JUDGMENT OF THE COURT (Fifth Chamber)

29 June 2000 *

In Case C-154/99 P,

Corrado Politi, a former member of the temporary staff of the European Training Foundation, residing in Turin (Italy), represented by J.-N. Louis, F. Parmentier and V. Peere, of the Brussels Bar, with an address for service in Luxembourg at Société de Gestion Fiduciaire, Boîte Postale 585,

appellant,

APPEAL against the order of the Court of First Instance of the European Communities (Second Chamber) of 9 February 1999 in Case T-124/98 *Politi* v *European Training Foundation* [1999] ECR-SC I-A-9 and II-29, seeking to have that order set aside,

the other party to the proceedings being:

European Training Foundation, represented by B. Wägenbaur, Rechtsanwalt, Hamburg, with an address for service in Luxembourg at the office of C. Gómez

* Language of the case: French.

de la Cruz, of the Legal Service of the Commission of the European Communities, Wagner Centre, Kirchberg,

defendant at first instance,

THE COURT (Fifth Chamber),

composed of: D.A.O. Edward, President of the Chamber, P.J.G. Kapteyn, A. La Pergola, H. Ragnemalm and M. Wathelet (Rapporteur), Judges,

Advocate General: F.G. Jacobs,
Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 24 February 2000,

gives the following

Judgment

1 By application lodged at the Court Registry on 26 April 1999, Mr Politi brought an appeal pursuant to Article 49 of the EC Statute of the Court of Justice and the

corresponding provisions of the ECSC and EAEC Statutes of the Court of Justice against the order of 9 February 1999 in Case T-124/98 *Politi* v *European Training Foundation* [1999] ECR-SC I-A-9 and II-29, hereinafter 'the contested order'), in so far as the Court of First Instance dismissed as inadmissible his action for annulment, first, of the decision of the European Training Foundation (hereinafter 'the Foundation') of 16 September 1997 establishing his final evaluation report and, second, of the Foundation's decision of 30 September 1997 not to renew his contract.

Facts

2 It is apparent from the contested order that:

'1 The applicant was engaged by the [Foundation]... with effect from 1 December 1994 as a member of the temporary staff, classified in Grade A 4.

2 The contract of employment was concluded for a period of three years, until 30 November 1997. Article 4 of the contract provided that the contract might be renewed pursuant to the final paragraph of Article 8 of the Conditions of Employment of Other Servants of the European Communities.

3 On 16 September 1997 the Director of the Foundation signed the applicant's final evaluation report for the period April 1996 to April 1997.

4 By letter of 30 September 1997 the Director of the Foundation reminded Mr Polity that his contract expired on 30 November 1997 and informed him that it would not be renewed. The applicant acknowledged receipt of that letter on 1 October 1997.

5 On 5 November 1997 the applicant's legal representative wrote to the Director of the Foundation complaining of irregularities in the final evaluation report and the decision not to renew his client's contract.

6 By letter of 18 November 1997, at the request of the Director of the Foundation, the Foundation's legal representative rejected the claims and submissions set out in the letter of 5 November 1997.

7 On 31 December 1997 the applicant's legal representative lodged a complaint pursuant to Article 90(2) of the Staff Regulations of Officials of the European Communities (hereinafter "the Staff Regulations"). He requested the Director of the Foundation to withdraw, first, the decision establishing the final evaluation report and, second, the decision not to renew his client's contract.

8 No reply was received to that letter.

9 It was in those circumstances that, by a document lodged at the Registry of the Court of First Instance on 2 August 1998, the applicant brought the

present application for annulment, first, of the decision of 16 September 1997 establishing the applicant's final evaluation report and, second, of the decision of 30 September 1997 not to renew the applicant's contract.

10 By a separate document lodged at the Registry of the Court of First Instance on 2 October 1998, the Foundation raised an objection of inadmissibility pursuant to Article 114 of the Rules of Procedure....'

The contested order

3 The Court of First Instance held that the application was out of time, and therefore inadmissible, for the following reasons:

'29 A letter from an official or servant which does not expressly request the withdrawal of the decision in question but is clearly intended to achieve an amicable settlement of his complaints, or a letter which clearly manifests the applicant's intention to challenge the decision which adversely affects him, is a complaint for the purposes of Article 90(2) of the Staff Regulations (see, in particular, the judgment in *Kotzonis* v *ESC*, cited above, paragraph 21, and the order in *Hogan* v *Parliament*, cited above, paragraph 36).

30 In the present case, the applicant's representative's letter of 5 November 1997 clearly challenged the irregularities which allegedly vitiated the final assessment and the decision of 30 September 1997.

...

32 The applicant's representative not only requested that an amicable solution be found to the dispute between his client and the Foundation, but also expressly invited the Director of the Foundation to withdraw, within two weeks, the decision not to renew the contract and to adopt a fresh decision renewing the temporary staff contract.

33 As the Foundation maintains, the letter of 5 November 1997 must therefore be classified as a "complaint" for the purposes of Article 90(2) of the Staff Regulations.

34 The fact that the applicant's representative stated in the letter of 5 November 1997 that if the Foundation did not give satisfaction to his client he would be obliged to lodge a complaint and that the covering letter enclosed with the memorandum of 31 December 1997 entitled "Complaint" states that "if [the] letter [of 5 November 1997] has been treated as a complaint for the purposes of Article 90(2) of the Staff Regulations, this letter should be regarded as withdrawing that complaint", cannot alter that conclusion.

35 As the Court has pointed out, first, the precise legal classification of a letter or memorandum is a matter for it alone and not for the parties and, second, the time-limits for submitting complaints and bringing actions are matters of public policy. Accordingly, the applicant cannot make the mandatory periods prescribed in the Staff Regulations begin to run again merely by declaring that he is "withdrawing" the complaint.

36 Consequently, there is no need to determine whether the letter sent on 18 November 1997 by the Foundation's representative on behalf of the Director of the Foundation is capable of constituting a reply to the complaint for the purposes of Article 90(2) of the Staff Regulations.

37 If it is, the action should have been brought before the Court within three months from the date of notification of that reply, in accordance with the first indent of Article 91(3) of the Staff Regulations. Allowing for the extension of time-limits on account of distance applicable in the present case, the action should therefore have been brought no later than 28 February 1998.

38 If, on the other hand, the letter from the Foundation's representative cannot be classified as a reply to the complaint for the purposes of Article 90(2) of the Staff Regulations, the complaint should, pursuant to the final subparagraph of Article 90(2) of the Staff Regulations, be regarded as having been the subject of an implied decision rejecting it on 5 March 1998, at the end of the four-month period commencing on 5 November 1997, the date on which the complaint was lodged. Pursuant to the second indent of Article 91(3) of the Staff Regulations, the applicant should then have brought an action within three months from that implied rejection. Allowing for the extension of time-limits on account of distance applicable in the present case, the action should therefore have been brought no later than 15 June 1998.

39 Of course, it follows from the judgment in *Dricot and Others* v *Commission*, on which the applicant relies, that a plea raised in the complaint may be developed in the course of the pre-litigation procedure by additional memoranda, provided that the objections made therein are based on the same legal ground as the heads of challenge put forward in the initial complaint. In the present case the letter of 31 December 1997, in so far as it reiterates certain of the accusations initially made in the complaint of 5 November 1997, constitutes such an additional memorandum.

40 However, it cannot be inferred that the lodging of such memoranda, even if within the three-month period following notification of the act adversely affecting the official where there has been no express reply to the complaint, makes the periods prescribed in the Staff Regulations begin to run again. It follows from the clear wording of the second subparagraph of Article 91(2) of the Staff Regulations that it is the date on which the complaint is submitted that triggers the period within which the appointing authority is to

notify its reply to the complaint. Moreover, in *Dricot and Others* v *Commission* the application had been lodged within the period prescribed in the Staff Regulations, calculated from the date of the complaint and not from the date of the additional memoranda.'

The appeal

4 By his appeal Mr Politi complains that the Court of First Instance unlawfully reduced the periods for lodging complaints and bringing actions referred to in Articles 90 and 91 of the Staff Regulations and breached the rights of the defence by incorrectly classifying the letter of 5 November 1997 from his representative to the Foundation as a complaint (paragraph 33 of the contested order) and the letter of 31 December 1997, also from his representative to the Foundation, as an 'additional memorandum' supplementing the complaint (paragraph 39 of the contested order).

5 The appellant maintains that it is clear from the wording of the letter of 5 November 1997 that it could not be classified as a complaint; furthermore, at that stage his representative had not been authorised to lodge such a document or to receive a reply to an alleged complaint. The letter was merely an informal step taken against an amicable background prior to initiating a pre-litigation procedure. On the other hand, the Court of First Instance should have classified the letter of 31 December 1997 as a complaint. That letter was lodged within the prescribed period and triggered the four-month period within which the Foundation was to reply; and it was from the end of that period that the three-month period within which the matter could be brought before the Court of First Instance should have been calculated. Consequently, the appellant's action was lodged within the prescribed period and was therefore admissible.

6 In his reply the appellant further claims, in the alternative, that even if the letter of 5 November 1997 was correctly classified as a complaint it should then have been regarded as having been withdrawn and replaced by the complaint of 31 December 1997. By withdrawing his complaint and then lodging a fresh

complaint within the prescribed period the appellant did not make the mandatory periods laid down in the Staff Regulations begin to run again but merely exercised his right of complaint within the period allowed for reflection.

Admissibility of the appeal

7 The Foundation claims that the appeal is inadmissible.

8 It contends that the grounds of appeal alleging misclassification of the letters of 5 November and 31 December 1997 are inadmissible since they are not based on an infringement of a rule of law but call in question findings of fact made by the Court of First Instance, in particular the fact that the appellant's representative was not authorised to lodge a complaint or to receive a reply to a complaint and the fact that on 5 November 1997 the appellant had not yet decided to lodge a complaint.

9 As regards the classification of the letter of 5 November 1997, moreover, the appellant merely reproduces the arguments which he had already put forward before the Court of First Instance.

10 The ground of appeal alleging a breach of the rights of the defence is also claimed to be inadmissible, since it does not state precisely what elements of the contested order are criticised.

11 In that regard, it should be pointed out, first, that the appeal seeks to challenge the classification by the Court of First Instance, in paragraphs 33 and 39 of the

contested order, of the letters of 5 November and 31 December 1997 and the inferences which it drew from them as regards calculation of the periods prescribed for lodging a complaint and bringing an action. However, it is settled law that the classification of an act or a measure for legal purposes by the Court of First Instance, in this case the question whether a letter is to be regarded as a complaint within the meaning of Article 90(2) of the Staff Regulations, is a question of law which may be raised in an appeal (see, in that regard, Case C-19/93 P *Rendo and Others* v *Commission* [1995] ECR I-3319, paragraph 26).

12 Next, as regards the classification of the letter of 5 November 1997, the appellant has clearly identified the paragraphs of the contested order which he disputes and has put forward arguments on the basis of which he considers that the legal assessment of the Court of First Instance is incorrect. Accordingly, it cannot be argued that the appeal, on that point, merely reproduces the arguments put forward before the Court of First Instance.

13 As regards, finally, the admissibility of the ground of appeal alleging breach of the rights of the defence, it is common ground that the appellant is thereby challenging the same aspects of the contested order as those challenged in the grounds of appeal alleging that the letters of 5 November and 31 December 1997 were incorrectly classified.

14 The appeal must therefore be declared admissible.

The appeal

15 It should be pointed out at the outset that the periods for lodging complaints and bringing actions referred to in Articles 90 and 91 of the Staff Regulations are

matters of public policy and cannot be left to the discretion of the parties or the Court, which must ascertain, of its own motion if need be, whether they have been complied with. Those periods meet the requirement of legal certainty and the need to avoid any discrimination or arbitrary treatment in the administration of justice (see, in particular, Case 79/70 *Müllers* v *Economic and Social Committee* [1971] ECR 689, paragraph 18, and Case 276/85 *Cladakis* v *Commission* [1987] ECR 495, paragraph 11).

16 Consequently, the Court of First Instance was correct to take the view, at paragraph 35 of the contested order, that the precise legal classification of a letter or memorandum is a matter for the Court alone and not for the parties, since it is essential, in order to ensure that the objectives of the time-limits for lodging complaints and bringing actions are achieved, that the triggering event be determined according to objective criteria.

17 It follows from the case-law of the Court of Justice that an act whereby an official or servant specifically challenges an administrative measure which adversely affects him constitutes a complaint for the purposes of Article 90(2) of the Staff Regulations (see, in particular, Case 167/86 *Rousseau* v *Court of Auditors* [1988] ECR 2705, paragraph 8). It is necessary, in that regard, to give priority to the content of the document rather than its form or title. Paragraph 29 of the contested order is consistent with that case-law.

18 In the present case the Court of First Instance found that in the letter of 5 November 1997 the appellant, through his representative, 'clearly challenged the irregularities which allegedly vitiated the final assessment and the decision of 30 September 1997' and 'requested that an amicable solution be found to the dispute between [the appellant] and the Foundation' and, in particular, that the decision not to renew the temporary staff contract be withdrawn (paragraphs 30 and 32, respectively, of the contested order).

19 Those findings provide sufficient grounds to classify the letter in question as a complaint for the purposes of Article 90(2) of the Staff Regulations.

20 The fact that the purpose of that letter was to arrive at an amicable solution does not alter that conclusion. The pre-litigation procedure is inherently amicable. Furthermore, as the Court of First Instance pointed out in paragraph 32 of the contested order, it is clear from the letter of 5 November 1997 that the appellant sought redress, namely the withdrawal of the decision not to renew his contract and the adoption of a fresh decision renewing his temporary staff contract.

21 The argument that the appellant's representative was not authorised to submit a complaint is equally unfounded. As the Advocate General has observed in point 39 of his Opinion, the letter of 5 November 1997, which the appellant has not suggested was written without his authority, must be classified on the basis of its characteristics.

22 As regards, finally, the appellant's alternative argument that he withdrew the first complaint and replaced it by his letter of 31 December 1997, which was submitted within the prescribed period, it is sufficient to point out that the time-limits laid down in Articles 90 and 91 of the Staff Regulations are matters of public policy and are not at the discretion of the parties or the Court, so that the appellant could not make the period prescribed for bringing an action begin to run again by submitting a fresh complaint. Consequently, as the letter of 5 November 1997 was a complaint, the second letter could not be one. At the

very most it could be regarded as an additional memorandum, as the Court of First Instance held in paragraph 39 of the contested order.

23 Having regard to the foregoing, it must be held that the Court of First Instance was correct in its view that the period for replying to the complaint had begun to run on 5 November 1997, in accordance with Article 90(2) of the Staff Regulations, with the consequence that, if the letter of the Foundation's representative of 18 November 1997 could not have been regarded as a reply to the complaint, the action should have been brought no later than 15 June 1998, which, as the Court of First Instance observed, was well before the date on which it was in fact brought.

24 The appeal must therefore be dismissed.

Costs

25 Under Article 69(2) of the Rules of Procedure, applicable to the appeal procedure by virtue of Article 118, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Article 70 of the Rules of Procedure provides that in proceedings between the Communities and their servants the institutions are to bear their own costs. However, by virtue of the second paragraph of Article 122 of the Rules of Procedure, Article 70 is not applicable to appeals brought by officials or other servants of an institution against that institution. Since the appellant's appeal has been unsuccessful he must be ordered to pay the costs of these proceedings.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

1. **Dismisses the appeal;**

2. **Orders Mr Politi to pay the costs.**

Edward Kapteyn La Pergola

Ragnemalm Wathelet

Delivered in open court in Luxembourg on 29 June 2000.

R. Grass

Registrar

D.A.O. Edward

President of the Fifth Chamber