ORDER OF THE COURT OF FIRST INSTANCE (Third Chamber)
24 June 1992 *

In Case T-11/90,

H. S., an official of the Council of the European Communities, residing in Brussels, represented by Thierry Demaseure, 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, 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,

intervener,

Council of the European Communities, represented by Yves Cretien, Legal Adviser, acting as Agent, assisted by Marc Grossmann, of the Brussels Bar, with an address for service in Luxembourg at the office of Xavier Herlin, Manager of the Legal Directorate, European Investment Bank, 100 Boulevard Konrad Adenauer,

defendant,

* Language of the case: French.

APPLICATION for the annulment of the decision allegedly adopted by the Council to subject the applicant to an HIV screening test during the annual medical examination and for an order requiring the Council to pay the applicant one ECU by way of compensation for the non-material damage which he suffered as a result of the institution's fault,

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

composed of: B. Vesterdorf, President, A. Saggio and C. Yeraris, Judges,

Registrar: H. Jung,

makes the following

Order

Facts and Legal Background

1 By letter of 7 February 1989, the Council's medical officer asked the applicant, an official of the Council, to undergo the annual medical check-up provided for in Article 59(4) of the Staff Regulations of Officials of the European Communities ('the Staff Regulations').

2 In that letter, the applicant was asked to have a blood test immediately at the institution's medical centre or at a laboratory of his choice so that the results would be available to the medical officer at the time of the check-up. Although making it clear that the blood test was not compulsory, the medical officer invited the applicant to fill in a form indicating the various tests which might be carried out. He also drew the applicant's attention to the fact that the 'HIV antibody test' was an AIDS screening test and that the reference to it could be deleted.

3 The applicant underwent the blood test and sent the form in question to the institution's medical centre after deleting the reference to the 'HIV antibody test', thus indicating that he refused to undergo it. The tests were carried out by Laboratory B which, according to the applicant, was instructed by the medical officer of the institution and, according to the Council, was chosen by the applicant.

4 During the annual medical check-up, which took place on 20 March 1989, the medical officer of the institution gave the applicant the results of the various tests carried out, one of which was the HIV test. The applicant immediately expressed his surprise to the medical officer, who assured him that there had been a mistake and that he would seek confirmation to that effect from the laboratory that carried out the analyses; he did so by letter of the same date.

5 By letter of 6 April 1989, the laboratory concerned replied to the Council medical department that there had undeniably been a regrettable mistake, attributable to its encoding department. A copy of that letter was given to the applicant, on a confidential basis, by the institution's medical officer on 24 April 1989, at a meeting of a working group of which both were members.

6 On 20 July 1989, the applicant lodged a complaint through official channels under Article 90(2) of the Staff Regulations against the decision of the Secretary General of the Council automatically to subject him and all his colleagues to an HIV test and against the individual decision to subject him to the test, notwithstanding his refusal, as indicated on the form supplied to him for that purpose by the Council's medical department. In his complaint the applicant did not identify the contested decisions by their dates. However, he called on the institution to admit the illegality of the practice of automatically and systematically subjecting all officials and other servants to HIV tests in connection with the annual medical check-up, and, after discovering that he himself had unlawfully and without his knowledge been subjected to such a test, he asked that he be paid one franc by way of compensation for the damage that both he and his family had suffered as a result of the fault on the part of the administration.

7 By memorandum of 8 December 1989, that complaint was rejected by the Secretary General of the Council on the grounds, first, that it was out of time and therefore inadmissible and, secondly, that it was unfounded. More particularly, the Secretary General confirmed to the applicant that the test in question had been carried out because of a regrettable error on the part of the laboratory, which was entirely outside the control of the appointing authority. The Secretary General also assured the applicant that an 'HIV antibody test' was not carried out on a systematic and compulsory basis for officials, as, moreover, was clearly apparent from the standard letter sent to officials on the occasion of each annual medical check-up.

8 In those circumstances, the applicant brought an action before the Court of First Instance on 9 March 1990 for the annulment of the contested measures and for compensation for the non-material damage that, in his opinion, he had suffered.

9 On 8 May 1990, the European Public Service Union, Brussels, applied to intervene in support of the applicant's submissions.

10 On 17 May 1990, by a separate document, the defendant, without lodging a defence, objected that the application was inadmissible.

11 By order of the Third Chamber of 25 September 1990, the European Public Service Union, Brussels, was granted leave to intervene.

12 By order of the Third Chamber of 15 January 1991, the decision on the objection of inadmissibility was reserved for the final judgment.

13 After the defendant lodged a defence, the applicant waived the right to lodge a reply. The intervener did not submit any observations.

Forms of order sought

14 The applicant claims that the Court should:

— declare his application admissible and well founded;

consequently:

(1) principally, annul the decision to subject all officials and other servants of the European Communities to an automatic and compulsory HIV screening test on the occasion of the annual medical check-up and the medical examination at the time of recruitment;

in the alternative, annul the decision to arrange for such tests under conditions which do not exclude the possibility of any any error;

(2) annul the decision of the Secretary General of the Council to subject the applicant to an HIV screening test organized on a systematic and automatic basis;

(3) in so far as necessary, annul the Council's decision expressly rejecting his complaint, since the Council, having admitted the error on the part of the laboratory instructed by it to carry out the medical analyses, denied all liability and refused to pay the applicant symbolic damages by way of compensation for the non-material damage suffered by him;

— order the defendant to pay the applicant one ECU as compensation for the non-material damage suffered both by him and by his family as a result of the fault on the part of the administration;

— order the defendant to pay the costs and the expenses necessarily incurred for the purposes of the proceedings.

15 The defendant contends that the Court should:

— principally, declare the action inadmissible;

— in the alternative, declare inadmissible the third plea in law relied on in support of the application and the claim for compensation, and for the rest dismiss the application as unfounded;

— order the applicant to pay the costs.

Admissibility

16 In support of its objection of inadmissibility, the Council contends that the official's decision to undergo a blood test is a matter for his discretion, and that applies *a fortiori* to the 'HIV antibody test', the request for which can be deleted by the official on the form addressed to the medical department. The Council rejects as untrue the applicant's statement that its medical department proceeded on its own initiative and systematically to have AIDS screening tests carried out during officials' annual medical check-ups. In the present case, the applicant was the victim of an error on the part of the medical laboratory chosen by him. The disclosure to the applicant by the medical officer of the institution of the letter of 6 April 1989 from Laboratory B, in which the latter admitted an error on the part of its encoding department, does not constitute an act of the appointing authority which adversely affected him. Accordingly, in the Council's contention, the contested decisions are non-existent and the application is devoid of purpose in so far as it seeks their annulment.

17 The applicant observes that he contested both the individual decision adversely affecting him and the Council's general decision to continue on its own initiative systematically to subject all officials to the tests in question. Those two decisions,

which, according to the applicant, confer on him an existing and genuine interest in bringing an action, caused him non-material damage. Moreover, the applicant claims that he did not choose the laboratory which carried out the tests but merely went to the Council's medical centre where he handed in the form. It was the institution's medical officer who instructed the laboratory to carry out the blood analyses, so that there was no question of any contractual relationship between the applicant and the laboratory. Consequently, the institution alone is liable for any fault committed by its medical department or by the laboratory.

18 The intervener, having emphasized that the HIV test was carried out in respect of the applicant owing to an error on the part of the laboratory instructed by the defendant, contends that it is the wish of the institution to organize the annual medical check-up in such a way as to compel officials automatically to undergo an AIDS screening test, without their receiving prior advice or information. It follows that, even if the action arises out of an error on the part of a laboratory, it is certainly not devoid of purpose.

19 As regards the substance, the Council, in its defence, reiterates its contention that the action is inadmissible, in the absence of any act adversely affecting the applicant. The Council adds that if the applicant considered that material acts attributable to the institution were not in conformity with the various provisions on which he relies it was incumbent on him to make a request under Article 90(1) of the Staff Regulations that the administration should change its conduct. He would thereby have caused a decision to be taken which could be the subject of an action for annulment and compensation.

20 It must be emphasized that, after the defence was lodged, the applicant waived the right to lodge a reply. In those circumstances, the defendant and the intervener did not lodge any rejoinder or observations in intervention.

21 Under Article 113 of its Rules of Procedure, this Court may at any time of its own motion consider whether there exists any absolute bar to proceeding with a case;

in addition, under Article 111 of those Rules, it may by reasoned order give a decision on the action pending before it where it is manifestly inadmissible.

22 Having regard to the arguments of the parties analysed above, the Court considers that the essential issue in this case is whether there was any act, of general or individual scope, on the part of the defendant institution which compelled the applicant, without his knowledge, to undergo an HIV screening test or whether the case stems solely from a fault which might be attributable to the Council's medical department. It was specifically in order to enable the parties to clarify that issue that the Court reserved its decision on the objection of inadmissibility until the final judgment, in view of the connection existing between the question of admissibility and the substantive issues. Thus, the order of 15 January 1991 states, at the end, that 'the remainder of the written procedure will enable the parties clearly to express their views on the alleged non-material damage and to say whether it is due to the illegality of an administrative act or to a material event'.

23 In the absence of any further clarification from the parties, it is appropriate for a decision to be given on this matter on the basis of the information given to the Court in the documents lodged by the parties up to and including the defence. An examination of those documents discloses nothing to show that the applicant was forced by any general or individual measure to undergo the test at issue. The letter sent to him by the medical officer of the institution clearly indicated, however, that the blood test was not compulsory. More specifically, attention was drawn to the fact that the 'HIV antibody test' was for AIDS screening and that the blood test could be carried out without the latter test being done. In that regard, it must be borne in mind that Article 59(4) of the Staff Regulations, which requires officials to undergo a medical check-up every year, does not provide for any measure to be taken by the institution concerning the check-up. In those circumstances, the applicant has not established the existence of any measure ranking as a decision which adversely affected him within the meaning of Article 90(2) of the Staff Regulations, whether a decision of the appointing authority or a failure by the appointing authority to adopt a measure required, expressly or by implication, by the Staff Regulations (judgment of the Court of Justice in Case 346/87 *Bossi* v *Commission* [1989] ECR 303, paragraph 8, and judgment of the Court of First Instance in Case T-6/91 *Pfloeschner* v *Commission* [1992] ECR II-141).

24 It follows from the foregoing that the claims for annulment in this action must be dismissed as manifestly inadmissible, since the applicant has not proved the existence of the contested measures and has not even been able to identify them.

25 As regards the claim for damages, it must be emphasized that in his application the applicant deliberately linked the existence of the alleged non-material damage with the alleged illegality of the contested measures adopted by the defendant institution. It has consistently been held by both the Court of Justice and the Court of First Instance that, where an official, pursuant to Article 179 of the EEC Treaty, brings an action seeking at the same time the annulment of an act of an institution and the award of compensation for damage caused by that act, the claims are so closely linked that the inadmissibility of the claim for annulment entails the inadmissibility of the action for compensation (see most recently the judgment of the Court of First Instance in Case T-27/90 *Latham* v *Commission* [1991] ECR II-35). It is thus appropriate also to dismiss as manifestly inadmissible the claim for compensation made in this action.

26 This Court also wishes to point out that any such claim would still have to be dismissed as inadmissible even if it were considered that the alleged non-material damage derived from a fault on the part of the medical department unconnected with the acts whose annulment is sought in the application. In such circumstances, the administrative procedure must commence, pursuant to Article 90(1) of the Staff Regulations, with a request from the official calling on the appointing authority to redress the damage suffered. It is only against the decision rejecting that request that a person may complain to the administration under Article 90(2) (judgment of the Court of Justice in Case 200/87 *Giordani* v *Commission* [1989] ECR 1877, paragraph 22; judgment of the Court of First Instance in Case T-5/90 *Marcato* v *Commission* [1991] ECR II-731). In the present case, it must be stated that the applicant did not submit such a request to the appointing authority and that, even if it could be conceded that the complaint of 20 July 1989 constitutes, in part, a claim for compensation of the non-material damage allegedly suffered, the fact nevertheless remains that the applicant did not lodge a complaint against the implied decision rejecting that claim.

27 It follows from the foregoing that, in any event, the present application must be dismissed as manifestly inadmissible.

Costs

28 Pursuant to Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. However, pursuant to Article 88 of those rules, in proceedings between the Communities and their servants the institutions are to bear their own costs. The parties must therefore be ordered to bear their own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby orders:

1. The application is dismissed as inadmissible;

2. The parties shall bear their own costs.

Luxembourg, 24 June 1992.

H. Jung — B. Vesterdorf

Registrar — President