JUDGMENT OF THE COURT (THIRD CHAMBER)
6 OCTOBER 1982 [1]

José Alvarez
v European Parliament

(Officials — Dismissal)

Case 206/81

Officials — Recruitment — Probationary period — Dismissal — Procedure — Adversary nature — Decision to dismiss — Grounds based upon unfavourable observations not previously communicated to the official concerned — Illegality
(Staff Regulations, Art. 34 (2))

A decision by the appointing authority to dismiss a probationary official at the end of the probationary period on the basis of observations supplied by various officials for the purpose of supplementing the probation report, which, although reflecting unfavourably on the official concerned, were not previously communicated to him, constitutes a failure to observe the adversary procedure laid down in Article 34 (2) of the Staff Regulations. Such a decision must be annulled because the grounds upon which it is based were established by a procedure which was not of an adversary nature, since the probationary official was precluded from giving his comments on all the complaints made against him which led to the decision to dismiss him.

In Case 206/81

JOSÉ ALVAREZ, formerly a probationary official of the European Parliament, residing at 83 Rue de la Semois, Luxembourg, represented by Victor Biel, with an address for service in Luxembourg at the latter's Chambers, 18 Rue des Glacis,

applicant,

v

1 — Language of the Case: French

EUROPEAN PARLIAMENT, represented by Martin Schmidt, Director of Personnel and Social Affairs, assisted by Alex Bonn, with an address for service in Luxemburg at the latter's Chambers, 22 Côte d'Eich,

defendant,

APPLICATION for the annulment of a probation report and of the subsequent decision to dismiss the applicant,

THE COURT (Third Chamber)

composed of: A. Touffait, President of Chamber, Lord Mackenzie Stuart and U. Everling, Judges,

Advocate General: G. Reischl
Registrar: J. A. Pompe, Deputy Registrar

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the conclusions, submissions and arguments of the parties may be summarized as follows:

I — Background to the dispute

José Alvarez, after being a member of the auxiliary staff of the European Parliament from 26 March 1979 to 30 September 1980, became a probationary official of that institution on 1 October 1980, following his successful participation in a competition.

When his probationary period expired, Mr Alvarez received an unfavourable report recommending that he should not be established. On 19 June 1981, the Secretary General of the Parliament informed the applicant by registered letter of his decision to dismiss him with effect from 15 July 1981, on the ground of his unfavourable probation report. On 8 July 1981, Mr Alvarez lodged a complaint against the probation report

and his consequent dismissal. The applicant's complaint was rejected by the Secretary General of the Parliament on 9 October 1981.

II — Written procedure

In accordance with Article 91 (4) of the Staff Regulations of Officials of the European Communities, which provides that an official may, after submitting a complaint to the appointing authority pursuant to Article 90 (2), immediately bring an action before the Court of Justice, provided that such action is accompanied by an application either for a stay of execution of the contested measure or for the adoption of interim measures, Mr Alvarez brought an action on 8 July 1981 against his probation report and the Parliament's decision of 19 June 1981 to dismiss him. At the same time he lodged an application for a suspension of the operation of the decision to dismiss him. The application was dismissed by order of 20 July 1981 of the President of the Third Chamber. Costs were reserved.

The written procedure in this case followed the normal course, in view of the fact that, by virtue of Article 91 (4) of the Staff Regulations, the proceedings were suspended until the decision rejecting the complaint had been taken.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court (Third Chamber) decided to open the oral procedure without any preparatory inquiry.

III — Conclusions of the parties

The applicant claims that the Court should:

Declare the application admissible;

Declare that it is well founded and therefore that the report drawn up at the expiry of the probationary period must be annulled;

Rule in consequence that the applicant's dismissal is null and void;

Refer the matter back to the European Parliament;

If appropriate, fix *ex aequo et bono* the amount of damages to be awarded to the applicant and order the Parliament to pay the amount in question together with interest at the rate of 6% per annum from the date on which the action was brought until settlement in full;

Order the defendant to pay all the costs of the proceedings.

The defendant on the other hand claims that the Court should:

Dismiss the action as unfounded;

Order the applicant to pay the costs.

IV — Submissions and arguments of the parties

The applicant takes the view that his probation report does not adequately state the grounds on which it is based, particularly with regard to his below-average assessment, that it contains criticism of his behaviour the incorrectness of which could be proved by means of inquiries and that it was drawn up without any objective checking, especially as regards his qualifications and linguistic abilities. He considers, indeed, that the whole staff report procedure and the resultant dismissal are vitiated by misuse of powers inasmuch as the Parliament had been concerned not to ensure that the institution obtained the best possible staff but rather to exclude a person with trade-union commitments. In the

applicant's view, only such a concern could account for the unfavourable probation report since, prior to becoming a probationary official, he had been a member of the auxiliary staff of the Parliament for 18 months and had given satisfaction to the latter.

In its defence the Parliament contends that the probation report did, in its opinion, specify sufficiently the grounds on which it was based. As far as the alleged incorrectness of the criticisms made therein is concerned, the Parliament stresses that a staff report is not a factual description but an appraisal made by the superiors of the official concerned which is not subject to any legal review, since it is not the function of administrative courts to repeat the inquiries on which the report is based or to substitute their own judgment for that of the administration.

In any case, the Parliament vigorously denies the applicant's charges that it misused its powers in relation to the applicant by reason of his trade-union activities. The Parliament views such claims as libellous and maintains that no justification for them is to be found in the file.

Lastly, since the decision to dismiss the applicant is the result of a probation report which, although unfavourable, is procedurally correct, there are no grounds for annulling it.

In his reply the applicant points out that, after leaving the European Parliament, he was employed for four months by the Economic and Social Committee and gave his new employers complete satisfaction, notwithstanding a defamatory letter which was sent to the Committee by the Parliament's security department.

As regards the incorrectness of the criticisms contained in the report, the applicant disputes the Parliament's contention that they are appraisals made by superiors and are not subject to review by administrative courts. The applicant takes the view that when the basis of an appraisal is false the appraisal itself is also false and is open to judicial review. The applicant maintains that the allegations made against him are incorrect and he repeats his offer to furnish evidence to that effect. In his view there is absolutely nothing in the documents submitted by the Parliament to the Court to support those allegations. Furthermore, he emphasizes that the various memoranda produced by the Parliament should not have been placed in the file on the strength of which he was dismissed, first because they were drawn up after the probation report itself and secondly because they were never disclosed to him.

The applicant also reiterates his arguments that the statement of reasons was inadequate and that the defendant misused its powers. Turning to the extent of the damage sustained, the applicant estimates it as one million francs.

In its rejoinder the Parliament states in the first place, with regard to the facts, that the memoranda concerning Mr Alvarez's activities which were annexed to its defence were added to his file before the decision to dismiss him had been taken. As for the allegedly defamatory letter sent to the Economic and Social Committee, it merely related to admission to the European Parliament's buildings in Brussels and contained no further observations. The Parliament annexed a copy of the letter to its rejoinder.

As regards the legal aspects of the case, the Parliament contends that the

argument alleging that the criticisms in the probation report are incorrect is inadmissible and in any case unfounded and it claims that sufficient reasons are stated in the probation report, as is demonstrated by the analysis of them undertaken by the applicant. Moreover it denies, most emphatically, that any misuse of powers occurred or that the applicant's dismissal was due to his trade-union activities.

V — Oral procedure

The parties presented oral argument at the sitting on 10 June 1982.

The Advocate General delivered his opinion at the sitting on 15 July 1982.

Decision

1 By application lodged at the Court Registry on 8 July 1981, Mr Alvarez, a former probationary official of the European Parliament brought an action for annulment of the probation report relating to him and of the decision to dismiss him which was taken on 19 June 1981 by the appointing authority and was confirmed, following a complaint, on 9 October 1981 and also for compensation for the material and non-material damage suffered by him as a result of that decision. At the same time he lodged an application for the adoption of an interim measure which was dismissed by an order of 20 July 1981 of the President of the Third Chamber.

2 In his application Mr Alvarez complains essentially of the summary, incorrect and incomplete nature of his probation report, the effect of which was that the statement of the grounds on which the decision to dismiss him was based was inadequate.

3 The European Parliament denies having dismissed the applicant on the strength of a probation report of a summary nature. It points out that, after communicating the probation report to the applicant and taking note of his comments on it, the administration of the European Parliament obtained observations from various officials as set out in three memoranda dated 18, 20 and 21 May 1981, all of which reflect unfavourably upon the applicant. Mr Alvarez was not contradicted when he asserted that the memoranda in question were not disclosed to him until after it had been decided to dismiss him.

4 Thus, when adopting its decision to dismiss the applicant, the appointing authority relied as much upon the above-mentioned memoranda, two of which expressly purport to be supplementary to the probation report, as upon that report itself.

5 Although the appointing authority, by taking that course of action, was endeavouring to supplement its information and to establish the grounds on which its decision was based, the fact remains that by failing to communicate to the applicant all the documents underlying its decision, it failed to observe the adversary procedure laid down in Article 34 (2) of the Staff Regulations.

6 Since the applicant was precluded from giving his comments on all the complaints made about him, which led to the dismissal decision, the latter must be annulled because the grounds upon which it is based were established by a procedure which was not of an adversary nature. A further reason which makes annulment of the decision necessary is that, in this particular case, it was especially important to communicate the supplementary memoranda to the applicant since the probation report itself was incomplete as regards his qualifications and the appraisal of his performance and moreover was unusually laconic.

7 The claim for damages must be rejected since the applicant has been unable to demonstrate the existence of any damage which would not be remedied merely by annulment of the dismissal decision.

Request to re-open the oral procedure

8 By letter dated 22 July 1982, the Parliament sought to have the oral procedure re-opened, referring to the opinion of the Advocate General which proposed that the probation report should be annulled on the ground that it was incomplete. According to the Parliament, that argument had been put forward by a member of the Court rather than by the applicant himself and the defendant had not had the opportunity to study it.

9 To grant such a request would be tantamount to enabling the parties to discuss the Advocate General's opinion, which under Article 59 (2) of the

Rules of Procedure marks the end of the oral procedure. In the course of that procedure, moreover, the Parliament had an opportunity of answering a question on that issue put by the Advocate General.

10 For the above reasons, the request to have the oral procedure re-opened cannot be allowed.

Costs

11 Under Article 69 (2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been asked for in the successful party's pleading. As the European Parliament has failed in its submissions, it must be ordered to pay the costs.

On those grounds

THE COURT (Third Chamber)

hereby:

1. **Annuls the decision of the appointing authority of the European Parliament of 26 June 1981 to dismiss Mr Alvarez;**

2. **Orders the European Parliament to pay the costs.**

Touffait Mackenzie Stuart Everling

Delivered in open court in Luxembourg on 6 October 1982.

P. Heim
Registrar

A. Touffait
President of the Third Chamber