Orders the High Authority to reimburse to the Court four-fifths of the costs incurred by it as legal aid.

Pilotti Rueff Riese

Serrarens Delvaux Hammes van Kleffens

Delivered in open court in Luxembourg on 12 December 1956.

M. Pilotti
President

P. J. S. Serrarens
Judge-Rapporteur

A. Van Houtte
Registrar

OPINION OF MR ADVOCATE GENERAL LAGRANGE

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Mr President,
Members of the Court,

I shall refrain in this case from beginning with a statement of the facts not only because these have been stated in full before you and moreover perfectly summarized in the report of the Judge-Rapporteur but because the case depends largely on the facts themselves so that an introductory summary would require a position to be adopted at that stage on important aspects of the case.

I – Claims in the application

Let me confine myself first of all to reminding you of the applicant's claims. In this re-

spect I refer to the 'final written claims' lodged on 16 August 1956 in accordance with Article 45 of the Rules of Procedure of the Court following the preparatory inquiries ordered and which only define, without altering or extending them, the claims in the application.

The *main claim* is for a declaration that Miss Mirossevich was appointed *permanently* and *definitively* on 9 December 1952 as an interpreter/translator with the language department (former category II) at an annual salary of Bfrs 300000 in addition to local allowance and in consequence for the annulment of the notice of 8 January 1953 'relating to an alleged trial period as amounting to *ultra vires* acts in the form of a misuse of powers in that it misrepresented the facts or at the least that it was based on an error of fact'.

Miss Mirossevich further claims a declaration that she is 'entitled to reinstatement in her career bracket and back payment of salary equal to the difference between what she has received and what she was entitled to receive by virtue of the 'status' of the post in question (with legal interest)'.

Alternatively she seeks a declaration 'that Miss Mirossevich was duly engaged on a *trial basis* on 9 December 1952 as an interpreter/translator' on the same conditions; and that the probationary period was completed only partially and inadequately but that it was terminated successfully after subsequent linguistic services'.

In consequence she seeks a declaration that the notice of 8 January 1953 relating to an uncompleted and inadequate probationary period is null and void because the notice was vitiated as based on misrepresentation of the facts and so forth (there follow the same claims as previously in relation to the reinstatement in the career bracket and back payment of salary).

The applicant finally claims that *'in any event* the *pseudo-contract* of 12 October 1953 should be declared null and void' on the grounds of lack of consent, fraud and so forth and the award of 'proper' compensation for non-material injury and that the High Authority be ordered to bear the costs.

As will be seen, the claims are solely of a *contractual nature*. The Court is not being asked to *annul* administrative decisions but to recognize that they are null and void as regards the obligations entered into towards the applicant, to define their precise scope and to prescribe sanctions for their disregard both by recognizing the right to 'reinstatement in the career bracket' and the grant of monetary compensation.

II — Jurisdiction

The position I have described appears to me sufficient to establish the Court's jurisdiction in the present case on the basis of Article 42 of the Treaty which provides that 'the Court shall have jurisdiction to give judgment pursuant to any arbitration clause contained in a contract concluded by or on behalf of the Community, whether that contract be governed by public or private law'. I think that with regard to what the applicant calles the 'pseudo-contract' of 12 October 1953 to which her signature is appended there is at least one clause which she recognizes as valid, namely: 'Any disputes of an individual nature arising from the application of the provisions of this letter of appointment or the regulations and decisions relating to staff shall be brought before the Court of Justice'. The contract was retroactive to 9 December 1952, that is to say, the date on which the applicant actually entered the service of the High Authority. Whether the applicant is considered, as she maintains, to have been appointed on that day, and on a definitive basis, as an interpreter/translator or whether on the contrary, as the High Authority maintains, on 9 December 1952 Miss Mirossevich was accepted only 'on a trial basis', it is clear that there is a dispute here relating to the nature and scope of a contractual relationship between the applicant and the High Authority, for the fact that there is such a relationship is uncontestable; consequently the validity of an arbitration clause giving jurisdiction to the Court in this respect cannot be denied. Neither of the parties, moreover, does so.

III — Admissibility

Since the position of the action is thus clarified as far as jurisdiction is concerned I

must now consider the *question of admissibility.*

(a) The High Authority objects first of all to admissibility on the ground that *the time-limit has expired.* It claims that since the action was brought more than one month after the notification of the decision of 8 January 1953 it is not admissible. It adds that this is so even if it is accepted, as is done in particular by the French Conseil d'Etat, that the making of a claim through official channels—to one's superior officer or direct to the author of the act complained of—results in the time-limit's being extended. Such an extension only takes effect if the claim through official channels was itself presented within the time-limit. That is not the position in the present case, for the claim by Miss Mirossevich to the Administrative Committee was made more than a month after the notification of the decision of 8 January 1953.

This claim of inadmissibility must be dismissed. This is so for a very simple reason, namely that there is no provision either in the contract or the Treaty or any of the protocols, annexes or the Convention specifying a strict time-limit as against officials or other servants who wish to bring actions before the Court relating to their relationship with one of the institutions of the Community. The High Authority cites Article 33 of the Treaty and Article 39 of the Statute of the Court of Justice. Article 33 concerns only applications for annulment brought against decisions of the High Authority by Member States, the Council and undertakings or associations. Article 39 of the Statute states that 'the proceedings provided for in Articles 36 and 37 of this Treaty' must be instituted within the time-limit of one month provided for in Article 33: these are proceedings relating to pecuniary sanctions involving undertakings and proceedings relating to fundamental and persistent disturbances involving States. It is clear that a time-limit such as that in Article 33 cannot be applied simply by analogy. If moreover there were such a time-limit the question would arise whether an official under contract such as Miss Mirossevich who is not asking for the annulment of certain adminsitrative decisions cannot nevertheless claim that these decisions are unlawful although she has not contested them within the time-limit. However, I repeat, there is no time-limit. There is not even any period of limitation applicable to the action because the arbitration clause does not contain any such. No doubt there is a serious lacuna here since the independent nature of law arising from the Treaty of course prevents the application of general provisions borrowed from national laws: it will be for the Rules of Procedure which the Court is to draw up in application of Article 58 of the Staff Regulations to repair this lacuna.

(b) The second claim of inadmissibility based on *aquiescence* is more difficult.

The High Authority maintains that Miss Mirossevich's conduct following the decision of 8 January 1953 implies 'acquiescence' in this measure involving the inadmissibility of any subsequent action either through official channels or before the Court against the said measure. It cites in support Italian and German case-law and theory. It recognizes that French case-law is 'indecisive' (the truth is that the doctrine of acquiescence is not recognized in France in relation to actions alleging *ultra vires* acts) but it adds that this shows the counterpart of the existence of strict time-limits for it can be maintained that the only form of 'acquiescence' consists in allowing the time-limits to pass without bringing an action.

This analysis seems to me correct in law. It is clear that the absence of a time-limit to which I have just drawn attention in the present state of positive Community law takes away much of the weight from the argument which denies the possibility of acquiescence in the legal relationships between an official and the administration: if the employee can at any time challenge the validity of administrative acts concerning him it must be recognized that for its part the administration is entitled to rely on circumstances which show acceptance by the person concerned of these acts and his implied waiver of his rights to sue in respect of them. This should be recognized more readily where, as in the present case, the relationship is contractual.

It is right however to remember that even if it is based on a contract the relationship between an official and the administration

is of a special nature: it is usually regarded as being a 'contract governed by public law' (this term is used in Article 42 of the Treaty). This means that the administration retains certain prerogatives under public law in respect of even its contractual staff where they are part of the public service. I do not wish to enter into a theroretical discussion of this question which is very difficult even in national law (see, for example, in French law a very good summary of the question: Duez and Debeyre, Droit Administratif, 1952, p. 744) and which is certainly even more so in comparative law. Let me just make this common-sense observation, namely that a public official, whether his appointment is a contractual one or not, is subject to special constraints vis-à-vis the administration. He is required to obey, subject to raising the matter subsequently, according to the old principle obtaining both for civilians and soldiers (I leave aside, naturally, the question of obedience to orders contrary to the criminal law and to fundamental moral and legal principles). In other words and more colloquially the State is not a master just like others: the parties are not on equal terms.

From this it follows in my opinion that extreme caution must be exercised in deducing 'acquiescence' in certain measures from the conduct even of a contractual official from the sole fact that he has not protested or 'made reservations' as do private persons anxious to protect their interests. From this point of view what value must be attributed to the various acts relied on by the High Authority as proof of acquiescence in the decision of 8 January 1953? This value is uneven. I do not think that much attention can be paid in this respect to the various postings which the applicant received during 1953: typing pool, library and so forth. The High Authority itself recognizes (rejoinder, page 12 of the French translation) that 'Miss Mirossevich had been promised that her position would be improved'. It is clear that efforts were made in this direction and this is not a matter for complaint against the High Authority but it is no less certain that the applicant did not cease herself to endeavour to improve her situation retaining the hope of returning to the position which she had at the beginning; in any event the fact of having accepted successive transfers to which she was subject cannot be regarded as acquiescence in the measure of 8 January implying a waiver of the right to challenge the regularity of that measure.

On the other hand serious doubts may be entertained with regard to the contract of 12 October 1953. On that day Miss Mirossevich signed a 'letter of appointment' for the period extending from 9 December 1952 (which is the date when she entered the service of the High Authority as an interpreter/translator) to 8 December 1953. This letter refers to a posting 'until further order to the Staff, Finance and General Administration, documentation and files division' and adds: 'During this period you will receive an annual salary of 2200 units of account of the European Payments Union and a local allowance equal to 25% of this salary'. In view of the retroactive nature of this contract, must it not be thought that the acceptance by the applicant of the conditions which it contained, in particular with regard to salary, involved a waiver of any claim in respect of the financial position in relation to the period in question? I admit that it is very reasonable to maintain this.

Nevertheless as far as I am concerned I am inclined not to accept this. It appears from the inquiry that at this period as previously and afterwards, Miss Mirossevich was not satisfied with her position. This appears from various pieces of evidence and in particular that of Mr Balladore-Pallieri, Director of Administration of the High Authority who was a witness at the inquiry. 'She (Miss Mirossevich) signed the contract when I was already a Director', he said at the hearing on 15 May 1956 (p. 31 of the Minutes). *'I myself insisted on this. At the time she told me that she had been promised a higher position'.* Thus it appears well established that the applicant even at that time had not lost hope of regaining a higher position. This does not in any way mean that there is proof that a promise was made to her in this respect: what would such a promise have been worth and who would have been entitled to make it? Nor does it provide proof of fraud or force vitiating the contract for nullity as is claimed. But I think these circumstances

suffice to prevent the signature to this contract (which was the first written contract and was intended essentially to regularize the administrative position of the applicant) from being seen as an acquiescence in the measure of 8 January 1953 involving a waiver of any action intended to question the lawfulness of this measure.

IV – Substance

I come now to to consideration of the substance, that is to say, basically the lawfulness of the decision of 8 January 1953.

Main claims

The *first question* which concerns the *main claims* of the application is under what conditions Miss Mirossevich entered the service of the High Authority on 9 December 1952. Was she appointed then, as she claims, on a definitive basis as interpreter/translator in which case the decision of 8 January was obviously unlawful? Or was she merely accepted for a trial as the High Authority maintains or as a probationer, the probationary period being one month (alternative argument of the High Authority)?

An appointment on a definitive basis would appear at least for such a position as quite unusual. Mr Decombis, secretary of the Personnel Division of the High Authority, alleges in a statement dated 9 August 1955 placed in the file that 'during the period in which the High Authority was being set up the summoning of assistants and the conditions of work were generally fixed orally. With regard to assistants in the language department he adds *'one of the terms of the oral agreements was a trial period of one month'*. The file contains a similar statement by Mr Kohnstamm, secretary of the High Authority, entrusted at the time with staff matters. It is necessary therefore for evidence in rebuttal to be produced in this respect. This has not been done: no obligation was entered into to this effect by the Italian Government; had it done so moreover it would not have bound the High Authority but would have simply involved that government in liability vis-à-vis the applicant. Reference to the theory of business adminstration which was made at the Bar appears to me somewhat strained. No evidence either has been forthcoming from the High Authority. This is moreover how the applicant herself puts the case in her complaint to the Administrative Committee: 'On 9 December a diplomat from the Italian Legation introduced me to the reviser of the Italian section of the language department of the High Authority: *I was engaged for the probationary period provided for* and I was set to work as a translator'. A little further, complaining that she had not been warned before being the subject of the measure in question she adds: 'From this point of view no distinction seems to be made between staff who have already signed their contract and *those completing their trial period'*. Thus on 10 February 1955, the date of this complaint to the Administrative Committee, the applicant was not yet thinking of contesting that she had been engaged as a probationer or for a trial period: she even recognized it expressly.

As regards the actual question whether it was a probationary period or a trial period I can scarcely see the legal or practical interest in the distinction involving as it does an employee under contract. I think that the concept of a probationary period is legally more correct and is more in accordance with the actual position: the term probationary period moreover occurs three times in the opinion of the Administrative Committee given in respect of the complaint by the applicant. It is there stated that 'the High Authority is no longer bound by the first *proposal of employment* made to Miss Mirossevich since the *results of her probationary period* were unsatisfactory'. Thus in the mind of the High Authority itself, the entry into service of the applicant was the result of a 'proposal of employment' subject to her successfully accomplishing a probationary period. By her actual and immediate entry into employment (evidenced in particular by the fact of her having signed on the same day a form relating to preservation of official secrecy) Miss Mirossevich must be regarded as having accepted that proposal of employment and the contract, albeit oral, was thus concluded. As for the wording used

in the letter of 8 January 1953 ('since your ability does not meet the requirements of the department, it is impossible to consider *offering you a contract of employment* as a translator') it does not means that an *oral proposal* of employment involving a probationary period was not made a month previously.

Alternative claims

I must now consider the *alternative claims* which are based on the alleged defectiveness of the *statement of reasons* on which the decision of 8 January 1953 was based, namely: 'Your ability does not meet the requirements of the department'.

In this respect the claim is twofold: on the one hand it is alleged that the probationary period was conducted irregularly and on the other that the decision is vitiated for misuse of powers.

Irregularity of the probationary period. The applicant alleges that she was not given an opportunity of showing her ability. She says she was given only three translations to do in a month and these related to current matters and did not involve any special linguistic knowledge in the legal, economic or technical sphere: it was impossible for the administration to judge her on such a brief trial.

The Court knows how the High Authority replies to this argument: it insists first of all forcefully on the discretionary nature of the assessment which it has made. Secondly it recognizes that the applicant was entrusted during her month's probation with only three or at most four translations, all relating to current matters; but adds that although these documents were easy, they were not translated satisfactorily by the applicant: it was therefore useless to give her more important and more difficult texts. In support of this observation the High Authority, with the intent of providing proof (which it maintains it is not required to do) of the *patent inability* of the applicant has produced one of the translations made, it not being possible to find the others.

The question must therefore be considered from the legal and factual point of view.

The question of *law* is quite simple if it is recognized that there are two aspects:

1. *The question of the applicant's ability to do her work.* There is no doubt that this question is essentially one of those which the administration has a discretion in assessing: this appears to me obvious and it is unnecessary to labour the point.
2. The question whether the applicant has been given *an opportunity to show her ability* during the period provided for this purpose. Here on the contrary there can and must be a review by the Court for it is a question of checking whether the probationary period has been conducted regularly and whether *it has even taken place.* The Concilio di Stato recognizes in a similar case a review of legality (for example the decision of 5 February 1951 cited in the reply). The serving of a probationary period is provided for by the contract and is one of the conditions of it. No doubt it is required mainly in the interests of the administration which before definitely committing itself wishes legitimately to be assured of the ability of the person concerned; but it is also in the interests of the individual, who has an 'interest' in being definitively employed and cannot be deprived *arbitrarily* of this interest if he has satisfied the obligations required of him. If therefore it were shown that during the period provided for and by act of the administration the person concerned was not given an opportunity of proving his ability without its being possible to make any complaint against him in this respect (for example, and to take an extreme case, if an employee had been given no work of any kind at all) it would be necessary to recognize that the administration had disregarded its contractual obligations and for the purpose of refusing a definitive appointment *could not rely on the employee's lack of ability or insufficient ability having regard to the requirements of the department.*

From the factual point of view the first question therefore is whether the mere fact that during her month's probationary period Miss Mirossevich was entrusted with only three or four translations must cause the probationary period to be regarded as not having been properly conducted.

Let us note first of all that there seem to have been only three translations: this is what the applicant claims and it is what appears from the register which has been produced. It is not contested further that these translations were of little importance either from the point of view of length or difficulty.

Although this is not proof I think it gives rise to a *serious presumption* in support of the claim that the applicant was not *given an opportunity* of showing her ability and consequently the probationary period was not properly conducted: to do a few hours of work during a month is not, *a priori,* to serve a month's probationary period. It is claimed, it is true, that the number of translations required of the language department during December 1952 was not very great. I was inquisitive enough to look at the departmental register in the file and I saw that the average number of pages translated during the period from 9 December 1952 to 8 January 1953 came to a little more than 100 per translator (to 95 for the Italian section).

I therefore think that evidence in rebuttal by the High Authority is in no way excessive or superfluous: it is in my opinion essential.

This evidence in rebuttal consists, as the Court will remember, in showing by the production of one of the three translations the applicant's *patent inability* to do her work having regard to the requirements of the department.

In these circumstances it was necessary: 1. To arrive at a decision on the authenticity of the document, which was contested by the applicant at least inasmuch, as, according to her, the document was not *drafted* by her: she claims that her part was limited to making certain manuscript corrections as practice on a typewritten draft made by someone else (whom she does not name moreover); 2. In the event of these allegations of the applicant not being upheld, to obtain an expert's opinion on the *quality of the translation,* the only proper means of putting the Court in a position to assess the merits of the evidence in rebuttal submitted by the High Authority. This seemed all the more indispensable since among the five errors mentioned by the High Authority as particularly inexcusable in this work was the translation of the French word 'néerlandais' by the word 'neerlandese' which, the defendant maintains, (rejoinder, p. 34) 'does not exist in Italian' and should have been translated by 'olandese'. Having the curiosity to look in the dictionary what was my surprise to find the word 'neerlandese' there! An expert's opinion was therefore called for and I am glad that the Second Chamber, which was entrusted with the inquiries, agreed to order one.

(a) As regards what has been wrongly called the 'challenge to the authenticity' the Court is aware that the applicant in the final form of her claims declared that she withdrew this challenge and regarded the three translations (including the one in question) attributed to her as 'legally authentic'. She consequently stated that she agreed to an expert's opinion 'so that it may be shown that the reviser Verderame lacked the linguistic and technical ability to form a judgment on the translator Miss Mirossevich'. There is here no question of the ability of the reviser but only that of the translator which must be assessed on its own. Further, the applicant, before coming to this conclusion goes into a long discussion in which various hypotheses are advanced from which it appears that she does not accept as established as a fact the High Authority's claim that it was a translation actually required of the applicant for the purposes of the department and was done and submitted by her. It is therefore necessary to arrive at a decision on this subject.

It is moreover easy: the documents produced by the High Authority establish in an irrebuttable manner and to some extent substantially that the document in question is the translation made into Italian by Miss Mirossevich and revised by the reviser Mr Verderame from an original French text; it was a translation which had been requested from the language department into the three other languages of the Community and entrusted by that department as regards Italian to the applicant. The witnesses could obviously not contradict and did not contradict the findings resulting in this respect from the documents produced.

(b) I now come to the quality of the translation assessed by the expert Mr Bedarida, Pro-

fessor at the Sorbonne.
Let us remember that the order of the Second Chamber ordering an expert's opinion was in these terms: 'An expert's opinion shall be obtained in order to determine, independently of the corrections made by the reviser, the quality of he translation produced as Document No 10 annexed to the rejoinder in the above-mentioned case having regard to the time-limit of two hours imposed on the language department to do the translation and the nature of the task normally falling on a translator, which is to keep as close as possible to the original'. Let us remember also that the expert, as a result of a special provision of the same order, received a copy of the document containing the manuscript corrections made by the applicant and 'excluding all others', that is to say excluding those which had been made by the reviser, of which the expert therefore had no knowledge.
The expert fulfilled his task precisely according to the terms enjoined upon him.
He has pointed out a number of mistakes or errors of diverse magnitude. The most serious in his opinion is in the following sentence: 'Dès que l'expérience des faits aura démontré ce qu'*elle* doit être, nous informerons nos abonnés de la *cadence* à laquelle paraîtra le Journal Officiel de la Communauté'. The translator did not notice that the pronoun 'elle' relates to the word 'cadence', although the latter followed it.

In addition the expert pointed out the following mistakes:

1. 'Dès que l'expérience des faits aura démontré ... (sentence already quoted) has been translated by words giving the sense of '*après que* l'expérience des faits, etc. ....';

2. (Still in the same sentence): the word 'cadence' is translated by a word meaning 'terme' ('termine');

3. 'Souscrit' (in speaking of subscription) is translated by 'firmato' which means 'signé'; the correct word is 'sottoscritto'. Here I must quote the comments of the expert: 'The choice of "firmato" appears all the more curious in that elsewhere the same translator shows a keen concern for the purity of the Italian language. She should be given credit, for example, for having translated the word "experts" by "periti" which is more customary then "esperiti" adopted as a noun recently under French or English influence'.

4. 'Règlements' is translated by 'norme' instead of 'regolamenti': the expert says that the latter word is both more specific and more the language of the administration then 'norme'. I must say that the observations which the applicant has made on this subject in one of her pleadings although perhaps having a certain pertinence in relation to the criticism of the original are not in my opinion convincing on the subject of the translation.

5. 'Autrement dit' as meaning 'c'est-à-dire' has been translated by 'nominati altrimenti' instead of 'cioè a dire' or more simply 'cioè'. It was a question of indicating the contents of one of the three parts of the Journal Officiel and the sentence to be translated was: 'Textes, purement juridiques, *autrement dit,* décisions, règlements, etc. ....'.

6. 'Première manifestation d'unité européenne' is translated as 'première mainfestation d'*une* unité européenne'.

7. The phrase 'de prendre chaque jour plus de réalité' is translated by 'di essere ogni giorno più *aggiornata*': this word means 'mettre à jour' or 'ajourner'.

8. Finally a whole line has been omitted.

After analysing the errors made the expert adds:

'In addition to these detailed observations certain general remarks should be made.

'On the one hand the most serious mistakes are towards the end of the translation. They may be due to the fact that the translator was running short of time. In this respect it is necessary to clarify the following question. In the two hours which were allotted to her for her work did the translator also have to type her Italian text? If so, it would be proper to deduct the time for the transcription from the total allowed for the test. And the transcription might to a certain extent explain the

above-mentioned omission of one line of the original.

'Further, if the translation department of the European Coal and Steel Community includes one or several revisers it may be asked whether the translator in question was not entitled to think that only the basic and as it were mechanical work of translation was required of her while others with more time at their disposal would subsequently be required to complete, correct and perfect it.

'In both cases I would regard these as factors capable of lessening the translator's responsibility and the scope of the imperfections of the work which I have been required to consider and assess'.

With regard to the second point I think the expert appears to go a little too far: the existence of the reviser does not exonerate the translator from his own responsibility for the *correctness* of the translation. In other words in so far as the mistakes pointed out by the expert relate to the *meaning* and not to the elegance or style there can be no 'lessening of responsibility' by reason of the fact that there is a reviser.

The first observation however concerns a very important issue namely whether the time which the applicant *actually* had was sufficient. What was that time? It is of course difficult to determine it precisely. What we do know from the precise particulars in the register is that the document for translation was delivered to the language department at 11 a.m. and that the translation had to be delivered at 1 p.m. We know also that it was not delivered until 1.30 p.m., that is, half an hour late. But we also know that the Dutch and German translations of the same document which also had to be delivered at the same time were not delivered until 2 p.m. and 2.30 p.m. respectively. If account is taken of the fact that the time-limit covered five operations (rough draft by the translator, typing of the said draft, correcting of the typed copy by the translator, revision by the reviser, and typing of the revised translation) the time-limit for a document of two pages of even moderate difficulty was probably a little short. It is possible that the Italian reviser, paying more respect to the time-limit than did his German and Dutch colleagues took the translation before the translator has finished checking it which would explain, as the expert observes, why the most serious faults are on the second page where there is only a single correction in the applicant's handwriting. Having said this I must now answer the question: is the document produced by the defendant, in the light of the expert's explanations, of such a nature as to reveal *on its own* inability *on the part of Miss Mirossevich* to do the work of translator with the High Authority so that the latter was entitled to refuse to entrust her with any more difficult work without being in breach of its obligations in relation to the probationary period? If account is taken of the nature and requirements of the tasks to be performed at the time both as regards accuracy and speed at that feverish period of organization when the High Authority, bound by the strict time-limits of the Treaty, had both to set up its own organization and establish the Common Market, I recognize that there may be a temptation to reply in the affirmative to this question. Nevertheless, having regard to what I have just said I do not think that a negative judgment can be based on this single test; I do not think that the probationary period was conducted properly.

It remains to consider in so far as it may be of use *the claim of misuse of powers:* it is alleged that the real reason for the decision of 8 January 1953 dismissing Miss Mirossevich from the language department was the reviser's desire to replace her by a friend the name of which the High Authority even considered itself bound to give us: it is Mr Delli Paoli who was actually employed in the language department of the High Authority immediately after the applicant's departure.

I am now touching on a particularly disagreeable aspect of this case: I shall explain myself without passion but unequivocally.

I shall dispose first of all of a controversy which arose between the parties relating to the presence of Mr Delli Paoli in Luxembourg in December 1952: according to the applicant he then came to endeavour to

find employment with the Community. Having failed to secure an appointment with the Court of Justice he applied to the High Authority and to make room for him his friend Mr. Verderame is alleged to have caused the applicant's establishment to be refused. The High Authority denies that Mr Delli Paoli even came to Luxembourg in December and has offered to produce his passport 'stamped', it says, 'by the Customs with the dates of his crossing the frontier at Thionville' (in January 1953 and not December 1952).
Besides the fact that production of the passport would prove nothing (for it is well known that at that time the passport stamp was very often omitted in respect of Italians entering the Grand Duchy), the fact is unimportant for I do not see how it would establish the alleged collusion: this could have taken place just as well if the person concerned were in Rome or Luxembourg in December. This is why moreover the Second Chamber refused to extend the inquiry to cover this issue.

Apart from that the following facts are established:

1. The fact (which I have already mentioned) that the applicant's departure from the language department and Mr Delli Paoli's arrival in the same department were simultaneous.

2. The fact that the two decisions were taken on the proposal of Mr Verderame, the reviser of the Italian section.

3. The fact that since the head of the department, Dr Thomik, was not sufficiently acquainted with Italian he relied on the reviser in both cases, that is to say, both with regard to the inability of the one and the ability of the other.

4. The fact that Mr Delli Paoli was appointed *to replace Miss Mirossevich*. The High Authority denies this in its rejoinder (French translation, p. 25); at least it claims that it was not necessary to remove Miss Mirossevich from her post in order to appoint Mr Delli Paoli. This is quite true *in law* for there was no fixed number of staff and it was not necessary for a vacancy to occur to allow the recruitment of a new employee. But *in fact* it was a replacement. This appears from the statement of Dr Thomik, head of the department, at the inquiry (Minutes of Hearing of 15 May 1956, p. 26 of the French translation) which is as follows:

'Question put by the President:

Are there any facts or circumstances showing, or capable of showing, that the applicant was dismissed from her post because the reviser of the Italian section wished to replace her by a friend?'

Witness's answer:

'When it appeared that the applicant did not meet the requirements *I wondered who could replace her.* However I did not know any translator whose mother tongue was Italian and I therefore asked Mr Verderame whether he knew anyone. As far as I remember Mr Verderame had not mentioned the name of Mr Delli Paoli previously'.

On being questioned by the Judge-Rapporteur:

'I did not have an Italian translator in reserve'.

5. Finally the last issue, the applicant alleges that her successor did not have the qualifications for a translator. This is what she says in the written procedure on three occasions:

(a) *Application, p. 3:* '.... further, Miss Mirossevich (who knows four languages) saw herself replaced by a friend of the reviser although he is not even a qualified translator (although officially stated to be a translator from French and English). Having obtained his contract of employment without any examination the new arrival was then transferred as a head of a newly created branch (the Conference Services branch)'.

(b) *Reply* (French translation, p. 36):

'What would he have done (Dr Thomik), if he had known, on signing the letter of appointment of Mr Delli Paoli as a translator from French and English into Italian that Mr Paoli, as is well known, had only a very mediocre knowledge of French and none at all of English?'

(c) *Final submissions* (French translation, p. 12): 'The linguistic knowledge of Mr Delli Paoli was, as was well known, very limited, to such an extent that he was obliged to seek assistance from a colleague and was transferred, as soon as Mr Balladore took over as head of the Personnel Department, to another branch'.

This is what the applicant alleges on the issue. It is not contested by the High Authority.

In these circumstances must misuse of powers be regarded as being established?

I think that the bringing together of the five factors which I have just mentioned is a very substantial beginning to evidence in support of misuse of powers. But I do not think that the evidence is complete.

In fact *we are not concerned with judging here the legality of Mr Delli Paoli's appointment:* we are concerned with the propriety of the dismissal of Miss Mirossevich.

No doubt it is *possible* that the true reason, the motive determining the dismissal, was the desire to replace the applicant by a friend of the reviser; but this is not certain. In other words the fact that the reviser *took advantage of* the departure of Miss Mirossevich to propose the appointment of one of his friends *does not prove* that the real reason for the dismissal was the desire to make that appointment possible: such behaviour cannot be presumed of the part of an official and there is no reason in the present case for doing so.

Nevertheless one observation is required. I mentioned a little while ago the special requirements of the department at the time and this is a consideration which was insisted on at the inquiry. However it is not possible to fail to observe that the attitude of the administration has revealed that it had *in fact* at that very time a somewhat 'elastic' conception of the requirements of the department. That is why the facts which I have just mentioned appear to constitute one further ground for making a strictly objective review of the regularity of the probationary period.

I therefore propose that the court should declare that the probationary period of Miss Mirossevich was not conducted regularly.

V – Consequences of the solution proposed

If the Court agrees with me on this solution it is necessary to draw the consequences. This raises certain tricky problems in law and in practice.

Law

In law we are, it should be remembered, in the realm of contract but it is a contract concerned with public law. Under the general law of contract in civil law the principle is that an infringement by one of the parties of his obligations does not automatically discharge the contract but allows the other party to require performance of the contract if performance is possible (in France, Article 1184 of the Code Civil). I think the same rule applies in all our countries.

But the same is not everywhere true with regard to *contracts of employment* (still in private law).

Thus in France when it is a question of individual disputes relating to employment the case-law has always refused to order the reinstatement of a wrongly dismissed employee: wrongful breach of contract sounds in damages. This case-law has been criticized (Durand, Traité de droit du Travail 1950, T. II, p. 903). On the other hand in the case of collective labour disputes the courts of arbitration called upon to settle these disputes have used their powers to order reinstatement, 'The only exception made', says Mr Durand, 'is in respect of management staff who are closely associated with the exercise of the employers' prerogatives and whose retention in the establishment is no longer possible once the necessary confidence has gone'.

In Germany the general law of contracts

which allows each party to compel the other to perform his obligations applies in principle to contracts of employment: a worker who is dismissed can require his reinstatement under a judgment declaring his dismissal to be wrongful and in consequence the contract of employment not to have been discharged. However, both the worker and the employer can claim that it is *in fact impossible* for them, the former to take up his work again and the latter to continue any co-operation with the employee of use to the undertaking. It is only when such grounds are relied on and accepted by the court that the court will declare that the contract of employment has been discharged in spite of the wrongful dismissal and order the employer to pay damages.

In Italy the general law of contracts is very similar to the French law: Article 1453 of the Italian Codice Civile contains with very slight variations the same rule as Article 1184 of the French Code Civil. As for the contract of employment it is subject to very special rules one of which allows an arbitration tribunal (which has jurisdiction where a dismissal is a disciplinary measure) to keep a contract in force in spite of its being against the employer's wishes where the dismissal is unjustified (Mazzoni and Grechi on labour law, Bologna, 1951, p. 207).

In the Netherlands the position is the same as in France.

Let us now turn to public law. I see no reason here for it not applying the general law of contracts, that is to say, to allow each party in principle at least to require the performance of the obligation contracted by the other in so far as performance is not impossible either in law or in fact. On the contrary, this right is only the counterpart in contractual law of the right to reinstatement which is the normal consequence of annulment in relation to officials subject to staff regulations: what the law, which forms the basis of the regulations, allows, contract, which is the law of the parties, must also allow. However, I did say 'in principle'; I should be tempted to recognize an exception in respect of certain posts—either ones very high up in the hierarchy or ones involving direct collaboration with the ultimate authority: there is here the element of 'necessary confidence' which is at the root of case-law in relation to arbitration in France as we have seen. Moreover the reason why administrations have recourse to contract in filling such posts is often to facilitate possible termination of the relationship and thus to avoid the maintenance of collaboration which may turn out to be impossible.

In practice

If we now pass to the application of this decision it goes without saying that the present case is not such as I have just been referring to. The solution therefore is, once the irregularity of the probationary period and in consequence of the decision which terminated it has been recognized, to order that the oral contract concluded on 9 December 1952 between the High Authority and Miss Mirossevich *be now performed by the serving of a probationary period of one month in the language department.* Of course at the conclusion of this probationary period and whatever the result the applicant's position must be considered and determined in accordance with the provisions of the recent staff regulations.

There remains the question of *compensation for the past damage.* In this respect I do not think it is right to order a 'reinstatement in career bracket' as was claimed. Such a reinstatement of a retroactive nature has a legal basis in my opinion only in respect of officials subject to the Staff Regulations who obtain the annulment of a decision of removal from post or dismissal: this is the result of the retroactive effect of the decision of annulment itself and of the legal fiction under which the person concerned is regarded as never having left his post. This is where the essential difference lies between the position under the Staff Regulations and the contractual position: no doubt the contract has never ceased to exist but the obligations which it involves and which in the event of not being performed must be performed now: performance of an obligation cannot be retroactive. Further the contract did not give a *right* to a career bracket nor to stability of employment, but simply an expectancy

(cf. judgment in *Kergall*). Finally in any event the right to reinstatement in a career bracket even as regards an official subject to the Staff Regulations arises only as a result of establishment, that is to say after the probationary period provided for has been served and this must first be served properly and with a satisfactory result. With regard to the right to back payment of salary which the applicant is also claiming there is no such right for the same reasons and in addition because (and this applies to all officials even those subject to the Staff Regulations) no 'service has been rendered'.

There can therefore only be compensation in relation to the damage suffered.

What is the quantum of damages?

It is obviously difficult to assess. I think it must be done independently of the results of the future probationary period which we cannot wait for: it is moreover a question of damages for past injury.

I do not think I can do better in this respect than to leave the matter to the Court as my colleague Advocate General Roemer did in the case of Kergall where there was also a large element of uncertainty. I shall confine myself to the two following observations relating to the attitude of the applicant and that of the administration.

The administration which could have parted company with the applicant endeavoured to find her other posts compatible with her ability and persisted in such endeavours. No doubt it may be thought that it was not solely by reason of philanthropy that it acted thus but because it was also aware of the disagreeable circumstances in which the applicant had been replaced in the language department. Nevertheless it seems to me that there is here a factor capable of lessening somewhat the wrong and consequently the liability of the administration.

As for the applicant it does not seem that she has made a great effort to endeavour to find a better position in the High Authority in so far as she had the opportunity. In particular she refused a posting to the division concerned with labour problems with the prospects of improvement which very likely this posting involved and which was in no way incompatible with her claim before the administrative Committee. 'God helps those who help themselves', says the proverb. The Court will have to consider how far the applicant's attitude is also capable of diminishing the administration's liability.

VI – Final observations

Before ending I should like to be allowed to say some words which go outside the legal sphere and that of the case.

At the end of the last hearing learned Counsel for the applicant has referred to the material and above all emotional position of his client and what he said moved me. The representative of the High Authority for his part stated in substance that leaving aside the legal sphere there was nothing further for him to say to accept in advance the loss of his case.

He was perfectly correct so far as the case is concerned. But now it will be a question of carrying out your judgment. If, as I hope very much, you adopt a solution which will basically return the parties to the *status quo* I hope that the second attempt will be made in complete fairness and that both parties will completely forget all that may have contributed to poison the case. And here I know that I am not making a vain appeal to the representatives of the High Authority who will be concerned with the matter. They are, as they have shown, perfectly conscious of the true rôle of a public administration which, far from being a blind machine, owes to itself more than any other employer to act fairly and not simply legally, honestly and not simply in accordance with the law, humanely and not simply as an institution. This is the price to be paid for the authority which is legitimately entrusted to it and which, truth to tell, has no real existence except at this price.

I should also like the applicant for her part to make an effort to rid herself of a certain paranoia which seems to afflict her to some extent, although I know that there are good reasons for this, and I hope that, confident in the wisdom and impartiality of her superiors, she will unreservedly accept the results of the new probationary period even if by ill-chance they should be unfavourable.

VII — Opinion

My opinion is as follows:

The decision of 8 January 1953 should be declared null and void together with the decision of the Administrative Committee which confirmed it.
The oral contract of 9 December 1952 should be performed by Miss Mirossevich's serving a probationary period of one month in the linguistic department of the High Authority as a translator and at the expiry of such probationary period, whatever the result, the position of the applicant should be determined in accordance with the provisions of the Staff Regulatons of the Community at present in force.
Miss Mirossevich should be awarded damages for the injury she has suffered by reason of the delay on the part of the High Authority in performing its contractual obligations with regard to her, the amount of which should be in the discretion of the Court.
The other claims in the application should be dismissed.
The High Authority should bear the costs of the proceedings save those relating to the dispute regarding the authenticity of the translation, which must be borne by Miss Mirossevich.