JUDGMENT OF THE COURT (Fourth Chamber)
9 August 1994 *

In Case C-412/92 P,

European Parliament, represented by Jorge Campinos, Jurisconsult, acting as Agent, assisted by Manfred Peter, Head of Division, acting as Agent, and Alex Bonn, of the Luxembourg Bar, with an address for service in Luxembourg at the General Secretariat of the European Parliament, office of the Jurisconsult, room 701, BAK Building, Kirchberg,

appellant,

APPEAL against the judgment of the Court of First Instance of the European Communities of 8 October 1992 in Case T-84/91 *Meskens* v *Parliament* ([1992] ECR II-2335), seeking to have that judgment set aside,

the other party to the proceedings being:

Mireille Meskens, an official of the European Parliament, represented by Jean-Noël Louis and Thierry Demaseure, of the Brussels Bar, with an address for service in Luxembourg at Fiduciaire Myson SARL, 1 Rue Glesener,

supported by

* Language of the case: French.

European Public Service Union, Brussels, represented by Gérard Collin and Véronique Leclercq, of the Brussels Bar, with an address for service in Luxembourg at Fiduciaire Myson SARL, 1 Rue Glesener,

intervener,

THE COURT (Fourth Chamber),

composed of: M. Diez de Velasco, President of the Chamber, C. N. Kakouris (Rapporteur) and P. J. G. Kapteyn, Judges,

Advocate General: M. Darmon,
Registrar: D. Louterman-Hubeau, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 24 February 1994,

after hearing the Opinion of the Advocate General at the sitting on 21 April 1994,

gives the following

Judgment

1 By application lodged at the Registry of the Court of Justice on 11 December 1992, the European Parliament ('the Parliament') brought an appeal under Article 49 of the EEC Statute and the corresponding provisions of the EAEC and ECSC Statutes of the Court of Justice against the judgment of 8 October 1992 in

Case T-84/91 *Meskens* v *Parliament* [1992] ECR II-2335, in so far as the Court of First Instance ordered the Parliament to make good the non-material damage caused to Mrs Meskens by the refusal of that institution to adopt with regard to her specific measures to comply with the earlier judgment of the Court of First Instance of 8 November 1990 in *Bataille and Others* v *Parliament* (Case T-56/89 [1990] ECR II-597, hereinafter 'the *Bataille* judgment').

2 It appears from the judgment under appeal that the Secretary-General of the Parliament refused to permit certain candidates, including Mrs Meskens, to take part in an internal competition organized by the Parliament, Competition No B/164. The reason given for the refusal was that internal rules concerning the recruitment of officials and other staff did not permit temporary staff who, like Mrs Meskens, were recruited otherwise than from reserve lists drawn up following external open competitions to take part in internal competitions.

3 By application of 23 November 1988 Mrs Bataille and other candidates sought the annulment of that refusal.

4 On 27 February 1989, while those proceedings were pending, the Parliament took the initiative of amending the internal rules concerning the recruitment of officials and other staff. The new rules provided that temporary staff were no longer precluded from taking part in internal competitions, but must, as a general rule, satisfy a condition of seven years' seniority in the institution in order to take part. The new rules became applicable on 1 April 1989 and there was no provision for them to be retroactive. The tests for internal Competition No B/164 were held on 6 March 1989, while the proceedings were in progress before the Court of First Instance, without Mrs Meskens and the other applicants in *Bataille* being able to take part.

5 On 8 November 1990 the Court of First Instance delivered judgment in *Bataille* annulling the decisions whereby the Parliament's Secretary-General refused to allow Mrs Meskens and other candidates to take part in the competition.

6 Following that judgment, Mrs Meskens approached the Secretary-General of the Parliament a number of times, the first of which was on 15 January 1991, in order to discover the measures adopted by the Parliament to comply with the judgment as required by Article 176 of the EEC Treaty. On 19 April 1991 the Secretary-General replied that the duty imposed by that article had been discharged by the adoption of the new rules described above. Not satisfied with that response, Mrs Meskens submitted a complaint by registered letter of 17 July 1991 followed by an action brought before the Court of First Instance by application of 19 November 1991, which led to the judgment under appeal.

7 In that judgment the Court of First Instance decided that the action was to be regarded as a claim for damages (paragraph 31) and that the refusal of the Parliament's Secretary-General to adopt with regard to Mrs Meskens specific measures to remove the consequences of the decision which had been annulled constituted a breach of Article 176 of the EEC Treaty and a service-related fault (paragraph 81).

8 The Court of First Instance also held that Mrs Meskens had not established the existence of material damage (paragraph 88). However, it found that the refusal of the Parliament's Secretary-General was such as to make the applicant uncertain and anxious with regard to her future at work and that such a situation gave rise to non-material damage (paragraph 89), which it evaluated *ex aequo et bono* at BFR 50 000 (paragraph 92).

9 That is the judgment which this appeal seeks to have annulled. The Parliament bases its appeal on five pleas which will be considered now in the order of the paragraphs of the contested judgment which they challenge.

The third plea

10 In the contested judgment the Court of First Instance described the applicant's claim as a claim for damages specifying the method of calculation, in which she estimated the damage 'at the sum of ECU 100 per day from the day she submitted her complaint until the day when the selection board for Competition No B/164 [reconvened] in order to re-examine her application ...' (paragraph 31). That description was endorsed by the applicant at the hearing and corroborated by the fact that she did not seek to have the Parliament ordered to take measures defined by her to comply with the *Bataille* judgment (paragraph 32).

11 In its third plea the appellant submits that by describing the application entitled 'Action for annulment' as an action for damages the Court of First Instance clearly distorted the applicant's claims.

12 It should be noted that although Mrs Meskens' application was entitled 'Action for annulment' it included a request that the Parliament be ordered to pay her a sum of money. The Court of First Instance was therefore right to describe the claim, after having sought clarification of the subject-matter from the applicant, as a claim for damages in the context of its unlimited jurisdiction, as Article 91(1) of the Staff Regulations permits it to do.

The fourth plea

13 The Court of First Instance considered in the judgment under appeal whether a pre-litigation procedure in accordance with Articles 90 and 91 of the Staff Regulations of Officials of the European Communities had taken place before Mrs Meskens' application was lodged.

14 It found, first, that the letter of 19 April 1991 from the Parliament's Secretary-General to the applicant's lawyer contained a definitive decision not to take any individual measure with regard to her following the *Bataille* judgment (paragraph 38). It went on to note that the registered letter sent by the applicant to the Parliament on 17 July 1991 constituted a complaint (paragraph 41) and that it was rejected by implication at the end of a period of four months from the date on which it was made (paragraph 43). Lastly, the Court of First Instance found that the subject-matter of the claims submitted in the action brought by Mrs Meskens was not different from that of the claims set out in the complaint (paragraph 44).

15 On the basis of those findings, the Court of First Instance held that a pre-litigation procedure consistent with the Staff Regulations had taken place (paragraph 45).

16 In its fourth plea the Parliament alleges that the pre-litigation procedure was irregular because it did not comply with Articles 90 and 91 of the Staff Regulations.

17 That plea is unfounded.

18 In the first place, the Court of First Instance rightly described the letter from the Parliament's Secretary-General of 19 April 1991 as a decision by the Parliament adversely affecting the applicant, inasmuch as it clearly indicated that that institution did not intend to take any individual measure with regard to Mrs Meskens in addition to the non-retroactive alteration of the internal rules. In the second place, inasmuch as that decision adversely affected the applicant the Court of First Instance was also right to regard the applicant's letter of 17 July 1991 as a complaint. In the third place, the Court of First Instance compared the claims in the action with those of the complaint and found that their subject-matter was the same. In those circumstances the pre-litigation procedure cannot be regarded as irregular.

The first plea

19 In the judgment under appeal the Court of First Instance recalled that the *Bataille* judgment declared that the Parliament's internal rules were unlawful and consequently annulled the individual decisions excluding the applicants, including Mrs Meskens, from the competition (paragraph 75).

20 Since the Parliament had in the meantime amended the unlawful internal rules, the Court of First Instance considered whether the new rules satisfied the duty imposed by Article 176 of the Treaty to take the necessary measures to comply with the *Bataille* judgment.

21 It found that the new internal rules had not redressed the harm done to Mrs Meskens by the decision which had been annulled because they were not retroactive. Accordingly, the Court of First Instance considered that the Parliament's adoption of the new rules could not be regarded as adequate compliance with its obligation under Article 176 of the Treaty (paragraph 77).

22 It was on the basis of those considerations that the Court of First Instance held that the Parliament's refusal to adopt specific measures with regard to Mrs Meskens constituted a breach of Article 176 of the Treaty and a service-related fault (paragraph 81).

23 The Parliament's first plea is that the compensation for non-material damage allowed to Mrs Meskens was not based on the service-related fault, the existence of which was not established, but on the temporary uncertainty in which she had been placed.

24 That plea is unfounded. Article 176 of the EC Treaty requires not only that the administration take the necessary measures to comply with the judgment of the Court but that it make good further damage which may be caused by the unlawful measure which has been annulled, subject to the conditions laid down in the second paragraph of Article 215 of the EEC Treaty. Thus Article 176 of the Treaty does not make compensation for the damage dependent on the existence of a new fault distinct from the original unlawful measure which has been annulled, but provides for compensation for the damage which results from that measure and which continues after its annulment and compliance by the administration with the judgment whereby it was annulled.

25 In this case the Court of First Instance established the Parliament's fault, which consisted in the refusal to allow Mrs Meskens to take part in Competition No B/164, in the *Bataille* judgment. It remained therefore to be ascertained whether the damage caused by that measure continued after it had been annulled.

26 That is what the Court of First Instance proceeded to do in the judgment under appeal, in which it decided that the non-material damage caused by the unlawful measure had not been removed because the Parliament had done nothing to eliminate the consequences of that measure.

The second plea

27 In the judgment under appeal the Court of First Instance stated that it was for the Parliament, in the exercise of the discretion conferred on it by Article 176 of the Treaty, to choose between the various measures possible in order to reconcile the interests of the service and the need to remedy the damage caused to the applicant (paragraph 78), and went on to hold: 'It is not for the Court to substitute itself for the administrative authority and determine the specific measures that the appointing authority should have adopted in this case. By way of illustration, however, it is appropriate to note that there were several possibilities open to the appointing authority in this case to comply with the judgment of the Court. Thus the Parliament could have organized a new internal competition at a level equivalent to that of Competition No B/164, either for all the staff of the institution or for the applicants in Case T-56/89. In the latter case, it would have been for the appointing

authority and the selection board to take scrupulous care that the level of the tests and the criteria for assessment were equivalent to those in Competition No B/164 in order to avoid the criticism of having organized a "tailor-made" competition' (paragraph 79).

28 The Court went on to state that 'where compliance with a judgment annulling a measure presents particular difficulties, the defendant may satisfy the obligation arising from Article 176 of the Treaty by taking "such decision as will provide due compensation for the damage which [the person concerned] has suffered as a result of the decision which has been annulled" (see the judgment of the Court of Justice in Case 76/79 *Könecke* v *Commission*, cited above, at p. 679; see also the judgment of the Court of Justice in Case 144/82 *Detti* v *Court of Justice*, cited above). In that context, the appointing authority could also have established a dialogue with the applicant in order to attempt to reach agreement offering her fair compensation for the unlawfulness of which she had been the victim' (paragraph 80).

29 In the second plea the Parliament relies on Articles 4, 27 and 29 of the Staff Regulations to allege that the Court of First Instance proposed various specific measures to the Parliament which could have been adopted in order to comply with the *Bataille* judgment. In so doing, it virtually substituted itself for the administrative authority.

30 That plea is likewise unfounded. In the judgment under appeal the Court of First Instance pointed out that it could not substitute itself for the administrative authority. Moreover, the measures described by the Court of First Instance were mentioned 'by way of illustration' of measures which could have removed the non-material damage caused by the original unlawful measure (see paragraph 27, above); they cannot in any way be regarded as injunctions addressed to the administration.

The fifth plea

31 In *Bataille*, the applicants sought primarily the annulment of the decision of the Parliament's Secretary-General excluding them from internal Competition No B/164 and for them to be permitted to take part in that competition. By way of ancillary to that, they requested the annulment of the decisions of the Secretary-General rejecting their complaints.

32 In the judgment under appeal the Court of First Instance held as follows:

'70. The applicants' request that the Court authorize them to take part in the competition and their request that it annul the decision dismissing their complaints, both of which accompanied the main claim that the Court should annul the decision rejecting their applications, were regarded by the Court as being so closely linked to the principal claim for annulment that they merged with it and had no independent significance. Their request to be authorized to take part in Competition No B/164 in fact constituted simply the expression of their opinion of the consequences of the annulment of the rejection of their applications. In those circumstances the Court did not find it necessary to rule on that request.

71. It should further be stated that a request of this type, assuming that it was independent of the request for annulment, would have been inadmissible in any event. The Community judicature cannot address injunctions to a Community institution without encroaching on the prerogatives of the administrative authority. In those circumstances the fact that the Court did not expressly dismiss the part of the head of claim concerning the applicants' participation in the competition as inadmissible does not in any way mean that it defined the extent of the obligation imposed on the Parliament by Article 176 of the Treaty.'

33 In the fifth plea the Parliament claims that the Court of First Instance did not give adequate grounds for its decision. In particular, it complains that the Court ruled in the judgment under appeal, that is to say after its composition had changed, on issues previously raised in *Bataille*, which had, however, acquired the force of *res judicata*. The Parliament submits that any difficulties raised by that judgment ought to have been considered and resolved in proceedings seeking an interpretation of it.

34 At the hearing the Parliament abandoned that part of its fifth plea which referred to the alteration in the composition of the Court of First Instance. It is therefore not necessary to reply to it.

35 As to the remainder of the fifth plea, it is also unfounded. Although Article 40 of the EEC Statute of the Court of Justice, which also applies to the Court of First Instance, makes provision for a special procedure to resolve difficulties concerning the meaning and scope of judgments, it remains open to the Court of First Instance to seek to ascertain the meaning and scope of a previous judgment which has not been the subject of such a procedure, if such an interpretation is necessary in order to resolve the dispute before it.

36 Such was the case here. In the judgment under appeal the Court of First Instance was bound to interpret the *Bataille* judgment. As indicated in paragraph 69 the Parliament's argument before the Court of First Instance that 'it was unnecessary to take specific measures because the Court rejected in that judgment (*Bataille*), by implication, the applicants' request to authorize them to take part in Competition No B/164' placed the Court of First Instance under a legal obligation to interpret that judgment.

37 On the basis of all those considerations the appeal must be dismissed.

Costs

38 Under Article 69(2) of the Rules of Procedure, applicable to appeals by virtue of Article 118 of those Rules, the unsuccessful party is to be ordered to pay the costs if they have been applied for. Since the Parliament was unsuccessful, it must be ordered to pay the costs of the appeal.

On those grounds,

THE COURT (Fourth Chamber)

hereby:

1. Dismisses the Parliament's appeal;

2. Orders the Parliament to pay the costs.

Diez de Velasco Kakouris Kapteyn

Delivered in open court in Luxembourg on 9 August 1994.

R. Grass M. Diez de Velasco

Registrar President of the Fourth Chamber