4. Orders the European Parliamentary Assembly to pay the costs.

O. Riese L. Delvaux R. Rossi

Delivered in open court in Luxembourg on 1 March 1962.

A. Van Houtte
Registrar

O. Riese
President of the First Chamber

OPINION OF MR ADVOCATE-GENERAL LAGRANGE DELIVERED ON 14 DECEMBER 1961[1]

Mr President,
Members of the Court,

Mrs Leda De Bruyn, the wife of Mr Giorgio Cerioni, was engaged by the European Parliamentary Assembly on a temporary basis in the capacity of typist (Grade 3A) for the period from 11 February to 10 March 1959, under a 'temporary contract' dated 11 February 1959. The governing terms were those contained in a document entitled 'Conditions of Employment of Auxiliary Staff' which was duly applied by the administrative body of the Assembly and which was expressly incorporated into the contract.

On 11 March 1959, that is on the day following the expiry date of this temporary contract, the applicant put her signature to a 'letter of appointment' from the Secretary-General which informed her that the European Parliamentary Assembly was prepared to make use of her services 'on the conditions of remuneration hereunder'. (There followed a figure showing the total remuneration together with additional allowances). Then the following provision appeared: 'These arrangements may be terminated at any time by either party on one month's notice. This letter is without prejudice to the subsequent conclusion of a contract'.

That, as you are aware, is the legal basis of what, by common consent, is referred to as the 'Brussels Rules'. You are also aware that, in spite of the mandatory provisions of Article 246 (3) of the EEC Treaty and of Article 214 (3) of the Euratom Treaty, no 'contract of limited duration' has been concluded with newly recruited staff.

One cannot but be struck at the outset by the difference between the clarity of the legal position ensuing from the auxiliary staff contract and the vagueness in which, apparently intentionally, the so-called 'Brussels Rules' are couched.

One should not be surprised, therefore, that the application of these 'Rules', the substance of which moreover constitutes a contract (even though the letter of employment attempts to suggest the contrary), should be a fertile source of contention and difficulty as the case law of this Court testifies.

On 3 July 1959, Mrs De Bruyn found herself being given one month's notice (no reason being stated), and her employment due to end on the evening of 3 August.

On 14 July, she forwarded a complaint to the Secretary-General to which he never replied. The matter had, in fact,

1 — Translated from the French.

become a contentious one by 25 July, the date on which the party concerned had brought the facts before the Arbitration Tribunal of the District of Luxembourg. That tribunal, by a judgment of 22 January 1960, declared itself to be without jurisdiction in the matter. On 7 December 1960, Mrs De Bruyn addressed to our Court a request for legal aid and, on this being granted, lodged her application on 23 March 1961.

In the first place I think that we should examine of our own motion, albeit cursorily, a certain number of questions on jurisdiction and admissibility.

The Assembly is an institution common to the three Communities and as such subject to the simultaneous application of the three Treaties. However, there is no reason in this case to ask whether, while waiting for the entry into force of the Staff Regulations provided for in Article 212 of the EEC Treaty and in Article 186 of the Euratom Treaty, the Staff Regulations of the ECSC, including those of its provisions concerned with recruitment, remain applicable to the staff of the institutions of the Community. Indeed, the European Parliamentary Assembly itself intended to submit, for the recruitment of its servants during this interim period, to the 'Brussels Rules' applied by the Commissions, i.e. to a body of rules appropriate solely to the EEC and Euratom Treaties, even though, as we have seen, the provisions in these Treaties which bear on the matter — Article 246 (3) (EEC) and Article 214 (3) (Euratom) — have not been observed. Article 42 of the ECSC Treaty requires, in order to give the Court jurisdiction, an arbitration clause which was absent in the present case. It is not therefore applicable. The jurisdiction of the Court rests on Article 179 of the EEC Treaty and Article 152 of the Euratom Treaty, which do not require an arbitration clause for servants of the EEC Commission, as you recognized by your decision in the case of Lachmüller and Others.

Another question then arises. Was not the claim 'misdirected'? You are, of course, aware that although, according to Article 6 of the ECSC Treaty 'the Community shall have legal personality' and 'shall be represented by its institutions, each within the limits of its powers', the systems of the two Treaties of Rome (EEC and Euratom) are different; true, only 'the Community shall have legal personality' (Articles 210 (EEC) and 184 (Euratom)), but on the other hand 'In each of the Member States, the Community shall enjoy the most extensive legal capacity accorded to legal persons under their laws; it may, in particular, acquire or dispose of movable and immovable property and may be a party to legal proceedings. To this end, the Community shall be represented by the Commission.' (Articles 211 (EEC) and 185 (Euratom)).

Nonetheless, I consider that this exclusive capacity attributed to the Commission to represent the Community (itself possessed of legal personality) relates only to dealings with third parties, and in particular to what one might call the 'civil life' of the Community. This could not possibly have the effect of conferring on the Commission a monopoly of legal representation, particularly before this Court, in disputes which bring into play the varied powers attributed to the institutions in accordance with Article 4 of the EEC Treaty and Article 3 of the Euratom Treaty. Thus one could not imagine the Commission resisting a claim made under Article 173 (EEC) or Article 146 (Euratom) against an act of the Council. In the present case, Articles 179 (EEC) and 152 (Euratom) provide that 'The Court of Justice shall have jurisdiction in any dispute between the Community and its servants, within the limits and under the conditions laid down in the Staff Regulations or

the Conditions of Employment.'
The 'conditions laid down in ..... the Conditions of Employment' of the servants of an institution imply a capacity on the part of the institution to exercise, with regard to such servants, and without any intervention by the Commission, the powers of an employer: appointment, dismissal, etc. This peculiar and exclusive capacity of an institution implies in its turn a parallel and no less exclusive capacity to institute proceedings concerning the disputes which may arise from its exercise. This should be equally so where what is involved is a dispute of a monetary nature which might result in the institution's being ordered to pay allowances or compensation on behalf of the Community, in whose budget, as you know — contrary to the position in the ECSC — the Commission plays a leading part in comparison with that of the other institutions.
Let us now turn to an examination of the dispute. The applicant seeks:

(1) the annulment of the decision of dismissal of 3 July 1959;
(2) an order against the Assembly to pay to the applicant
    (a) a sum of 60 000 francs by way of non-material damages;
    (b) a sum equal to 3 months' salary in lieu of notice; and
    (c) payment of the installation allowance.

As far as the conclusions relating to annulment are concerned, they should not be taken too literally if we are to go by what is said in the body of the application: 'The European Parliamentary Assembly is in breach of contract on the ground of the absence of reasoning in the disputed decision and, as termination of the contract has become final, the Assembly's liability must be discharged by way of damages.'
This interpretation of the conclusions has, moreover, been confirmed at the Bar, as you may remember.
It follows that it cannot be pleaded that the applicant has lost her rights because of lapse of time. We have here a *claim for damages* which can be blocked only by prescription; this obstruction does not arise here, since a period of limitation (5 years) has been provided for only in matters of non-contractual liability (Article 43 of the EEC Protocol on the Statute of the Court of Justice, Article 44 of the Euratom Protocol).
First and foremost, the question is to determine whether the contract binding the applicant to the Assembly entailed the performance of a probationary period and, if so, its length and legal effects.
The letter of employment is silent on the point, which seems quite normal for a contract for an unlimited period, terminable by either side on one month's notice. If the Administration considers that the servant does not satisfy the requirements of the job, it can quite lawfully make use of its right of repudiation even during the first month, and if there was a probation I cannot see *a priori* what new legal relationship could be established between the parties after the completion of the probationary period.
Nevertheless, the existence of a probationary period in the contractual relations between the applicant and the Assembly seems well established. In the first place, the defendant alleges, without being formally contradicted on this point, that such was the practice and that the applicant had certainly been warned of it. On the other hand, it is not contested that the applicant received a document, APE 926, at the same time as her letter of employment, relating to the refund of removal expenses and to the installation allowance, and saying, in effect, that these advantages are accorded to servants 'of at least two months' standing under a letter of employment of the Brussels type, *and whose probation report is satisfactory*'.
Nor is it contested that the applicant was

acquainted with a new communication No 59/13, dated 12 March 1959 (that is to say, the day after her engagement), which also mentioned the necessity of a 'satisfactory probation report' as a qualification for payment of the installation allowance.

What was the length of this probation? Two months, we are told in reply to Question No 2 put by the Court. Nevertheless, in the present case the Assembly considers that it was of three months, since the repudiation occurred on 3 July whereas the letter of employment was dated 11 March, the time limit having been extended for twenty-two days so as to take into account two periods of sick leave granted in the interval: three months, reckoned from 11 March, plus twenty-two days brings us to 3 July. Without prejudice to the extension, to which she makes no allusion, the applicant in her request for legal aid recognizes that the probation lasted for three months. In fact I would call attention to the following clause in the application: '... this contract not having been repudiated *before 11 June 1959, the end of the period of probation*'.

I shall, therefore, in the present case admit the existence of a probationary period, and its length of three months.

But then the question arises: what were the legal effects of this probation in the relationship between the parties? You know the argument of the Assembly on this point: the appraisal by the Administration of the value of the probation is purely discretionary and the grounds cannot be stated. If the competent authority — in this case the Secretary-General — considers that the party concerned has not shown evidence in his behaviour, either from the point of view of his abilities or from that of his temperament, of the necessary capacities, it has the right simply to put an end to the contract, without having to assign reasons for its decision. In the converse situation it refrains from taking a decision of dismissal, which implies that a subsequent dismissal will have to be duly justified in accordance with the case law of the Court. These precedents would not then be applicable where the servant is dismissed at the end of the probation. The only obligation on the administration as far as the probation (or trial period, as it is more exactly called by the defendant) is concerned, is to give the interested party the opportunity of being able to give a conclusive demonstration of his abilities: *vide* the Mirossevich case. But once this condition is fulfilled, the result of the probation can be assessed only in a discretionary manner; the actual grounds leading to an unfavourable decision are not necessarily or solely of a technical character: a large number of considerations of another nature may quite legitimately affect it, and it would be impossible to phrase some of them explicitly without prejudicing the party concerned and exposing the Administration to an action for defamation. All these considerations have been developed with considerable of General Services, Mr Neujean, dated the European Parliamentary Assembly. Nevertheless, they have not convinced me.

Indubitably I agree that in spite of the absence of any decision more or less analogous to establishment as an official, and in spite of the absence of any change in the legal nature of the contract or its mode of discharge, always excepting the right to the installation allowance, the fact that there was a probationary period, confirmed by a 'probation report', makes it impossible to justify a dismissal by anything other than proper grounds — grounds over which the Court should have control. *But this requirement exists from the beginning:* dismissal should not be any more arbitrary after the first month than after several years: your case law has never made such a distinction.

The truth is that the first months corresponding to a probationary period,

having the character of a trial period, are intended to allow the party concerned to 'get into his stride'. He is, as it were, under observation, and it is at the end of this period that the general assessment, which enables it to be said whether or not he shows the required abilities, should take place. A probation report was provided for with this in mind. But since, in fact, no decision to offer or refuse establishment is made, and it is either by means of dismissal with the normal contractual notice or by the absence of dismissal that the decision should be expressed, it is essential that the grounds should be stated. It should be known whether the dismissal is prompted as a result of an unfavourable assessment of the results of the probation or as a result of any other cause.

Now in the present case, as you know, there is a favourable probation report on the files: it is the note of the Director of General Services, Mr Neujean, dated 3 July 1959, which is based on the report of the Deputy Head of the Translation Department, which in turn takes account of a note of the interested party's immediate superior, Miss Liliana Moggio.

Two remarks on this subject: first, the latter note mentions not only the technical proficiency of the applicant ('her typewritten work shows care, accuracy, a perfect knowledge of Italian spelling and a satisfactory speed' — *discreta* has no pejorative meaning in Italian) but also those well-known qualities of temperament to which, with justification, the Assembly seems to attach so much importance: 'willing, anxious to make herself useful — valuable characteristics for establishing and maintaining the best relations with colleagues'.

What more could one want from a typist?

The second remark, which has certainly not escaped your notice and which, I might say, has been discreetly emphasized by counsel for the applicant, refers to the rather unusual terms used by the note of the Director of General Services, from which one cannot but retain the impression that the initiative in terminating Mrs De Bruyn's contract had been taken at a higher level where it might have been wished (or so it seems) to instigate an unfavourable probation report. That impression inevitably weighs on the whole matter and it must be recognized that nothing has been done on the Assembly's side during the course of the action to dissipate it.

It is true that the defendant does not appear to consider the note of the Director of General Services as the 'probation report' referred to in communication 59/13. In the eyes of the defendant, this would be a technical note, and the real report could be compiled only by the Secretary-General. Since he obviously could not address a report to himself, the upshot of it would be that the decision of dismissal, though given without stated grounds, should be regarded as substituted by implication for the favourable testimonial following on the technical testimonial stating grounds only for its own part, and issued by the head of the responsible department.

I am unable to follow the argument of the defendant on this point. A probation report is compiled normally by the head of the department to whom the party concerned is answerable, in this case the Director of General Services, who was responsible for the translation service. Moreover, the Assembly recognizes this itself in its reply to Question No 2 put by the Court where we read this: 'The probation, in the circumstances, was dependent on a practice which consisted in *each Director's* providing the Secretary-General at the end of two months' effective service by the party concerned with a *probation report* on the basis of which the Secretary-General decided on the servant's retention or dismissal.'

In the present case, the report of the Director of General Services was satisfactory. Of course, the Secretary-General was not bound to approve it, but it would have been up to him to say why he did not approve it. At the very least he should have said that his opinion of the abilities and temperament of the applicant, in the light of the requirements of the service, differed from that of her immediate superiors and that she had not completed a satisfactory probation or, alternatively, that he had based his decision on other grounds. In the latter case the precariousness of the probation was not a valid argument since, *ex hypothesi*, the stated ground would not have been germane to the manner in which the applicant had acquitted herself of her professional obligations during the period of her probation. The difficulties or unpleasantness occasioned by the statement of the appropriate ground cannot be balanced against the protection of the fundamental rights of the servant. Besides, the difficulties of giving grounds should not be exaggerated: the four official languages of the Community, and the Italian language in particular, contain enough nuances to allow of a correct statement of any justifiable ground.

To sum up: I consider, then, that the precedent of Lachmüller and Others is also applicable here. The statement of grounds required by this precedent entails no formality; as the decision puts it, it is intended only to allow the Court to exercise its control. Its absence, therefore, is not a deficiency of form and it cannot be cured by sufficiently pertinent grounds being given before the Court, the latter having the powers of a judge with full jurisdiction in the matter. But in the present case we are still awaiting the statement of the grounds of the applicant's dismissal.

The assessment of damages is obviously difficult. In the case of Lachmüller and Others you based yourselves solely on the non-material damage suffered by the applicants, 'by reason of the anxieties which the precarious position arising from default of the Commission caused them'. You had recognized in fact that the applicants had 'either been re-instated in their former jobs or had found new employment' (though the judgment does not say if it was less remunerative), and for this non-material damage you awarded 60 000 Belgian francs to each of the interested parties. In the Fiddelaar case there was neither mention of re-instatement nor of new employment but, again, of the 'precarious position arising from the default of the Commission', a ground to which is added 'the age and situation of his family'; but all is considered as non-material damage which is assessed at 100 000 Belgian francs.

In the present case we know that the applicant has found employment in her native land but we know nothing of its nature or its terms. We think that an equitable compensation would consist in the award of 30 000 francs as damages (equal to roughly three months' pay). Should damages for dismissal be added? I think not. Indeed, although the decisions in the Lachmüller and Fiddelaar cases have fixed the normal period of notice as three months, a period which had in fact been observed, there is here a pre-determined period expressly mentioned in the contract: one month. It is one of the rare express stipulations of this contract which nevertheless governs the parties' rights, and one must abide by it.

Finally, on the subject of payment of the installation allowance, by the terms of communication 59/13 of 12 March 1959 to which I have already alluded:

'payment of the installation allowance is due only when the following conditions are present:

1. a favourable probation report;
2. a favourable medical examination; and
3. proof of installation.'

The first condition is fulfilled: a satisfactory probation report had been made out, as we have seen, by the Director of General Services, and communicated to the applicant. It is not contested that a satisfactory medical examination took place. As for the 'proof of installation', this appears sufficiently, according to the formal affidavits filed at the hearing by counsel for the Assembly, from the tenancy agreement of one year dated 8 May 1959. The fact that this date precedes the end of the period of probation merely shows that the applicant took a certain risk, albeit encouraged in this by the Administration, which advised its employees to install themselves as soon as possible: this was of little importance in the present case since the probation report was satisfactory.

The three conditions having been fulfilled, the applicant was entitled to claim the installation allowance.

I am therefore of the opinion:

— that the prescribed amount of the installation allowance should be paid to Mrs De Bruyn;

— that the European Parliamentary Assembly should be ordered to pay the sum of 30 000 Luxembourg francs to Mrs De Bruyn;

— that the remaining conclusions of the application should be dismissed; and

— that costs of the action should be borne by the European Parliamentary Assembly.