promotion.

(b) In addition, the obligation imposed on the President to give the Bureau advance information of decisions before filling the posts concerns, according to Decision No 175/62, officials of Category A.

The applicant's claim that the distinction made by that decision between officials of *Category A* and those of the *languages staff* is a clerical error cannot be accepted, as the Court held in its judgment of 13 July 1972 in *Bernardi*.¹

(c) Franco Colussi also maintains that it is not established that the President actually considered the merits and the periodic reports of the candidates himself. He is said simply to have based his decision on the memorandum addressed by the head of the Italian Division to the Director of Translation on 8 October 1980, which gave an incomplete and inaccurate description of the qualifications of the candidates. He considers that Parliament should provide the evidence that the President actually conducted a personal investigation.

The letter of 4 September 1981 states that the President of the Parliament rejected the applicant's complaint after a thorough investigation had been undertaken by his staff. That statement does not lead to the conclusion that a

personal examination did not take place. On the contrary it establishes the seriousness of the investigation undertaken to enable the President to take his decision with knowledge of all the facts of the case. At any event, it would be impossible to furnish the formal evidence which Franco Colussi seems to be demanding.

(d) The applicant notes that the authority which considered the complaint was in this case the same as that which adopted the measure complained of. That situation results from the procedure established by Title VII of the Staff Regulations, which is purely administrative in nature. It clearly does not have the character of proceedings before a court. Perhaps it might indeed be desirable for that state of affairs to be altered, but it conforms to the provisions in their present state.

B — Substance

The nature of the duties attached to the vacant post was described in the vacancy notice as being those of:

A linguistic adviser with special responsibility for specialized work of revision and translation and for the vocational training of officials and trainees in the division;

To replace the head of the division in his absence.

(a) Franco Colussi maintains that the fact that the procedure of promotion rather than that of internal competition was used constitutes a misuse of power. The vacancy notice was intended to reserve the vacant post for the oldest official or the one with the greatest

¹ — [1972] ECR 603 at p. 609, paragraph 19 of the decision:

"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".

seniority in each linguistic division in order to ensure that the latter would be automatically promoted to the highest grade in the language staff "as a reward". In order to achieve that aim the notice was drawn up so as to include, among the duties to be performed, the vocational training of officials and trainees of the division and, further, the procedure provided for in Article 29 (1) (a) (promotion by selection) was preferred to that of an internal competition.

As I pointed out at the beginning of this opinion, the European Parliament maintains that such an argument, which questions the validity of the vacancy notice, in the applicant's reply, is inadmissible because it was only formally claimed that the notice be declared void.

In my view that argument is closely connected with the question of the validity of the decision not to appoint Franco Colussi in so far as any assessment of that question requires that it be ascertained whether the conditions imposed by Articles 29 and 45 of the Staff Regulations have been observed. Therefore, in the context of his application for the annulment of the decision not to appoint him, the applicant may plead the irregularity of a measure which necessarily conditioned that decision.

Nevertheless, in my view, the argument is not well founded.

In the first place it should be noted that the disputed decision could not in itself have achieved the aim which the applicant attributes to the administration.

Only that decision in conjunction with all the other decisions taken in connection with the vacancy notice could accomplish that objective. The proof that there was no general plan may be seen from the fact that, at least in the Danish Translation Division, the appointing authority did not select the oldest official. The applicant then notes that in reality it might be suggested that, on the contrary, "the age of the candidates may be a negative factor". Such an admission, however, invalidates his argument.

In was, in fact, not the oldest candidate or the candidate with the longest service who was selected, but the person with the greatest seniority in Grade L/A 4. That was the position in the Italian Division: of the three candidates the one who qualified as such was not considered because he had been assigned to a political group for the last eight years. The candidate who was selected had a greater seniority in the grade than the applicant.

If, as Franco Colussi argues, the officials of Grade L/A 4 who were eligible for promotion had never been able to participate in the vocational training of officials and trainees, which was one aspect of the duties attached to the vacant post, it is clear that such a criterion could scarcely be assessed on the basis of the candidates' periodic reports. However, it is hard to see how the organization of an internal competition would have helped to decide between the candidates as regards their aptitude for performing those specific duties.

According to the case-law of the Court,¹ the appointing authority must first

¹ — Most recently the judgment of 28 October 1982 in Case 265/81, *Giannini*, paragraph 3.

consider whether the vacancy may be filled by transfer or promotion. Only after that has been done, may an internal competition be organized.

(b) Franco Colussi also maintains that the consideration of the comparative merits of the candidates provided for in Article 45 was not carried out in the proper manner. His own merits and abilities were more impressive than those of the successful candidate, who did not have the required qualifications.

As far as that last point is concerned, in the context of the present action, I can only conclude that the responsibility lies with the applicant. However, it may be noted in connection with the assessment of his merits that a memorandum of 8 October 1980 which appears in the file, addressed by the head of the Italian Translation Division to the Director of Translation, shows that the applicant and the other candidate had both received excellent reports. The head of the division certainly knew that the applicant had on several occasions been a member of selection boards for competitions,

since he himself had participated in those selection boards or indeed had been the chairman. He must also have known that Franco Colussi, as the latter took pains to remind him on 3 September 1980, was the holder of a degree in foreign languages and literature and a degree in law.

Nevertheless when the candidates have equal qualifications, their age may legitimately constitute an alternative criterion. In the case *Costacurta*,¹ the Court has indicated that "age may well constitute an important factor regarding the quality and efficiency of the official to be recruited".

As the post in question involved in particular the vocational training of officials and trainees in the division and replacing the head of division when he was absent, it does not seem to be obviously inappropriate to take into consideration the seniority in the grade.

Under those circumstances, the appointing authority exercised a choice which the Court has generally refused to subject to close scrutiny.

I propose:

That the application be dismissed, and

That the applicant be ordered to bear his own costs.

1 — Judgment of 22 March 1972, Case 78/71, [1972] ECR 163 at p. 168, paragraph 9 of the decision.