JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)
8 October 1992 *

In Case T-84/91,

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

applicant,

supported by

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

intervener,

v

European Parliament, represented by Jorge Campinos, Jurisconsult, and Manfred Peter, Head of Division, acting as Agents, with an address for service in Luxembourg at the General Secretariat of the European Parliament, Kirchberg,

defendant,

APPLICATION for compensation for the material and non-material damage alleged by the applicant,

* Language of the case: French.

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Fifth Chamber),

composed of: K. Lenaerts, President, H. Kirschner and D. Barrington, Judges,

Registrar: B. Pastor, Administrator,

having regard to the written procedure and further to the hearing on 2 July 1992,

gives the following

Judgment

The facts

1 On 22 February 1988 the European Parliament ('the Parliament') published Notice of Internal Competition No B/164 for the recruitment of administrative assistants (f/m) in Career Bracket B 5/B 4.

2 At the time the applicant was working as a member of the temporary staff for a political group of the Parliament. After she was engaged her name was entered on a reserve list for posts in Category C drawn up following an open competition of the Parliament. She submitted an application for Competition No B/164.

3 Her application was rejected by the Secretary-General of the Parliament on the ground that the internal rules concerning the recruitment of officials, temporary staff, auxiliary staff and local staff which were adopted by the enlarged Bureau of the Parliament in 1979 provided that 'temporary staff recruited otherwise than from lists drawn up following external open competitions may not take part in internal competitions'.

4 On 23 November 1988 the applicant and seventeen other candidates brought an action challenging the decisions rejecting their applications, in which they claimed that the Court of First Instance should, *inter alia*, '... annul the decision of the Secretary-General of the Parliament rejecting the applicants' applications for internal competition No B/164 and authorize them to take part in it ...'. By a judgment of 8 October 1990 in Case T-56/89 *Bataille and Others* v *Parliament* [1990] ECR II-597, the Court of First Instance '[annulled] the decisions of the Parliament rejecting the applicants' applications for internal competition No B/164'. The judgment has acquired the force of *res judicata*.

5 On 27 February 1989, while the proceedings in Case T-56/89 were pending, the Parliament amended its internal rules concerning the recruitment of officials and other staff. The new rules provide that temporary staff are 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 under the same conditions as officials. Those new rules became applicable on 1 April 1989. No provision was made for them to be retroactive. The tests for internal competition No B/164 were held on 6 March 1989 without the applicants in Case T-56/89 being able to take part.

6 The Court, of its own motion, took account of the applicant's personal file. It is apparent from that file that the applicant, a member of the temporary staff since 1 October 1981, was classified in Grade C 1 from 1 January 1986. With effect from 1 February 1989 she was appointed as a probationary official in Grade C 4, step 3. With effect from 1 August 1989 she was appointed as an established official in the same grade and step. On 1 September 1989 the applicant was seconded in the interest of the service to the Socialist Group of the Parliament, where she was classified in Grade C 1, step 3. Since 1 May 1991 she has been classified in Grade C 1, step 4.

7 On 15 January 1991 Mrs Meskens's lawyer sent a letter to the Secretary-General of the Parliament asking him to indicate 'the measures adopted by the Parliament, in pursuance of Article 176 of the EEC Treaty, following the judgment delivered on [8] November 1990 by the Fifth Chamber of the Court of First Instance'.

8 In a second letter, dated 1 March 1991, the applicant's lawyer referred the Secretary-General to the terms of his first letter and again asked him to indicate the measures adopted by the Parliament following the said judgment. On 20 March and 19 April the applicant's lawyer sent two further letters to the Secretary-General of the Parliament. In the second of these, he stated: 'In the absence of information regarding the measures adopted by the Parliament to comply with the abovementioned judgment I shall be obliged to advise my client to lodge a complaint and, if necessary, to bring an action for annulment with a view to obtaining a declaration that the Parliament has failed to fulfil its obligations by not taking the necessary measures to comply with the judgment'.

9 That letter crossed with a letter which the Secretary-General sent to the applicant's lawyer on 19 April 1991, worded as follows:

'As regards compliance with the *Bataille* judgment, it should be noted that even before that judgment was delivered the European Parliament had already amended its practice in respect of the conditions for the admission of temporary staff to internal competitions by adopting new rules on 15 March 1989.

Detailed examination of the principles developed by the Court of First Instance in its judgment leads me to believe that these new rules of the Parliament may be regarded as complying with the Staff Regulations and with all the relevant Community case-law.

It follows that by putting these new rules into practice the Parliament has satisfied its obligation under Article 176 of the EEC Treaty.'

10 On 30 April 1991 the applicant's adviser sent a further letter to the Secretary-General in which he acknowledged receipt of the letter of 19 April 1991 and again asked that the measures adopted by the Parliament to comply with the judgment be explained to him. He stated that the applicant would lodge a complaint 'against the Parliament's refusal to comply with the judgment' unless an answer was given by 5 May.

11 In a registered letter received by the Parliament on 17 July 1991 the applicant sent to the appointing authority a document entitled 'Complaint submitted under Article 90(2) of the Staff Regulations ... against the European Parliament's decision refusing to adopt the necessary measures to comply with the judgment of the Court of First Instance of 8 November 1990 ... in Case T-56/89'.

12 With regard to the admissibility of her complaint, the applicant claimed that she had waited a reasonable time for the Parliament to adopt the necessary measures to comply with the judgment and had then asked on a number of occasions to be informed of the measures adopted. She considered that the answer given by the Secretary-General to the letter of 1 March 1991 from her lawyer was negative and constituted a decision adversely affecting her, and she pointed out that her complaint against it was lodged within three months of the day on which she had become aware of it.

13 As for the substance, the applicant maintained that Article 176 of the Treaty required the Parliament, in order to comply with the judgment, to re-open the procedure for internal competition No B/164 for all the applicants in Case T-56/89, to have their applications re-examined by the selection board in the light of the principles laid down in that judgment, and to supervise, in the context of the powers conferred on it by the Staff Regulations, the organization of the written and oral tests that the selection board had to arrange especially for the applicants admitted. According to the applicant, the adoption of new rules, of which she and the 17 other applicants in Case T-56/89 had not been able to take advantage because they were not retroactive, cannot be regarded as sufficient to satisfy the requirements of Article 176 of the Treaty.

14 The applicant concluded by stating:

'It is apparent from the considerations set out above that the European Parliament has failed to fulfil its obligations by refusing to take, in respect of the complainant, the necessary measures to comply with the judgment of 8 November 1990.

The complainant therefore asks that that decision be annulled and that the Parliament take the necessary measures to convene the selection board for Competition No B/164 to enable it to re-examine her application and, if necessary, organize new tests for her.

The Parliament's refusal to take the said measures undeniably causes her significant non-material damage, damage of the same kind as that suffered by officials where their normal career progress is disrupted by the failure to draw up their periodic reports within the usual time.

The applicant therefore asks that a sum of ECU 100 be awarded to her for each day's delay from the submission of this complaint until the day on which the selection board for Competition No B/164 reconvenes to examine her application in the light of the judgment of the Court of First Instance.'

Procedure

15 When the defendant had not replied to that letter within four months, Mrs Meskens lodged an application initiating these proceedings at the Registry of the Court of First Instance on 19 November 1991.

16 On 26 November 1991 the Secretary-General sent the applicant a letter in the following terms:

'I have considered your letter of 17 July 1991, which you entitle a complaint, with great care.

May I first of all draw your attention to the fact that it was in that letter that you first specifically formulated your wishes with respect to compliance with the judgment in the abovementioned case. Consequently, I must regard your letter not as a complaint under Article 90(2) but as a request under Article 90(1) of the Staff Regulations.

As to whether it is well founded, the objective of your request is, in the words of your letter, to "convene the selection board for Competition No B/164 to enable it to re-examine your application and, if necessary, organize new tests".

As you will recall, the applicants in *Bataille and Others*, including yourself, had, at the time of their action, submitted a similar request to be allowed to take part in Competition No B/164. Even though the applicants obtained judgment in their favour, the Court of First Instance did not grant that request.

It follows that there is no legal basis in the *Bataille* judgment for the objective of your request of 17 July 1991 and, consequently, that it cannot be regarded as well founded.

I regret that I am unable to grant your request [customary formalities] .'

17 The written procedure followed its normal course. By letter of 22 January 1992 the applicant declined to submit a reply to the defence.

18 By an application lodged at the Registry of the Court of First Instance on 5 February 1992, the European Public Service Union, Brussels, asked to be allowed to intervene in support of the form of order sought by the applicant. By an order of 12 March 1992 the Court (Fifth Chamber) granted that request. The intervener lodged its statement on 7 May 1992 and the President of the Fifth Chamber decided that there was no need to fix a time-limit for the parties' reply. The written procedure was therefore closed on that day.

19 Upon hearing the report of the Judge-Rapporteur, the Court decided to open the oral procedure without any preparatory inquiries. At the Court's request, the applicant produced copies of the two letters which her lawyer had sent to the Secretary-General of the Parliament on 19 and 30 April 1991 and which were referred to in the parties' statements.

20 The applicant claims that the Court should:

(i) declare that by failing to take the necessary measures to comply with the judgment of the Court of First Instance in Case T-56/89 the European Parliament has failed to fulfil its obligations;

(ii) order the European Parliament to pay the applicant the sum of ECU 100 per day from 17 July 1991, the day on which she submitted the complaint, until the day when the measures to comply with the judgment are taken;

(iii) order the defendant to pay the costs.

21 The European Parliament claims that the Court should:

(i) declare the application inadmissible, or unfounded;

(ii) make an order for costs as appropriate.

22 The intervener claims that the Court should:

(i) grant the form of order sought in the application for annulment as submitted by the applicant;

(ii) order the defendant to pay the costs, including the costs of the intervener.

Admissibility

The parties' arguments

23 The Parliament pleads inadmissibility on two grounds. First of all, it maintains that there was no complaint within the meaning of Article 90(2) of the Staff Regulations of Officials of the European Communities ('the Staff Regulations'), so that an essential condition for the admissibility of the action is absent. According to the Parliament, the applicant's letter of 17 July 1991, entitled 'Complaint', is actually a request within the meaning of Article 90(1) of the Staff Regulations. On that point, it explains that a complaint may be brought only against an act adversely affecting an official, either because the appointing authority has taken a decision or because it has failed to take a measure required by the Staff Regulations. The defendant claims that in that letter for the first time the applicant asked the Parliament to re-convene the selection board for Competition No B/164 in order for it to re-examine her application and, if necessary, organize new tests for her. The Parliament contends that it never had the opportunity beforehand to adopt a decision in respect of this specific 'wish', so that the letter in question cannot be regarded as a complaint.

24 In answer to a question put by the Court, the defendant's representative stated at the hearing that the Parliament had regarded the letter of 19 April 1991 from the Secretary-General as a decision capable of forming the subject-matter of a complaint. He subsequently retracted his statement and said that the Parliament had regarded that letter as an answer to a request submitted by the applicant under Article 25 of the Staff Regulations.

25 Secondly, the Parliament claims that the subject-matter of these proceedings is different from that of the pre-litigation procedure. It draws the Court's attention to the fact that during the pre-litigation procedure the applicant had requested that the appointing authority take specific administrative measures, while her action seeks to obtain damages.

26 The applicant considers that her action is admissible. She points out that she waited for a reasonable time before taking steps to ascertain the measures taken to comply with the judgment in Case T-56/89, and that she lodged her complaint within three months of the day when she became aware of the answer given by the Secretary-General of the Parliament to the letter in which she had asked for those measures to be identified. According to the applicant, that complaint was impliedly rejected on 17 November 1991 and these proceedings were therefore brought within the time-limit laid down in the Staff Regulations.

27 At the hearing, she added that as the Parliament was required by Article 176 of the Treaty to take the necessary measures to comply with the judgment of the Court of First Instance, no prior request on her part was necessary, as the infringement of that obligation in itself constituted an act adversely affecting her.

28 At the Court's request the applicant's representative also stated that her application must be regarded as an action for damages, not for annulment, and that paragraph 1 of her claim sought a declaration that the administration had committed the service-related fault which, according to the applicant, was the source of the damage for which she claimed compensation.

29 The intervener considers that the Parliament is wrong to describe the letter entitled 'complaint' sent to it by the applicant on 17 July 1991 as a 'request'. The Parliament's refusal to take the necessary measures to comply with the judgment of the Court in Case T-56/89 is unquestionably an act adversely affecting the applicant, so that there was no need, in the present case, to submit a prior request.

Appraisal of the Court

30 It should first of all be pointed out that, in accordance with the second sentence of Article 91(1) of the Staff Regulations, the Court has unlimited jurisdiction in this action for damages. Unlike the situation in actions for annulment (see the judgments of the Court of Justice in Case 12/69 *Wonnerth* v *Commission* [1969] ECR 577, at 584, and Case 108/88 *Jaenicke Cendoya* v *Commission* [1989] ECR 2711, at 2737), the Court therefore has jurisdiction to determine, in these proceedings, the request submitted by the applicant under the first head of her claim for a declaration that the defendant committed a service-related fault (see the judgment of the Court of First Instance in Case T-156/89 *Valverde* v *Court of Justice* [1991] ECR II-407, paragraph 141).

31 With regard to the second head of claim, it is appropriate to consider whether it is a claim for damages or rather a request that the Court impose a fine on the defendant in order to compel it to take what the applicant believes are the necessary measures to comply with the judgment in Case T-56/89. In the absence of a legal basis conferring jurisdiction on the Court to impose such a fine, such a request must be dismissed automatically as inadmissible. The applicant's request that the Parliament should pay her a certain sum of money per day until it takes the measures which she seeks appears at first sight to refer to the mechanism of a fine and the method for calculating it. However, it is possible to interpret it in the light of the statement in the application that the applicant estimates the damage that she has suffered '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 reconvenes in order to re-examine her application'. That statement makes it possible to regard the applicant's claim that she be paid a certain sum of money per day as a claim for damages specifying the method of calculation which, according to her, should be applied in order to determine the extent of her loss.

32 Furthermore, the applicant stated at the hearing that she intended only to bring an action for damages. That statement is borne out by the fact that she did not ask the Court to order the Parliament to take specific measures to comply with the judgment in Case T-56/89. It is only if combined with such a request, which is also without any legal basis in Community law, that the second head of claim could be interpreted as a request that the Parliament be ordered to pay a fine.

33 It is then necessary to ascertain whether a pre-litigation procedure under Articles 90 and 91 of the Staff Regulations took place in this case. In that regard, it should be pointed out that the pre-litigation procedure required by the Staff Regulations is different where the damage for which compensation is sought was caused by an act adversely affecting the official within the meaning of Article 90(2) of the Staff Regulations from the procedure required where the damage was caused by conduct not involving a decision. In the first case the admissibility of the action for damages is subject to the condition that the official has submitted to the appointing authority, within the prescribed period, a complaint against the act which caused him damage and that he has brought the action within three months of the rejection of that complaint (see the judgment in Case 9/75 *Meyer-Burckhardt* v *Commission* [1975] ECR 1171, at 1182 et seq.). In the second case, on the other hand, the administrative procedure which must precede an action for damages, in pursuance of Articles 90 and 91 of the Staff Regulations, consists of two stages, first a request and secondly a complaint against the express or implied rejection of that request (see the order of the Court of First Instance in Case T-64/91 *Marcato* v *Commission* [1992] ECR II-243, paragraph 32 et seq.).

34 In her submissions regarding the substance of the case the applicant refers to two instances of the Parliament's conduct which, according to her, are the cause of the damage for which she claims compensation. The first is the refusal to admit her to take part in the tests in Competition No B/164, which was annulled by the judgment of the Court in Case T-56/89. The second is the refusal to take the necessary measures vis-à-vis the applicant to comply with that judgment. It must be stated that the document entitled 'Complaint' submitted by the applicant on 17 July 1991 referred only to the second instance. On the other hand, the damage possibly resulting from the decision annulled by the judgment in Case T-56/89 did not form the subject-matter of a pre-litigation procedure before this action was brought. Compensation for it cannot therefore be claimed in the context of this action, the sole subject-matter of which is compensation for the damage that the applicant considers was caused her by the Parliament's refusal to comply with the judgment in Case T-56/89.

35 It is therefore necessary to determine whether the letter which the Secretary-General of the Parliament sent on 19 April 1991 to the applicant's lawyer constitutes a decision and therefore an act adversely affecting the applicant within the meaning of Article 90(2) of the Staff Regulations or whether it was simply a communication in which the administration confined itself to informing her of the attitude that the appointing authority intended to adopt, at the appropriate time, in a subsequent formal decision, and which is therefore not capable of affecting the applicant's legal position.

36 In that respect, it is necessary to take account, first, of the legal context in which that letter was drawn up. By rejecting the applicant's application to take part in Competition No B/164, the appointing authority had taken an individual decision in relation to the applicant. That decision was annulled by the judgment of the Court in Case T-56/89. Accordingly, her application to take part in the competition in question was again referred to the appointing authority, but no valid decision was taken. It was therefore necessary to take a fresh decision, giving effect in that respect to the judgment of the Court.

37 The Court finds that it is clear from the wording of the letter of 19 April 1991 that the defendant considered that the adoption of its new rules on the recruitment of officials and other staff had made it unnecessary to take any other specific measure to comply with the judgment in Case T-56/89 and that the appointing authority was therefore not minded to take fresh measures. It should be added that that attitude was, in the words of that letter, the result of a 'detailed examination' of the judgment of the Court.

38 The applicant was therefore justified in considering, as is apparent from her letter of 30 April 1991, that the letter from the Secretary-General contained a definitive decision of the appointing authority not to take any individual measure with regard to her following the judgment of the Court. In those circumstances, the possible intention of the author of the letter to provide only information to the applicant cannot prevail over the objective content of the letter (see the judgment of the Court of First Instance in Case T-28/89 *Maindiaux* v *ESC* [1990] ECR II-59, at 71).

39 It is irrelevant in that respect whether the applicant had previously submitted to the appointing authority a request under Article 90(1) of the Staff Regulations that it take specific measures. There is nothing to prevent the appointing authority from addressing a decision to an official even where the official has not submitted a request or has confined himself to asking to be informed of the appointing authority's intentions regarding him.

40 In those circumstances, the applicant had to submit to the appointing authority, within the period of three months laid down in Article 90(2) of the Staff Regulations, a complaint against the decision refusing to take any specific measure with regard to her to comply with the judgment in Case T-56/89.

41 The Court finds that the applicant requested, in her registered letter of 17 July 1991, that the decision of the appointing authority of 19 April 1991 be annulled. That is the typical content of a complaint. It is true that she also asked that specific measures be taken, which bears more resemblance to the content of a request; however, the fact that the applicant pointed out to the appointing authority the consequences which, according to her, had to be drawn from the annulment sought is no bar to her approach being described as a complaint.

42 The same applies to the claim for compensation for the non-material damage that the applicant claims she was caused by the decision of 19 April 1991. An official in respect of whom an act adversely affecting him has been taken may choose to seek, before the Community courts, either the annulment of that act or damages, or both (see the judgment of the Court of Justice in *Meyer-Burckhardt*, cited above). That rule is applicable not only at the stage of the judicial proceedings but also at the stage of the administrative appeal.

43 The applicant's complaint was the object of an implied rejection at the end of a period of four months from the date on which it was made, in other words on 17 November 1991. Consequently, the action, which was lodged on 19 November 1991, was brought within the time-limit prescribed in the Staff Regulations.

44 Moreover, it follows from the foregoing considerations that the subject-matter of the claims in this action for damages is not different to that of the claims set out in the complaint. On the one hand, the applicant has already claimed compensation in her complaint. The complaint did not contain an application for a declaration that a service-related fault had been committed or a request for compensation for alleged material damage. However, the applicant's claim for annulment of the decision taken against her may imply a claim for compensation for the damage,

both material and non-material, that that decision may have caused her (see the judgment of the Court of Justice in Case 126/87 *Del Plato* v *Commission* [1989] ECR 643, at 663).

45 It follows that a pre-litigation procedure consistent with the Staff Regulations did in fact take place. Accordingly, this action for damages is admissible.

Substance

The parties' arguments

46 In support of her claim for compensation, the applicant maintains that the decision of the Parliament not to take the necessary measures to enable the selection board for Competition No B/164 to re-examine her application in the light of the principles laid down in the judgment of the Court of First Instance in Case T-56/89 is unlawful.

47 She considers that the annulment by the judgment of the Court of the decision whereby the appointing authority had rejected her application had the consequence that the Parliament, in pursuance of Article 176 of the Treaty, was obliged to re-open the procedure for internal competition No B/164 for all the applicants in Case T-56/89, to have their applications re-examined by the selection board in the light of the principles laid down in that judgment and to supervise, within the framework of the powers conferred on it by the Staff Regulations, the correct organization of the written and oral tests that the selection board was required to arrange specially for the applicants admitted.

48 The applicant considers that the mere fact that the defendant had adopted new rules regarding the conditions for admission of temporary staff to internal competitions cannot be regarded as satisfactory for the applicants in Case T-56/89, regard being had to the requirements of Article 176 of the Treaty. She points out that she and her 17 colleagues were unable to benefit from the new rules in the absence of retroactive effect.

49 At the hearing, she further stated that if it were assumed that the adoption of the new rules before judgment was delivered in Case T-56/89 removed any unlawfulness in her case, the Court would have had to declare that the application in Case T-56/89 had become devoid of purpose. The Court in fact annulled the decisions rejecting the applicants' applications.

50 According to the applicant, the Parliament has therefore failed to fulfil its obligations by refusing to take, vis-à-vis the applicant, the necessary measures to comply with the judgment in Case T-56/89.

51 The applicant considers that that conduct caused her significant material and non-material damage.

52 With regard to the material damage, Mrs. Meskins claims in her application that the rejection of her candidature for Competition No B/164, which was annulled in Case T-56/89, meant that for a number of years she was deprived of the chance of being appointed to a post in Grade B. In answer to the questions put by the Court, she stated that her material loss was the result, first of all, of the lack of progress which her career had probably suffered. She points out in that respect that other successful candidates in the open competition (Grade C) in which she was successful who were appointed officials before her were able to take part in Competition No B/164 and that their success rate was much higher than the average for all candidates.

53 Secondly, she claimed at the hearing that in order to be able in future to take part in internal competitions organized by the Parliament for the purpose of filling posts in Grade B, she chose to become an official in Grade C 4, even though she had been classed, as a member of the temporary staff, in Grade C 1. That fact caused her a significant loss of income until she occupied a new C 1 post with a political group.

54 Still at the hearing, she maintained that, thirdly, according to a practice in the political groups, if she had been admitted to take part in a competition for posts in Grade B that might have enabled her to be classified in Grade B 3 rather than in Grade C 1 in the post which she occupies, on secondment, with a political group. That happened in the case of a colleague who was admitted to Competition No B/164.

55 With regard to the non-material damage, the applicant considers that the Parliament's refusal to take the necessary measures to comply with the judgment in Case T-56/89 caused her damage of the same kind as that suffered by officials whose normal career progress is disrupted by the failure to draw up their periodic reports within a reasonable time. She claims that the appointing authority contributed to that non-material damage by not being prepared to discuss the matter with her.

56 The applicant assesses *ex aequo et bono* the damage which she therefore suffered and continues to suffer at the sum of ECU 100 per day from the date on which she submitted her complaint until the date when the selection board in Competition No B/164 reconvenes to reconsider her application in the light of the principles laid down in the judgment of the Court.

57 The Parliament denies that it failed to fulfil its obligations to comply with the judgment in Case T-56/89. It claims that the judgment in that case does not provide a legal basis for the applicant's claim that it should adopt the necessary measures to allow her to take part in Competition No B/164. The Parliament points out that in Case T-56/89 the applicants had not only sought the annulment of the decisions rejecting their applications but also asked the Court to authorize them to take part in that competition. It states that the Court confined itself in its judgment to annulling the decisions in issue. The Parliament therefore considers that the Court, by failing to rule on that second claim submitted by the applicants, impliedly dismissed it.

58 At the hearing the Parliament also adverted to the problems which would have been caused by re-opening Competition No B/164. When the judgment was delivered in Case T-56/89 the work was complete and a reserve list had been drawn up, consisting of the names of 41 successful candidates. It referred to the judgment of the Court of Justice in Case 144/82 *Detti* v *Court of Justice* [1983] ECR 2421, and contended that it was therefore unnecessary to reconsider the results of the competition. Furthermore, the organization of a specific competition for the applicants in Case T-56/89 would have implied the risk of a 'tailor-made' competition.

59 The Parliament further claimed that the new rules on the recruitment of officials which allow temporary staff to take part in internal competitions and which, according to the Parliament, are consistent with the principles laid down by the Court in its judgment in Case T-56/89, appear to have satisfied the persons concerned, apart from the applicant.

60 As for the non-material damage claimed by the applicant, the Parliament suggested at the hearing that a distinction should be drawn between the damage regarding her career progress, on the one hand, and the damage relating to her status at work resulting from the unwarranted rejection of her application on the other hand. With regard to the first, it contended that the applicant had only a slight chance of success in the competition owing to the fact that, despite being seconded to a Grade C 1 post, she is classified as an official in Grade C 4 and is therefore at the beginning of her career. Furthermore, a new internal competition for access to Grade B was to take place in September 1992 and the applicant could submit her application without fear of discrimination.

61 With regard to the damage to her status at work, the Parliament considers that the judgment in Case T-56/89 gives the applicant full satisfaction in that respect.

62 The Parliament concludes that the claim that it be ordered to pay the sum of ECU 100 per day with effect from 17 July 1991 is unfounded.

63 The intervener points out that in the judgment in Case T-56/89 the Court rejected the argument of the Parliament that there had been no individual decisions in that case refusing to allow the applicants to participate in Internal Competition No B/164 because their exclusion was the consequence of the Parliament's 'internal rules' on recruitment. The intervener states that the Court specifically annulled the individual decisions refusing to admit them to the competition and that it was therefore for the defendant, in accordance with Article 176 of the Treaty, to take the necessary measures to comply with that judgment.

64 According to the intervener, the Parliament was wrong to consider that the adoption of new rules on the conditions in which temporary staff may take part in internal competitions must, as far as the applicants in Case T-56/89, and in particular Mrs Meskens, are concerned, be regarded as sufficient in the light of Article 176 of the Treaty.

65 The intervener claims that the Order of the Court of First Instance (Fifth Chamber) of 12 March 1992 authorizing it to intervene in this case refutes the Parliament's argument that the fact that the Court did not expressly rule on the applicants' request in Case T-56/89 to authorize them to take part in the tests in Internal Competition No B/164 must be interpreted as an implied rejection by the Court of that request. It points out that, quite to the contrary, the Court considered that that request was so closely linked to the principal claim that it was merged with it and had no independent significance.

66 According to the intervener, the defendant therefore infringed Article 176 of the Treaty by considering that the judgment in issue did not provide 'a legal basis for the complaint submitted on 17 July 1991 by Mrs Meskens'.

The Court's assessment

67 It is necessary first of all to determine whether the decision of the Secretary-General of the Parliament refusing to take any specific measure vis-à-vis the applicant following the judgment of the Court of First Instance in Case T-56/89 constitutes a service-related fault for which the Parliament may be liable.

68 In order to do so, it is necessary to see whether that decision constitutes an infringement of the obligation laid down in Article 176 of the Treaty to take the necessary measures to comply with that judgment, which annulled the decisions rejecting the applications to take part in Competition No B/164 of the applicants in Case T-56/89.

69 With regard to the Parliament's argument that it was unnecessary to take specific measures because the Court rejected in that judgment, by implication, the applicants' request to authorize them to take part in the competition, it should be pointed out that the forms of order sought by the applicants in Case T-56/89 were drafted as follows:

'— declare their action admissible and well founded;

— consequently, annul the decision of the Secretary-General of the Parliament rejecting the applicants' applications for Internal Competition No B/164 and authorize them to take part in it and, as an incidental measure, annul the decisions of the Secretary-General dismissing the complaints lodged by the applicants.'

70 The applicants' request that the Court authorize them to take part in the competition and their request that it annul the decisions 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 conse-

quences 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.

72 It is then necessary to consider whether the Parliament fulfilled its obligation to comply with the judgment of the Court of First Instance by amending its internal rules regarding the conditions under which temporary staff may take part in internal competitions.

73 In that respect, it should be pointed out, first, that Article 176 provides for the sharing of powers between the judicial authority and the administrative authority, according to which it is for the institution that issued the act annulled to determine what measures are required to comply with a judgment annulling a decision (see, for example, the order of the Court of Justice in Joined Cases 98/63 R and 99/63/R *Reynier and Erba* v *Commission* [1964] ECR 276, at 278, and the judgment of the Court of Justice in Case 76/79 *Könecke* v *Commission* [1980] ECR 665, at 679).

74 In exercising that power of appraisal, the administrative authority must observe the provisions of Community law as well as the operative part and the grounds of the judgment with which it is required to comply (see, for example, the judgments of the Court of Justice in Case 14/61 *Hoogovens* v *High Authority* [1962] ECR 253, at 268, and Joined Cases 97/86, 193/86, 99/86 and 215/86 *Asteris v Commission* [1988] ECR 2181, at 2208).

75 In the second place, it should be pointed out that the judgment of the Court in Case T-56/89 annulled the individual decisions whereby the Parliament had rejected the candidatures of the applicants in that case for Competition No B/164. Among those decisions was the decision addressed to the applicant in this case. In the grounds for that judgment (see, in particular, paragraph 48), the Court held that the internal rules of the Parliament concerning the recruitment of officials, temporary staff, auxiliary staff and local staff adopted by the enlarged Bureau of the Parliament in 1979 were contrary to the Staff Regulations in so far as they precluded temporary staff 'recruited otherwise than from reserve lists drawn up following external open competitions' from taking part in the internal competitions of the institution.

76 In those circumstances the Parliament is right to consider that compliance with the judgment would have made it necessary to repeal that internal rule, if it had still been applicable when the judgment was delivered. As the Parliament had replaced its rules concerning the recruitment of officials by new internal directives just before that judgment was delivered by the Court, it is necessary to examine whether that measure satisfied the obligation to take the necessary measures to comply with that judgment with regard to the applicant in this case.

77 The adoption of the new general rules did not remedy the damage inflicted on the applicant by the individual decision rejecting her application which was annulled by the Court. The applicant did not benefit from the retroactive application of the new rules, so that the effects of the unlawful acts committed with regard to her — the fact, in particular, that she was unable to have her application for Competition No B/164 considered at all — were entirely maintained. Consequently, the fact that the Parliament adopted new general rules on the participation of temporary staff in internal competitions cannot be regarded as adequate compliance with its obligation under Article 176 of the Treaty.

78 It follows that the defendant was required to adopt specific measures with a view to eliminating the illegality committed with respect to the applicant. It cannot escape that obligation by pleading the difficulties that such measures might entail. It is for the Parliament, in the exercise of the power of assessment 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.

79 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.

80 Furthermore, 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 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.

81 Consequently, the decision of the Secretary-General refusing to take any specific measure vis-à-vis the applicant apart from the non-retroactive amendment of rules of general application constitutes a breach of Article 176 of the Treaty and a service-related fault.

82 It is now necessary to examine whether that fault has caused damage to the applicant.

83 With regard to the material damage, it should be pointed out at the outset that damage which may have been caused to the applicant by the decision annulled in Case T-56/89 does not form the subject-matter of this case (see paragraph 34, above). Any lack of progress which her career may have suffered in comparison with the candidates admitted to Competition No B/164 cannot therefore be taken into consideration in this case.

84 With regard to the fact that the applicant suffered loss of income through being appointed an official in Grade C 4, it is sufficient to observe that she was classified in that grade between 1 February 1989 and 31 August 1989, in other words before the judgment was delivered in Case T-56/89. It follows that the damage that she may have suffered during that period is also not germane to the action, which concerns only the damage which may have been caused to her by the decision of the Secretary-General refusing to take any specific measure in her favour to comply with the judgment in Case T-56/89.

85 In so far as that refusal to comply with the judgment of the Court may have deprived the applicant of a chance of being appointed to a post in Category B, it should be pointed out that she is at present seconded to the socialist group, where she holds a post in Grade C 1. Had the defendant complied with the judgment in Case T-56/89 by enabling her to participate in a competition for Grade B and had she been successful in that competition, she might have been appointed an official at the basic grade in Category B, in other words in Grade B 5. In accordance with Council Regulation No 3834/91 of 19 December 1991, adjusting with effect from 1 July 1991 the remuneration and pensions of officials and other servants of the European Communities, the remuneration for Grade C 1 is higher than that for Grade B 5 and even, as far as the first four steps are concerned, to that for Grade B 4. Consequently, the Court finds that the applicant has not established the existence of material damage caused to her by the Secretary-General's decision.

86 Finally, as concerns the reference, first made at the hearing, to the situation of another official classified in Grade B 3 by a political group after being admitted to

Competition No B/164, it should be noted that Article 48(2) of the Rules of Procedure of the Court of First Instance provides that no fresh issue may be raised in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure. The applicant's representative admitted that the applicant was already aware when she brought the action of the facts invoked at the hearing. In those circumstances, the Court can only reject that attempt to establish the existence of material damage connected with the applicant's current position in the post which she occupies with a political group and therefore completely different from the damage claimed in the application, which was concerned with her subsequent career possibilities as an official.

37 Since, moreover, the Parliament disputed the accuracy of her claims, the Court cannot regard it as established, on the basis of a simple assertion by the applicant, that the mere fact of being admitted to an internal competition for access to posts in Category B would automatically have meant that the applicant would have been reclassified in Grade B 3 by the political group to which she is seconded. Finally, even supposing that such a practice exists or may exist on the part of political groups, that is not an advantage to which the applicant could have been entitled, under the Staff Regulations, if the defendant had correctly complied with the judgment in Case T-56/89. In those circumstances, it is impossible to find a causal link between the service-related fault established in this case and the fact that the applicant did not benefit from that advantage.

38 It follows that the applicant has not established the existence of material damage.

39 With regard to the non-material damage, on the other hand, it should be pointed out that the refusal of the Secretary-General to take any specific measure to eliminate the consequences of the decision annulled was of such a kind as to make the applicant uncertain and anxious with regard to her future at work and that such a situation constitutes non-material damage (see, for example, the judgment of the Court of Justice in Joined Cases 173/82, 192/83 and 186/84 *Castille* v *Commission* [1986] ECR 497 and the judgment of the Court of First Instance in Case T-27/90 *Latham* v *Commission* [1991] ECR II-35, at 50).

90 That damage could not be eliminated by the fact that the applicant was successful in Case T-56/89. Her damage in fact results specifically from the fact that her legitimate claim, namely that the defendant should, following that judgment, make an effort to redress the consequences of the illegality committed with regard to the applicant, was not satisfied. Consequently, the applicant might have feared that that illegality could continue to affect her notwithstanding the judgment that she had obtained annulling the measure.

91 However, account should be taken, first, of the fact that the Parliament is still required to take the necessary measures vis-à-vis the applicant to comply with the judgment in Case T-56/89 and, secondly, the fact that the applicant will in future be able to participate in other internal competitions in which it will be possible for her to show evidence that she has the qualifications required for posts in Category B.

92 In those circumstances, it is appropriate, in order to compensate for the non-material damage suffered by the applicant, first of all to grant her application for a declaration that the defendant committed a service-related fault. Furthermore, the Court, assessing *ex aequo et bono* the damage suffered, considers that the applicant should be awarded damages in the amount of BFR 50 000.

Costs

93 Pursuant to Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs. Since the Parliament has been essentially unsuccessful in its submissions, it must be ordered to pay the costs, including those of the intervener.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

1. **Declares that the decision of the Parliament of 19 April 1991 whereby it refused to take any specific measure vis-à-vis the applicant to comply with the judgment of the Court of First Instance of 8 November 1990 (T-56/89) is unlawful and that it constitutes a service-related fault for which the Parliament is liable;**

2. **Orders the Parliament to pay the applicant the sum of BFR 50 000 by way of damages;**

3. **Dismisses the remainder of the application;**

4. **Orders the Parliament to bear the costs, including those of the intervener.**

Lenaerts Kirschner Barrington

Delivered in open court in Luxembourg on 8 October 1992.

H. Jung D. Barrington

Registrar President