JUDGMENT OF THE COURT (SECOND CHAMBER)
5 APRIL 1984 [1]

José Alvarez
v European Parliament

(Official — Dismissal — Unfavourable probation report — Contestation)

Case 347/82

Officials — Recruitment — Probationary period — Dismissal — Discretion of the administration — Review by the Court — Limits
(Staff Regulations, Art. 34)

As regards dismissal pursuant to Article 34 of the Staff Regulations the appointing authority has a wide discretion and the Court's power of review extends only to manifest errors or the possibility of misuse of powers.

In Case 347/82

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

applicant,

v

EUROPEAN PARLIAMENT, represented by Manfred Peter, Head of the Legal and Administrative Questions Division, assisted by Alex Bonn, with an address for service in Luxembourg at the latter's Chambers, 22 Côte d'Eich,

defendant,

APPLICATION for the annulment of the second decision (dated 6 December 1982) to dismiss the applicant and for damages of at least BFR 500 000,

1 — Language of the Case: French.

THE COURT (Second Chamber)

composed of: K. Bahlmann, President of Chamber, P. Pescatore and O. Due, Judges,

Advocate General: P. VerLoren van Themaat
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 — Facts and written procedure

José Alvarez was a member of the auxiliary staff of the European Parliament from 26 March 1979 to 30 September 1980 and was then appointed a probationary official of that institution with effect from 1 October 1980. When his probationary period expired, Mr Alvarez received an unfavourable report recommending that he be dismissed.

It may be seen from that report, which was drawn up on 30 March 1981, that the assessments of the applicant's work were generally negative. In particular, the report notes that the applicant displayed a marked lack of interest in his work, that on occasion he was absent without reason, that he had difficulties in his relations with his colleagues and that he had numerous disputes, sometimes violent, with his superiors, towards whom he displayed a degree of duplicity.

After the Parliament administration had communicated the report to the applicant and taken note of his comments, it obtained supplementary information from various officials. This resulted in three memoranda being placed in the applicant's file:

(a) a memorandum of 18 May 1981 from Mr Mestat, Head of the Conferences and Protocol Division;

(b) a memorandum of 20 May 1981 from Mr van Schelven;

(c) a memorandum of 21 May 1981 drawn up by Mr van den Berge, Director of General Administration at the Parliament.

Those memoranda all noted that Mr Alvarez's conduct disturbed the smooth running of the department; that from Mr van den Berge concluded that the dismissal of the applicant was not only thoroughly justified, but absolutely necessary. It is common ground that those memoranda were not communicated to the applicant at the time.

On the basis of the probation report and the above-mentioned supplementary memoranda, the Secretary-General of the Parliament informed the applicant, by letter of 18 June 1981, of his decision to dismiss the applicant with effect from 15 July 1981. The applicant brought an action against that decision and against his probation report. At the same time as his main action, he lodged an application to suspend the operation of the decision to dismiss him. The latter application was dismissed by order of 20 July 1981 of the President of the Third Chamber ([1981] ECR 2187). However, by judgment of 6 October 1982 ([1981] ECR 3369), the Third Chamber annulled the dismissal decision on the chief ground that "by failing to communicate to the applicant all the documents underlying its decision, it [the appointing authority at the Parliament] failed to observe the adversary procedure laid down in Article 34 (2) of the Staff Regulations", and that as a result "the applicant was precluded from giving his comments on all the complaints made about him, which led to the dismissal decision".

It may be seen from the file that, following the above-mentioned judgment, the Director of Personnel and Social Affairs at the Parliament again submitted to Mr Alvarez his probation report, by letter of 14 October 1982, and appended to it the memoranda which had not been disclosed to him in the course of the first dismissal procedure. He requested the applicant to submit any comments within a period of 15 days.

By letter of 20 October 1982, the applicant's legal representative refused to accept the communication, and demanded the immediate reinstatement of the applicant in his former duties, in compliance with the judgment of 6 October 1982.

In a letter of 17 November 1982, the Director of Personnel and Social Affairs at the Parliament challenged the construction put by the applicant on the judgment of 6 October 1982; he contended that the judgment annulled the dismissal decision on the ground of a procedural defect only, namely the failure to communicate the supplementary memoranda. In those circumstances, he stated, it was clear that the appointing authority had to decide the fate of the probationary official, observing this time the procedural rules the infringement of which had resulted in the above-mentioned judgment. Accordingly, the Director of Personnel and Social Affairs resubmitted the probation report and the supplementary memoranda to the applicant for his comments, pointing out that if no comments were received, the Parliament would be obliged to consider that the whole report had met with the applicant's approval.

By letter of 23 November 1982, the applicant's legal representative, after again accusing the Parliament of failing to comply with the Court's judgment, demanded the reinstatement of Mr Alvarez. Again he protested against what he termed the Parliament's "new ultimatum" for the submission of the applicant's comments on the memoranda supplementing the probation report. He added: "On no account must you

assume that the whole report has been accepted by my client", and went on to say that he "reserved the right to formulate any further observations and criticisms at the appropriate time and place".

After that letter, the Director of Personnel and Social Affairs informed the applicant on 10 December 1982 that he would be dismissed with effect from 15 December 1982.

On an unconfirmed date, the applicant lodged a complaint within the meaning of Article 90 (2) of the Staff Regulations.

On 29 December 1982, the applicant brought an action for the annulment of the second dismissal, which included a claim for damages of "at least" BFR 500 000 because of the "vexatious nature" of that dismissal. On the same date, by a separate document, pursuant to Article 83 of the Rules of Procedure, he submitted an application to suspend the operation of the decision that was the subject of the proceedings.

That application was rejected by order of 17 January 1983 of the President of the Second Chamber, who, as far as the urgency was concerned, referred to the order given on 20 July 1981 and held, as regards the factual and legal grounds establishing a *prima facie* case for the grant of interim measures, that the Parliament had complied with the judgment of 6 October 1982 by communicating to the applicant all the documents on which his dismissal had been based, since the Court had annulled the first dismissal on the basis of failure to observe the adversary nature of the procedure provided for under Article 34 (2) of the Staff Regulations.

Nevertheless, during that period, the applicant's representative continued to make representations to the Parliament administration concerning compliance with the judgment of 6 October 1982, and on 3 March 1983 he lodged an application for the interpretation of the judgment of 6 October 1982, which the Court dismissed by order of 29 September 1983.

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

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

II — Conclusions of the parties

The *applicant* claims that the Court should:

Declare the application admissible;

Declare that it is well founded;

Annul in consequence the second dismissal, with all the legal consequences;

Declare that owing to its vexatious nature the second dismissal caused non-material damage to the applicant to the amount of at least BFR 500 000;

In any event order the Parliament to pay the costs of the proceedings, which the applicant was obliged to bring, even though vexatious.

The *European Parliament* claims that the Court should:

Dismiss the action with costs.

III — Submissions and arguments of the parties

The *applicant* first sets out the facts of the case and contends that the Parliament was unwilling to comply with the judgment of 6 October 1982, as is shown by the fact that it resubmitted memoranda to the applicant that the Court, in Case 206/81, had declared could not be relied on. It was for that reason that the applicant's legal representative had returned the documents to the Parliament without comment.

The applicant makes the following submissions in support of his application for the second dismissal decision to be annulled:

(a) If the Court were to uphold the second dismissal it would necessarily have to go back on its previous view and allow specific criticisms which had been dismissed by the judgment of 6 October 1982 to be used again for the same ends.

(b) The Rules of Procedure would be infringed, in so far as by admitting in new proceedings documents that it had been held in the first proceedings could not be relied on against the applicant, the Court would have to act in breach of the principle of legal certainty.

(c) By refusing to assign a post to the applicant and by actually deciding to dismiss him a second time on pretexts "contrary to all legal principles", the Parliament was refusing to comply with a judgment of the Court.

(d) The second dismissal is illegal inasmuch as it constitutes repudiation of the authority of the Court of Justice.

(e) The second dismissal constitutes, in addition, a misuse, or at least an improper use, of powers, which, in the applicant's view, justifies his application for substantial damages.

The *Parliament* reviews the whole history of the dispute and contends that the various submissions in the action are unfounded.

As regards the applicant's third submission, namely its alleged failure to comply with the judgment of 6 October 1982, the Parliament contends that it complied with the judgment without delay. However, it questions whether the applicant is equally willing to comply with the judgment. It submits that Mr Alvarez seeks to construe the judgment of 6 October 1982 as saying that, following the annulment of the dismissal decision, his status was no longer that of a probationary official but that of an established official, whereas the judgment merely annulled the dismissal decision for failure to observe the adversary nature of the administrative procedure. In the Parliament's view, the effect of the judgment of 6 October 1982 was to put the parties back in the position in which they were before the dismissal which was subsequently annulled. Consequently, following the judgment, the Parliament had to make good the procedural defect underlying the Court's decision.

The Parliament contends that Mr Alvarez's first two submissions are on similar lines. In point of fact, the Court did not find in its first judgment that the three supplementary memoranda could not be relied on, precisely because the Court held that the dismissal should be annulled on the ground of its non-adversary nature owing to the failure to communicate the memoranda to Mr Alvarez in the proper manner. Ac-

cordingly, it is not the Parliament that has failed to comply with the Court's judgment by remitting all the documents to the applicant, but the latter, in so far as he has refused to submit comments on the memoranda. In the Parliament's view, that is evident from the interim order of 17 January 1983.

In those circumstances, it is pointless to discuss the submission concerning the alleged breach of law and the questions of a possible misuse or improper use of powers.

In his reply, the *applicant* points out first, as regards the facts, that the documents produced by the Parliament still do not include the memoranda mentioned by Mr Mestat, stating that Mr MacKeever drew up several memoranda concerning very numerous incidents involving Mr Alvarez and his superiors. He claims once again that the Parliament failed to comply with the judgment of 6 October 1982: the annulment of the dismissal entailed for the Parliament "obligations other than that of reviving a procedure which, in the view of the Court, cannot be relied on against us". He protests equally vigorously against the claim that he might have accepted the supplementary memoranda by tacit acquiescence, and refers in this connection to his reply lodged in Case 206/81 and, in particular, to paragraphs 7, 8, 9 and 12 thereof.

As regards the submission that the Parliament failed to comply with the judgment of 6 October 1982, the applicant reiterates that the Parliament should have assigned him a post in his service and in his career bracket, and was certainly not entitled to decide to dismiss him again, since that is tantamount to simply confirming an earlier decision, which conflicts with the judgment of 26 May 1971 (Joined Cases 45 and 49/70 *Bode* v *Commission* [1971] ECR 465).

In his view, the proper course of action for the Parliament was not to make good its failure to respect the adversary nature of the first procedure, but to comply with the first judgment, since the Court had never ordered or even recommended the Parliament to effect a second dismissal while paying closer attention to the rights of the defence. Moreover, contrary to the Parliament's assertion, the non-adversary nature of the procedure was not the sole ground for the annulment of the first dismissal, since in paragraph 6 of the judgment of 6 October 1982 the Court stated that: "the probation report itself was incomplete as regards his qualifications and the appraisal of his performance and moreover was unusually laconic".

In addition, in the applicant's view, the memoranda are illegal and not even the fact of their being communicated could confer any status on them in law or under the Staff Regulations. As a consequence, the applicant reiterates his arguments in full, in particular that of the infringement of the procedural rules on the basis that, in his view, a procedural defect may not be rectified and any derogation from that principle constitutes a breach of legal principles.

He further maintains that no-one may be proceeded against twice on the basis of the same facts when a decision against which no appeal may be filed has been taken by a court having jurisdiction.

The second dismissal is also unlawful, in so far as it is absurd to claim that the Court's judgment of 6 October 1982

entailed any right whatsoever to dismiss the applicant for a second time.

Mr Alvarez claims that the Parliament misused its powers by misusing procedures, in so far as the appointing authority applied Article 34 of the Staff Regulations instead of the disciplinary procedure under Article 51.

In the alternative, if, as the applicant considers to be unlikely, the supplementary memoranda may be relied on against him, he contests those memoranda, claiming principally that his dismissal was due not to his behaviour but rather to the situation within the messengers' department.

In its rejoinder, the *Parliament* first rejects the applicant's request that the memoranda from Mr MacKeever be produced. It states that it has nothing more to add as far as the applicant's submissions are concerned, and repeats emphatically that it has complied with and will continue to comply with the Court's judgment as far as is necessary and without any reservation.

IV — Oral procedure

The parties presented oral argument at the sitting on 26 January 1984.

The Advocate General delivered his opinion at the sitting on 1 March 1984.

Decision

1 By application lodged at the Court Registry on 29 December 1982, Mr Alvarez, a former probationary official of the European Parliament, brought an action for annulment of the decision to dismiss him taken by the Director of Personnel and Social Affairs of the European Parliament on 6 December 1982 and also for compensation for the non-material damage suffered by him as a result of that decision.

2 By judgment of 5 October 1982 (Case 206/81 [1982] ECR 3369), the Court (Third Chamber) annulled the first decision to dismiss the applicant, which had been taken on 19 June 1981, on the ground that, by failing to communicate to the applicant all the documents underlying its decision, and, in particular three memoranda supplementary to the probation report, the Parliament had failed to respect the adversary procedure provided for under Article 34 (2) of the Staff Regulations.

3 Following that judgment, the Parliament recommenced the dismissal procedure by communicating to the applicant the probation report together, this time, with the three supplementary memoranda. After giving the applicant the opportunity to submit comments, the Parliament took a new decision dismissing him, thereby rejecting his repeated requests to the effect that the Parliament was obliged to reinstate him in compliance with the judgment of 6 October 1982.

4 At the same time as he brought this action, the applicant submitted an interim application to suspend the contested decision. That application was dismissed by order of 17 January 1983 of the President of the Second Chamber ([1983] ECR 65).

5 After bringing his action against the new dismissal decision, the applicant nevertheless continued to make representations to the Parliament administration concerning its compliance with the judgment of 6 October 1982, and on 3 March 1983 he lodged an application for the interpretation of that judgment, which the Court (Second Chamber) dismissed by order of 29 September 1983.

6 In his application, Mr Alvarez contends essentially that by proceeding in the manner described above the Parliament has refused to comply with the first judgment of the Court; that, therefore, the second dismissal constituted a repudiation of the authority of the Court of Justice, and, moreover, a misuse, or at least an improper use, of powers; that if the Court upheld the second dismissal it would have to go back on its earlier decision and allow certain criticisms which had been dismissed by the judgment of 6 October 1982 to be used again for the same ends, which would also be an infringement of procedural rules and a breach of the principle of legal certainty. However, at the sitting the applicant withdrew the line of argument based on misuse of powers.

7 The Parliament contests all those submissions, contending essentially that, since the effect of the judgment of 6 October 1982 was to put the parties back in the same position as they were in before the dismissal that was subsequently annulled, the Parliament had to make good the procedural defect criticized in the Court's decision. Consequently, the first judgment had not found that the supplementary memoranda could not be relied on, and it was

not the Parliament that had failed to comply with the judgment but the applicant, by failing to submit his comments. Under those circumstances, there had been no repudiation of the authority of the Court of Justice and likewise no misuse or improper use of powers.

8 It should be examined first whether the Parliament complied correctly with the judgment of 6 October 1982.

9 As has already been observed in the order of 17 January 1983, the Court, by its judgment of 6 October 1982, annulled the first dismissal on the basis of the failure to respect the adversary procedure provided for under Article 34 (2) of the Staff Regulations. The applicant himself acknowledged at the sitting that the effect of the annulment of the first dismissal was to restore the *status quo ante*. Accordingly, by remitting to the applicant all the papers on which his dismissal is based, including all the documents not previously communicated to him, the Parliament complied in that regard with the judgment of 6 October 1982.

10 Consequently that argument must be dismissed.

11 Secondly, it should be examined whether, by using again the same documents on which the first dismissal had been based, the Parliament repudiated the authority of the Court's first decision and infringed the procedural rules.

12 In the judgment of 6 October 1982, the Court emphasized the importance of communicating the memoranda supplementary to the probation report; nevertheless it did not annul the probation report as the applicant had requested at the time.

13 In those circumstances, the Parliament cannot be said to have disregarded the authority of the first judgment when it recommenced the dismissal procedure and asked the applicant to submit his comments on the supplementary memoranda in question.

14 It should be borne in mind as regards the alleged infringement of the rules governing the procedure and breach of the principle of legal certainty that, in its judgment of 6 October 1982, the Court did not rule on the substance of the criticisms set out in the supplementary memoranda; consequently, it cannot be said that the Parliament was at fault on the ground that, by communicating the memoranda to the applicant, it revived criticisms that had previously been dismissed by the Court.

15 Consequently, the whole of that line of argument must also be dismissed.

16 Lastly, the applicant's argument contesting the three supplementary memoranda must also be dismissed. The whole of the applicant's argument in this respect is restricted to allegations that were already made in the first case and to contesting the memoranda and assessments of the applicant's immediate superior, to which two of the three supplementary memoranda refer. Furthermore, the appointing authority has a wide discretion as regards dismissal pursuant to Article 34 and the Court's power of review extends only to manifest errors or the possibility of misuse of powers. In this case, however, the applicant himself does not claim that there was manifest error. This being so, it must be held that the applicant has been unable to rebut the allegation that the standard of ability shown by him was not sufficient to justify his establishment.

17 For the above reasons, the application must be dismissed, including the application for compensation for non-material damage.

Costs

18 Under Article 69 (2) of the Rules of Procedure, the unsuccesful party is to be ordered to pay the costs. However, under Article 70 of those Rules, costs incurred by the institutions in proceedings by servants of the Communities are to be borne by the institutions themselves.

On those grounds,

THE COURT (Second Chamber)

hereby:

1. **Dismisses the application;**

2. **Orders the parties to bear their own costs including those of the interim application.**

Bahlmann Pescatore Due

Delivered in open court in Luxembourg on 5 April 1984.

J. A. Pompe
Deputy Registrar

K. Bahlmann
President of the Second Chamber

OPINION OF MR ADVOCATE GENERAL VERLOREN VAN THEMAAT DELIVERED ON 1 MARCH 1984 [1]

Mr President,
Members of the Court,

1. Introduction

The action that I have to consider today is the application by Mr Alvarez for the annulment of the European Parliament's second decision, dated 6 December 1982, to dismiss him under Article 34 (2) of the Staff Regulations and for damages of at least BFR 500 000.

1 — Translated from the Dutch.