ORDER OF THE PRESIDENT OF THE COURT
17 JANUARY 1983 [1]

José Alvarez
v European Parliament

Case 347/62 R

Application for the adoption of interim measures — Suspension of operation — Interim measures — Conditions for granting
(Rules of Procedure, Art. 83 (2))

In Case 347/82 R

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

applicant,

v

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

defendant,

APPLICATION to suspend the operation of the European Parliament's decision of 6 December 1982, by which the applicant was dismissed,

THE PRESIDENT OF THE SECOND CHAMBER, replacing the President of the Court pursuant to Article 96 (1), the second paragraph of Article 85 and the second paragraph of Article 11 of the Rules of Procedure,

makes the following

1 — Language of the Case: French

ORDER

Facts and previous history of the dispute

1 The applicant, who was a member of the auxiliary staff of the European Parliament from 26 March 1979 to 30 September 1980, was appointed with effect from 1 October 1980 a probationary official of the Parliament. The report issued on the expiry of his probationary period was unfavourable and recommended that he be dismissed.

2 It may be seen from that report, which was drawn up on 30 March 1981, that the assessments of the applicant's work were in general 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 colleagues and that he had numerous disputes, sometimes violent, with his superiors, with whom he was not always truthful. A temporary transfer to Brussels resulted in an improvement, but the general assessment was nevertheless negative.

3 After the Parliament administration had communicated the report to the applicant and taken note of his comments, it obtained supplementary information from various officials in memoranda of 18, 20 and 21 May 1981. It has been established that those memoranda were not communicated to the applicant at the time.

4 In the supplementary memorandum of 18 May 1981 Mr Mestat, Head of the Conferences and Protocol Division, noted that in his department the applicant's conduct had been uncooperative and sometimes violent and that there had been numerous incidents with his superiors. He also pointed out that the applicant had been warned of the possible effect of such incidents on the assessment of his probationary period and that he had been temporarily transferred to Brussels in order to avoid further difficulties. Although since that date certain improvements had been noted, they were not, in the

opinion of the author of the memorandum, such as to negate the earlier unfavourable impression.

5 In the memorandum of 20 May 1981, which concerned the applicant's period of activity in Brussels, Mr Van Schelven observed that Mr Alvarez's work was satisfactory, but that his conduct disturbed the smooth running of the department because of "his inability to adapt himself and because his superiors were not prepared to tolerate him".

6 Finally, in the memorandum of 21 May 1981 Mr Van den Berge, Director of General Administration at the Parliament, commented that the applicant had repeatedly displayed a particularly aggressive attitude and that he had threatened other officials with physical violence; that, on several occasions, he had intentionally misled his superiors and had adopted an offensive and threatening attitude towards them. The author of the memorandum drew attention to the negative consequences which the establishment of the applicant might have on the functioning of the messenger service, inasmuch as it would demonstrate that "anything is permissible" in the administration of the European Parliament. Consequently, he considered that the dismissal of the applicant was not only thoroughly justified, but absolutely necessary.

7 On the basis of the probation report and the above-mentioned memoranda, the Secretary General of the Parliament informed the applicant, by letter of 18 June 1981, of his decision to dismiss him with effect from 15 July 1981.

8 On 8 July 1981 the applicant lodged a complaint against the report and his subsequent dismissal. Pursuant to the combined provisions of Articles 90 (2) and 91 (4) of the Staff Regulations, the applicant brought an action on 8 July 1981, registered under No 206/81, for the annulment of his probation report and the decision to dismiss him. At the same time as his main action, he lodged an application, No 206/81 R, to suspend the operation of the decision to dismiss him. That application was rejected by an order of the President of the Third Chamber of the Court of 20 July 1981 ([1981] ECR 2187).

9 By judgment of 6 October 1982 (not yet published), the Third Chamber annulled the decision of dismissal. It may be seen from the grounds of that judgment that the annulment of the decision was based on the Parliament's failure to communicate to the applicant all the documents on which its decision was founded and, therefore, its failure to observe the adversary procedure laid down in Article 34 (2) of the Staff Regulations.

10 It may be seen from the file in the case 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 communicated in the course of the first dismissal procedure. He requested the applicant to return the papers with any appropriate comments, as provided for by Article 34 (2), within a period of 15 days.

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

12 By a letter of 17 November 1982, the Director of Personnel and Social Affairs communicated the following reply to the applicant's legal representative:

" . . . I take note of the interpretation which you give to the said judgment, an interpretation which I cannot accept. The judgment of the Court of Justice of the European Communities annulled only the decision to dismiss Mr Alvarez, on the grounds of a procedural defect, namely the failure to communicate to your client memoranda supplementary to his probation report. Under those circumstances, it is clear that the appointing authority must decide the future of the probationary official on the basis of the probation report of 30 March 1981 and the supplementary memoranda, observing this time, however, the procedural rules the infringement of which led to the annulment granted in the said judgment.

Therefore I refer you to my first letter and request that you communicate to me before 25 November 1982 any comments which your client may wish to submit in relation to his probation report and to the memoranda of Mr Mestat, Mr Van Schelven and Mr Van den Berge of 18, 20 and 21 May 1981 respectively.

If, on the expiry of this new and *final period*, your client has not submitted his comments, the European Parliament will be obliged to consider that the whole report has met with his approval.

I take this opportunity of informing you that the European Parliament has paid BFR 250 000 into your bank account; that sum represents an advance on the salary which will be paid to your client in compliance with the above-mentioned judgment. On receipt of the information which I asked you to provide in my letter of 27 October 1982, a supplementary payment will be effected, if necessary, corresponding to the balance due."

13 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 re-instatement of Mr Alvarez and the payment of his salary, according to the provisions of the Staff Regulations, and, in addition, gave notice that if his request was not met within eight days, formal notice would be served on the Parliament by a Huissier de Justice to give satisfaction to the applicant subject to a penalty payment of BFR 10 000 per day of delay for failure to do so. The representative again protested against 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".

14 After that letter, the Director of Personnel and Social Affairs informed the applicant on 10 December 1982 that on the basis of the probation report of

30 March 1981, supplemented by the memoranda of 18, 20 and 21 May 1981, he would be dismissed with effect from 15 December 1982.

15 It may be seen from the file in the case that at the same time the Parliament paid the applicant an advance on the salary to which he was entitled from 15 July 1981, the date of the annulled dismissal, in addition to the equivalent of two months' basic salary by way of compensation for dismissal, in accordance with the provisions of Article 34 (2) of the Staff Regulations.

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

17 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 (1), (2) and (3) of the Rules of Procedure, he submitted an application to suspend the operation of the decision which was the subject of the main proceedings.

18 In his application for the adoption of interim measures, the applicant claims that the second dismissal would cause him "exceptional harm", since there was no chance of finding worthwhile employment for someone who had just been dismissed twice by a Community institution. He had therefore suffered irreparable harm. In view of the previous history of the case, it was for the Parliament to rebut the presumption of such harm.

19 The European Parliament, in accordance with Article 84 (1) of the Rules of Procedure, submitted its observations on the application to suspend the operation of its decision on 11 January 1983.

20 As the written statements of the parties contain all the information required in order to give a ruling on the application for the adoption of interim measures, it has not been considered necessary to hear the oral arguments of the parties.

Decision

21 Article 83 (2) of the Rules of Procedure requires the applicant to specify the circumstances giving rise to urgency and the factual and legal grounds establishing a *prima facie* case for the interim measures applied for.

22 As far as the urgency is concerned, it is sufficient to refer to the grounds of the order given by the President of the Third Chamber on 20 July 1981. As the Parliament has fulfilled or offered to fulfil all the financial obligations which resulted from the annulment of the first dismissal, the applicant's position is essentially the same as it was at the time of the first application for the adoption of interim measures.

23 As regards the grounds for the application to suspend the operation of the decision, it should be noted that by its judgment of 6 October 1982, the Court 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. It rejected, however, the claim for the annulment of the probation report. By communicating to the applicant all the papers on which his dismissal is based, including the documents not previously communicated to him, the Parliament has complied in that regard with the judgment of 6 October 1982.

24 By refusing, for his part, to submit comments on the documents communicated to him, the applicant has attempted to thwart the adversary nature of the procedure, the importance of which was emphasized in the judgment of 6 October 1982. On the face of it, therefore, he has admitted that he is unable to reply satisfactorily to the cirticisms of his conduct during his period of probation.

25 It must therefore be declared that the applicant has, by his own conduct, placed himself outside the conditions which, within the meaning of Article 83 (2) of the Rules of Procedure, might have justified the adoption of an interim measure for his benefit.

On those grounds,

THE PRESIDENT OF THE SECOND CHAMBER, replacing the President of the Court pursuant to Article 96 (1), the second paragraph of Article 85 and the second paragraph of Article 11 of the Rules of Procedure,

hereby orders as follows:

1. **The application to suspend the operation of the decision of 6 December 1982 dismissing the applicant is dismissed.**

2. **Costs are reserved.**

Luxembourg, 17 January 1983.

P. Heim
Registrar

P. Pescatore
President of the Second Chamber, replacing the President of the Court