OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER
delivered on 14 July 1998 *

1. This is an appeal by the European Parliament against the judgment of the Court of First Instance of the European Communities of 10 July 1997 [1] annulling its decisions of 22 May and 9 August 1995 in which it decided and confirmed, respectively, that its official, Mrs Gaspari, had been improperly absent for one day, for which reason it deducted a day from her annual leave entitlement.

The facts of the case

2. The facts found proved in the judgment at first instance are, briefly, as follows:

— On 3 May 1995 Mrs Gaspari submitted to the Parliament administration a medical certificate indicating that she was unfit for work from Wednesday 3 May until Friday 5 May 1995.

— On Thursday 4 May 1995 the Parliament's medical officer in Luxembourg went to the applicant's home to examine her and informed her that she was fit to return to work the following day, Friday.

— Mrs Gaspari did not resume her duties until Monday 8 May 1995. On that same day she sent a note to the Director-General of Personnel objecting to the way in which the institution's medical officer had treated her.

— On 22 May 1995 the Personnel Division informed Mrs Gaspari that it regarded her absence as irregular and that the day of absence would be treated as part of her annual leave pursuant to Article 60 of the Staff Regulations of Officials of the European Communities. That decision was confirmed on 9 August 1995.

— On 21 August 1995 Mrs Gaspari lodged a complaint (dated 11 August) against the decision of 22 May 1995, in which she claimed that she had followed the guidance given by her doctor, that the obser-

* Original language: Spanish.

1 — Case T-36/96 [1997] ECR II-595.

vations of the medical officer were baseless and that the latter had adopted a 'partisan' approach.

— On 13 December 1995 the Parliament rejected her complaint.

The grounds of the judgment under appeal

3. Of the three pleas put forward by Mrs Gaspari in seeking annulment of the administrative decision (no statement of reasons, infringement of Article 59 of the Staff Regulations and manifest error of assessment), the Court of First Instance considered only the first, which, in its view, was sufficient to justify a finding in her favour.

4. After stating that, strictly, the contested measure was not the report drawn up by the medical officer but the administrative decision treating her absence as irregular, the Court of First Instance emphasises that, in effect, the decision was based solely on that report.

5. In the opinion of the Court of First Instance, the logical consequence of that fact is that the official concerned must 'be granted access to the medical officer's report' in order to be in a position to ascertain the grounds of the decision at issue and assess its merits.

6. Since the report was not disclosed to the official or to her attending doctor, the statement of reasons in this case was confined to a mere reference to the opinion of the Parliament's medical officer, who considered that Mrs Gaspari should have returned to work on Friday 5 May. According to the Court of First Instance, that statement of reasons was 'merely formal and therefore insufficient to allow the applicant to assess its merits'.

7. The Court of Justice adds that, in addition, the principle of respect for the rights of the defence was infringed in the applicant's case: since the conclusions of the medical examination were not disclosed to her, Mrs Gaspari was unable to give her views on them or challenge them with any chance of success. Respect for the rights of the defence requires that a person should be able to express his views on the entire content of a medical officer's report.

The grounds of appeal

8. The appeal is based on the following four [2] pleas:

(a) The Court of First Instance should have declared the application inadmissible under Article 179 of the EC Treaty since the pleas put forward in the application did not coincide with the claims set out in the prior complaint.

(b) The Court of First Instance erred in law by considering that the contested decision was vitiated by the lack of, or by a defective, statement of reasons. It is incumbent on the official concerned to show that the medical officer's report was not well founded. Otherwise, the system provided for in Article 59(1) of the Staff Regulations would become meaningless.

(c) The Court of First Instance infringed Article 48(2) of its Rules of Procedure by upholding the plea relating to breach of the rights of the defence, which was raised by Mrs Gaspari only in her reply.

(d) In any event, there was no breach of the rights of the defence, and therefore the Court of First Instance erred in law by annulling the contested administrative decisions on that ground.

The first ground of appeal

9. The European Parliament alleges, first, that the Court of First Instance should not have admitted Mrs Gaspari's appeal since the pleas on which it was based differed from those set out in the complaint that preceded it.

10. That allegation is nothing short of astonishing at this stage in the procedure since it was not put forward in the defence at first instance. If the Parliament's defence counsel considered the application inadmissible at first instance, the logical course would have been to raise an appropriate objection at the proper point in the procedure, namely before the judicial authority responsible for dealing with it. A reading of that defence is sufficient to show, on the contrary, that it focuses on the

2 — In fact, the grounds of appeal are set out under only three headings, namely inadmissibility of the application at first instance, the existence of a statement of reasons and the examination of an issue by the Court of First Instance of its own motion. However, in developing the latter ground of appeal, the Parliament advances both substantive and procedural arguments, which I consider must be dealt with separately. Although I could have referred to the first and second parts of the third ground of appeal, I have chosen, for reasons of clarity, to treat them as separate grounds.

statements of reasons for the decisions and on the alleged error of appraisal but it makes no submissions as to the inadmissibility of Mrs Gaspari's application. The defence called for the application to be dismissed on substantive grounds and certainly not on grounds of inadmissibility.

11. In any event, there is no reason for an application to the Court of First Instance not to put forward legal arguments which were not set out in a prior complaint. The fact that the complaint and the application to the Court must correspond, to which the Court of Justice [3] has referred on occasion, requires that the applicant's claims should be the same in both documents and that the *causa petendi* should have been settled in the complaint, the entire reason for this being not to detract from the latter. But that requirement cannot be interpreted so rigidly as to prevent an applicant from adding before the Court of First Instance new arguments (or evidence) differing from those put forward in his complaint. There would not be much point in requiring the involvement of a lawyer in staff cases before the Court of First Instance if his role were to be confined to repeating the arguments already advanced by the official in his complaint without the help of a lawyer.

12. In this case, both the complaint and the application pursue the same end (a declaration that the decisions are void) and invoke the same cause of action (the allegedly improper conduct of the defendant institution), and even some of the legal arguments put forward coincide. The fact that the application to the Court incorporates further arguments or endows those put forward earlier with a legal guise cannot in my opinion render it inadmissible.

13. Finally, the case-law of the Court of Justice allows a defect which constitutes a matter of public interest and affects a contested measure (and that category of defect includes the lack of a statement of reasons and infringement of the rights of the defence) to be examined at any stage of the procedure, and the applicant's right to raise the matter does not lapse merely because he failed to do so in his earlier complaint. [4]

The second ground of appeal

14. The problem raised by the second ground of appeal concerns the requirement that reasons be stated for the contested decisions. As I have said, they contained only a reference to the medical officer's report but did not transcribe its contents.

15. Consideration of this plea must start from a question of principle: must a Community institution include, in the statement of reasons for decisions like those at issue here, the text of a report drawn up by the medical officer following his visit to the official? If

3 — See the references to that case-law in paragraph 9 of the judgment of the Court of First Instance of 29 March 1990 in Case T-57/89 *Alexandrakis* v *Commission* [1990] ECR II-143.

4 — Case C-166/95 P *Daffix* [1997] ECR I-983, paragraphs 24 and 25.

not, may it be considered that such decisions lack the statement of reasons required for such administrative measures?

16. In my opinion, a decision concluding that an official's absence is irregular must without doubt state the reasons which prompted the institution to adopt it: if it is a decision concerned with absences following an examination by a medical officer, when — and the official so admits — the doctor personally called on the official to return to work and the official did not do so, the decision contains an adequate statement of reasons if it sets out those facts and refers to Articles 59 and 60 of the Staff Regulations as being applicable.

17. I do not consider it necessary for such decisions to include in addition the entire text of the report of the medical officer to the institution concerned or of the clinical assessments contained in it or which might be obtained from the medical officer.

18. Sometimes, medical confidentiality may even prevent the medical officer from disclosing the results of his professional examination to the institution concerned. [5] In such cases, it is sufficient for his report to contain a final assessment as to whether or not it is appropriate for the official to resume duties. It is precisely that final conclusion (and not the clinical background thereto) which, in turn, constitutes the statement of reasons for the administrative measure. Conversely — in order to ensure a wholly balanced approach — it cannot be required that the certificate from the official's attending medical practitioner to the effect that he is unfit for work contain the doctor's detailed professional assessments as to his patient's condition.

19. Even if it were the case that the requirements of medical confidentiality did not extend so far and the medical officer might disclose all his findings to the institution, that would not mean that the institution was obliged to incorporate them in the decision finding that the official's absence was irregular, a reference to the doctor's report being sufficient. Subject to the distinctions which I shall draw shortly, such a succinct statement of reasons may be sufficient to justify the administrative measure, provided that later, in the event of disagreement, it might have to be amplified at a later stage.

20. I consider that the key to this dispute is to be found in the latter point. The institution employing the official may omit the content of the medical officer's report from its original decision, but it may not refuse to obtain that report and make it available to the official concerned [6] if the official makes a

5 — According to Article 86 of the Deontological Rules of the College of Medical Practitioners of Luxembourg, appended as Annex III to the appeal, a doctor giving a second opinion is bound by professional secrecy *vis-à-vis* the administration or organisation by whom he is contracted, and he may and must disclose only his conclusions to them, on an administrative basis, without indicating the reasons of a medical nature on which they are based.

6 — In referring to the duty of the institution, as such, I will not consider the question of which of its departments has to provide the official with the report. This issue (which I regard as entirely peripheral) was the subject of certain of the Parliament's submissions at the appeal hearing.

legitimate request to that effect, either to acquaint himself with its terms or to challenge an administrative measure adopted on the basis of that medical report.

21. That aspect of the question does not, however, concern the requirement of a statement of reasons for an administrative measure: it relates to a later phase, such as administrative or judicial proceedings which might be brought against it. In view of the eminently specialised nature of the assessments of the medical officer, his report constitutes a form of evidence which, if need be, could be compared with other evidence of the same kind or made the subject of specialist examination at the request of either party as part of the procedure for review of the administrative measure.

22. I think it is appropriate to stress this point: by way of statement of reasons for the measure in which it was decided that the official's absence was irregular, it was sufficient for the institution to state the proven facts (the medical officer's examination, the express instruction to the official to resume duties, the latter's subsequent conduct) and the provisions of the Staff Regulations applicable to such conduct, on which the decision was based. The official's rejection of the decision, based on her disagreement with the doctor's findings, means that in the course of the administrative complaint procedure (and *a fortiori* during the judicial review) she should have access, if she so requests, to the medical report in question. But two stages are involved here, which must not be confused.

23. A refusal on the part of the institution to comply with such a request will not infringe the obligation to give a statement of reasons but it may encroach upon the official's right to react, in full knowledge of the facts and with equality of arms, against an adverse administrative measure. In that regard, it is necessary to analyse the assessments of the Court of First Instance in the contested judgment concerning the rights of the defence, upon which the third and fourth grounds of appeal focus.

24. This ground of appeal should therefore be upheld since the Court of First Instance erred in law by holding that the statements of reasons for the contested administrative decisions were inadequate.

The third ground of appeal

25. In its third ground of appeal [7] the Parliament criticises the Court of First Instance for not complying with Article 48(2) of its Rules of Procedure, pursuant to which no new plea may be put forward in the course of the proceedings unless it is based on matters of law or fact which have come to light in the course of the procedure.

26. Counsel for the Parliament contends that the plea as to breach of the rights of the

7 — See footnote 2 regarding the way the grounds of appeal are set out in the appeal.

defence was introduced by the applicant only in her reply, no mention of it being made in her prior complaint. The Court of First Instance should not therefore have entertained it. *A fortiori*, the Court of First Instance should not have examined it on its own initiative.

27. As regards possible differences between the content of the complaint and the application to the Court of First Instance, I refer to what I said in relation to the first ground of appeal. I repeat that I can see no objection to the raising in the application to the Court of legal arguments additional to those raised at the administrative stage provided that there is no change in the claim or cause of action. In any event, since the defects are matters of public interest, they can always be raised at a later stage.

28. As regards the alleged irregularity in the course of the procedure, I again do not consider that Article 48 of the Rules of Procedure of the Court of First Instance has been infringed, for two reasons:

(a) first, there is no need to examine to what extent that court may, of its own motion, examine certain defects of a Community measure which encroach upon fundamental rights, since in this case the infringement of the rights of the defence was raised by the applicant, as is expressly acknowledged in the Parliament's defence; [8]

(b) second, whilst it is true that the heading of the first plea in law in the application referred only to the statement of reasons for the measure, it is also true that it was there emphasised that it was impossible for the official to examine and challenge the substance of the contested decision, an argument which concerns the rights of the defence.

29. Consequently, the Court of First Instance did not contravene any rule of law in dealing, in its judgment, with a legal argument raised by the applicant in the proceedings before it.

The fourth ground of appeal

30. After contending that the argument concerning breach of the rights of the defence should have been declared inadmissible in the contested judgment, counsel for the European Parliament asserts that, in any event, there was no such breach.

8 — Paragraph 50 of the appeal refers to: '... The introduction by the Court of First Instance of this new argument ... raised by the applicant only at the stage of the Reply ...'.

31. A clarification is called for before this ground of appeal is considered: the question whether or not the Parliament actually denied the applicant access to the medical report. It is a matter to which the contested judgment makes no reference whatsoever under the heading 'Facts', nor is there any reference to it under the headings 'Pre-litigation procedure' or 'Procedure before the Court'. Nevertheless, later, in examining the legal issues, the Court of First Instance states twice that the applicant asked in her complaint for disclosure of the medical report (paragraphs 30 and 31).

32. The applicant's complaint was very succinct, being confined to two statements: '(1) I merely followed to the letter the guidance given by my doctor, namely that three days off work were necessary; (2) the observations of the medical officer (whom my attending medical practitioner would really like to meet) were baseless since it was the first time he had seen me and on other occasions he has used these partisan methods, as demonstrated by the attached note from the Staff Committee dated 30 May 1995'.

33. For its part, the Parliament insists that the applicant acknowledged at the hearing before the Court of First Instance that she had never asked to examine the medical officer's report.

34. Since the Court of First Instance establishes the facts and an appeal does not represent an appropriate time to review them, particularly in view of the fact that Counsel for the Parliament has not alleged that there has been any distortion of evidence, which is directly and immediately inferable therefrom, it must be conceded that in her complaint Mrs Gaspari sought access to the medical report. Does the defendant institution's lack of response to that request affect retroactively the validity of the decisions antedating the complaint?

35. In my view, the answer must be negative: I have already stated that the decisions with which the complaint was concerned were sufficient to explain to their addressee the reasons for which the administration regarded her absence as irregular. Also, Mrs Gaspari admits that she received from the medical officer who visited her a direction to return to work the next day, the obvious explanation for which is that he considered her fit to do so. If the official needed the detailed medical report (for example, to show it to her attending medical practitioner) she could have asked for it at any time before making the complaint, with a view to complaining in greater detail.

36. In any event, the Parliament's (implicit) refusal to make the medical report available to the official, as requested in the terms described above, could be a reason for annulling the decision which disposed of the administrative complaint, on the ground of possible breach of the rights of the defence whilst the complaint was being dealt with, but not for annulling the original decisions.

37. That difference, I believe, needs to be emphasised: first, the decisions at issue in these proceedings contained from the outset an adequate statement of reasons since they made it clear to the person concerned why the administration considered her absence irregular. Second, even if it is conceded that the Parliament, at the official's request, should have given her a copy of the medical report (finally produced in the proceedings before the Court of First Instance), that does not affect the requirement of a statement of reasons but relates to an item of evidence which could be challenged in complaint proceedings and, *a fortiori*, in proceedings before the Court.

38. Therefore, if there was any breach of the rights of the defence, it occurred when the contested decisions had already been adopted. It is thus a defect which affects not those decisions but a subsequent administrative measure — like the decision disposing of the complaint. Paradoxically, that last measure was not annulled by the contested judgment, which declared void only the decisions of 22 May and 9 August 1995.

39. In conclusion, it is appropriate to uphold the fourth ground of appeal as well, since the Court of First Instance erred in law in annulling the two contested decisions by reason of an event (the failure to respond to the later request for disclosure of the medical report) which postdated them and cannot affect their validity.

40. Finally, since the Court of First Instance did not give judgment on the other pleas in law put forward by the applicant at first instance, regarding which problems remain regarding the assessment of the facts and evaluation of evidence, it is appropriate, in accordance with Article 54 of the EC Statute of the Court of Justice, to refer the case back to that court for judgment.

41. Since in my view the circumstances envisaged in Article 122 of the Rules of Procedure of the Court of Justice are not present, there is no need for the judgment to give any directions as to costs.

Conclusion

42. I therefore suggest that the Court of Justice should uphold the appeal brought by the European Parliament and should:

(1) set aside the judgment of the Court of First Instance of 10 July 1997 in Case T-36/96;

(2) refer the case back to the Court of First Instance for it to give judgment on the other pleas in law put forward by the applicant;

(3) reserve the costs.