OPINION OF ADVOCATE GENERAL JACOBS

delivered on 24 February 2000 *

1. This is an appeal against an order of the Court of First Instance [1] dismissing an action brought against the European Training Foundation ('the Foundation') by a former member of its temporary staff. The applicant had sent the Foundation two communications during the period within which he was entitled to submit a complaint against an act adversely affecting him. He considered his complaint to be the second of the two, but the Court found it to be the earlier communication when calculating the period within which the action could be brought. It therefore ruled the action out of time and consequently inadmissible.

Relevant legislative and other provisions

2. The Foundation was established by Council Regulation No 1360/90, [2] under which [3] its staff are governed by the rules and regulations applicable to the officials and other servants of the European Communities. Its seat is in Turin. [4]

3. Under Article 46 of the Conditions of Employment of Other Servants of the European Communities, Title VII of the Staff Regulations applies by analogy to temporary staff. That title governs the procedure to be followed in the event of a dispute between a staff member and the Community body employing him. Article 90 regulates the internal, pre-litigation procedure and Article 91 the contentious procedure before the Community judicature.

4. Under Article 90(2), a staff member may submit a complaint against any act adversely affecting him, within a period of three months from (in so far as is relevant to the present case) the date on which he received notification of the decision embodying that act. The relevant authority [5] must give a reasoned decision within

* Original language: English.

1 — Order of the Court of First Instance (Second Chamber) of 9 February 1999 in Case T-124/98 *Politi* v *European Training Foundation*.

2 — Council Regulation (EEC) No 1360/90 of 7 May 1990 establishing a European Training Foundation, OJ 1990 L 131, p. 1.

3 — Article 14, as amended by Article 1(8) of Council Regulation (EC) No 2063/94 of 27 July 1994 amending Regulation (EEC) No 1360/90, OJ 1994 L 216, p. 9.

4 — See the decision taken by common agreement between the governments of the Member States on 29 October 1993, OJ 1993 C 323, p. 1.

5 — In the case of temporary staff, this means the authority referred to in the first paragraph of Article 6 of the Conditions of Employment, namely the person authorised to conclude contracts engaging such staff. Although the term 'appointing authority' is strictly applicable only in the context of officials appointed under the Staff Regulations, I shall none the less use that term hereinafter since it appears convenient and is employed both by the parties and by the Court of First Instance in the order under appeal.

four months from the date on which the complaint was lodged, failing which an implied decision rejecting the complaint is deemed to have been taken at the end of that period.

5. Under Article 91(2), an action may be brought before the Court of First Instance [6] against any express or implied decision rejecting a complaint lodged in accordance with Article 90(2). Under Article 91(3), that action must be brought within three months from the date on which the decision was notified or, in the case of an implied decision, the end of the four-month period referred to in Article 90(2).

6. In accordance with Article 1 of Annex II to the Rules of Procedure of the Court of Justice (Decision on extension of time-limits on account of distance), procedural time-limits in actions before the Court are extended by 10 days for parties resident in Italy. That extension applies also to proceedings before the Court of First Instance by virtue of Article 102(2) of its Rules of Procedure.

6 — Since Council Decision 88/591/ECSC, EEC, Euratom of 24 October 1988 establishing a Court of First Instance of the European Communities, OJ 1988 L 319, p. 1; see Article 3(1)(a).

The order under appeal

Facts

7. The facts of the case, as set out in paragraphs 1 to 9 of the order under appeal, may be summarised as follows.

8. Mr Politi (the applicant at first instance and appellant in the present proceedings), who resides in Turin, was employed by the Foundation under a temporary contract running from 1 December 1994 to 30 November 1997, with a possibility of renewal.

9. On 16 September 1997, the Director of the Foundation signed the final version of Mr Politi's performance evaluation report for the period April 1996 to April 1997. By letter of 30 September 1997, received by Mr Politi on 1 October 1997, he stated that the contract would not be renewed.

10. On 5 November 1997, Mr Politi's lawyer wrote to the Director of the Foun-

dation challenging the evaluation report and the decision not to renew the contract. A reply to that letter was sent, at the Director's request, by the Foundation's lawyer, dismissing the contentions made. On 31 December 1997, the applicant's lawyer submitted a 'complaint pursuant to Article 90(2) of the Staff Regulations', seeking the withdrawal of the evaluation report and of the decision not to renew the contract. No reply was sent to that letter.

11. Mr Politi brought an action before the Court of First Instance on 2 August 1998, seeking the annulment of (i) the decision of 16 September 1997 establishing his final evaluation report and (ii) the decision of 30 September 1997 not to renew his contract.

Law

12. Following an objection to admissibility lodged by the Foundation, the Court of First Instance held that the application was out of time and thus inadmissible. Its reasoning (paragraphs 23 to 42 of the order under appeal) was essentially as follows.

13. The admissibility of an action brought by a staff member is conditional upon proper observance of the preliminary administrative procedure. Time-limits for the lodging of complaints and Court actions are a matter of public policy and are binding on the parties. The precise legal categorisation of a letter or memorandum is a matter for the Court alone and not for the parties. A letter which does not expressly request the withdrawal of a decision but is clearly intended to achieve an amicable settlement constitutes a complaint, as does a letter which clearly manifests the applicant's intention to challenge a decision adversely affecting him.

14. The letter of 5 November 1997 from the applicant's lawyer contained clear allegations of irregularities in both the evaluation report and the decision of 30 September 1997. It alleged, as regards the former, errors in the evaluation which were not based on any objective evidence and, as regards the latter, failure to comply with the time criteria given in the Foundation's Staff Handbook of January 1997, failure to state reasons, material error of assessment and misuse of procedure. It sought not only an amicable solution to the dispute but also annulment, within two weeks, of the decision not to renew the contract. Such a letter must be treated as a complaint.

15. That conclusion was not affected by the statement in that letter that a complaint

would be lodged if satisfaction were not given, or by that in the letter accompanying the 'complaint' of 31 December 1997 that if the previous letter were to have been treated as a complaint, 'the present should be regarded as a withdrawal'. An applicant could not start time running again by a mere declaration of 'withdrawal'.

16. It was therefore unnecessary to determine whether the letter of 18 November 1997 from the Foundation's lawyer constituted a reply to the complaint or not. If it did, the action should have been brought by 28 February 1998, taking account of the extension of the time-limit on account of distance; if it did not, there must have been an implied decision rejecting the complaint on 5 March 1998, four months after the lodging of the complaint, and the action should have been brought within a period of three months plus 10 days' extension on account of distance, namely by 15 June 1998.

17. The letter of 31 December 1997 was to be regarded as an additional memorandum developing pleas raised in the complaint; as such, although permissible, it could not have any effect on the time-limit for a reply which, from the clear terms of Article 91(2) of the Staff Regulations, must be calculated from the date on which the complaint itself was lodged, so that the period within which a court action could be brought had expired well before 2 August 1998.

Arguments on appeal

18. Mr Politi's first argument is that the Court of First Instance was wrong to regard the letter of 5 November 1997 as a complaint. That letter, as is clear from its terms, was written by his lawyer, who had not been authorised to lodge a complaint on his behalf at that stage. It further clearly indicated that he had not yet decided to lodge a complaint. By instructing the Foundation's lawyer to reply to Mr Politi's lawyer, moreover, the Director of the Foundation clearly recognised the nature of the exchange since he could not have delegated his powers as appointing authority to a lawyer who was not an official or other servant of the Communities. Nor, in any event, had Mr Politi authorised his lawyer to receive a reply to a complaint on his behalf.

19. Secondly, Mr Politi asserts that the Court of First Instance wrongly classified the letter of 31 December 1997 as an 'additional memorandum' to a complaint, since it was the first and only complaint lodged.

20. Thirdly, Mr Politi claims that the Court of First Instance's decision has the effect of unlawfully shortening both the period for reflection enjoyed by the staff member under Article 90(2) of the Staff Regulations and the period allowed for the institution's reply, the latter in particular by making it run from 5 November 1997 despite the need to reply to the contentions submitted on 31 December 1997.

21. Mr Politi concludes that the letter of 31 December 1997 should have been classified as a complaint lodged in good time, that the four-month period allowed for the Foundation to reply should have been calculated from that date and the three-month period for the institution of Court proceedings from the expiry of the latter, and that the action was thus not brought out of time.

22. In his reply, Mr Politi presents the alternative argument that, if the letter of 5 November 1997 was correctly classified as a complaint, then it should have been regarded as having been withdrawn and replaced by the complaint of 31 December 1997, which he submitted in good time in the exercise of his right to a three-month period of reflection. The withdrawal and replacement thus did not trigger any new time-limits for the purposes of the Staff Regulations.

23. The Foundation considers that Mr Politi's first two grounds of appeal are inadmissible in that they do not allege any breach of a rule of law; they do not challenge the Court of First Instance's legal characterisation of the facts but its appraisal thereof, in particular as regards the assertion that Mr Politi's lawyer had no authority to submit a complaint at that stage or receive any reply thereto. The first ground of appeal, moreover, merely reproduces arguments already presented at first instance.

24. The third ground of appeal, it considers, is both inadmissible, in that it does not identify the contested elements of the order under appeal, and manifestly unfounded, because the order was made after the end of the period allowed for lodging a complaint and could thus in no way have shortened that period, it being for the staff member to decide at what precise moment within it he wishes to submit a complaint.

25. As regards the alternative argument raised by Mr Politi in his reply, the Foundation contends that, whilst a staff member is entitled to withdraw a complaint, he may not replace it by another and thus trigger a new four-month time-limit for the appointing authority's reply. To do so would run counter to the principle that the time-limits in Articles 90 and 91 of the Staff Regulations are mandatory as a matter of public policy, and would undermine legal certainty. It would require the appointing authority to wait until the end of the three-month period before drafting its reply, in case the original complaint should be withdrawn and a new one

submitted within that period, and it would be incompatible with the aim of seeking an amicable solution.

Analysis

Admissibility of the appeal

26. The Foundation is, I consider, unfounded in arguing that in his first and second grounds of appeal the appellant does not allege any breach of a rule of law, does not identify the contested elements of the order under appeal and challenges the Court of First Instance's appraisal of the facts rather than their categorisation in law.

27. Mr Politi is clearly challenging the findings that (a) the letter of 5 November 1997 was a complaint and (b) the letter of 31 December 1997 was merely an 'additional memorandum'. He specifically cites paragraphs 33 and 39 of the order under appeal, in which those findings are set out. The arguments he puts forward clearly convey his contention that the Court of First Instance misapplied (and thus infringed) Community law in making those findings. He seeks review by the Court of Justice of the legal characterisation of the facts by the Court of First Instance and the legal conclusions drawn from them.

28. The claim that the first ground of appeal reiterates arguments presented at first instance, however, is not unsubstantiated. Almost all of the argument on that ground in Mr Politi's appeal, together with the whole of the section entitled 'Conclusions', which is very closely related to it, is copied practically verbatim from his observations on the objection to admissibility at first instance.

29. The Court of Justice has consistently held, from *Kupka-Floridi* [7] to *Clauni and Others*, [8] that an appeal which simply

7 — Case C-244/92 P *Kupka-Floridi* v *ESC* [1993] ECR I-2041, paragraph 10 of the order.

8 — Order of 20 January 2000 in Case C-171/99 P *Clauni and Others* v *Commission*, paragraph 16.

repeats or reproduces verbatim the pleas in law and arguments already submitted to the Court of First Instance is inadmissible. However, that ruling has been applied above all in cases where the arguments put forward on appeal do not identify the contested aspects of the judgment or order under appeal but merely make an imprecise claim of illegality coupled with a blanket reference to, or reproduction of, the submissions made at first instance, particularly where the latter include submissions based on factual allegations expressly dismissed by the Court of First Instance. Such appeals, this Court has held, merely seek, in reality, reconsideration of the application at first instance and fall outside the jurisdiction of the Court of Justice.

30. I do not consider that the situation here is of that type. Mr Politi has clearly identified the finding in the order under appeal (in paragraph 33) which he is challenging and has put forward clear legal grounds on which he considers that finding to be wrong in law. Despite the repetition of arguments raised before the Court of First Instance, the grounds put forward in the appeal are clearly identifiable as criticisms of that Court's order. In that regard, I would agree with Advocate General Fennelly's criticisms of excessive recourse to this type of objection to the admissibility of an appeal. [9]

31. I thus consider that the fact that Mr Politi's first ground of appeal largely repeats arguments put forward at first instance should not, in the circumstances of this case, constitute a bar to its admissibility.

32. The Foundation objects to the admissibility of the third ground of appeal solely in that it does not identify the contested elements of the order under appeal. That objection, I consider, is unjustified; the contested elements are clearly the same as in the first and second grounds, namely, the characterisation of the letter of 5 November 1997 as a complaint and of that of 31 December 1997 as an 'additional memorandum'.

Substance of the appeal: admissibility of the action at first instance

33. There is a single substantive issue in the appeal: whether the Court of First Instance

9 — See Case C-304/97 P *Carbajo Ferrero* v *Parliament* [1999] ECR I-1749, paragraph 8 of the Opinion, apparently followed by the Court at paragraphs 27 and 28 of the judgment, and the Opinion delivered on 27 January 2000 in Case C-352/98 P *Bergaderm and Goupil* v *Commission*, [2000] ECR I-5241, paragraph 25.

was right in law to treat the letter of 5 November 1997 as a complaint and not the letter of 31 December 1997. Mr Politi argues essentially that: (i) the letter of 5 November 1997 could not, in law, constitute a complaint; (ii) the letter of 31 December 1997 could not constitute anything other than a complaint; and (iii) by deciding the contrary, the Court of First Instance illegally shortened the periods of reflection laid down in the Staff Regulations.

34. It has often been stated that the legal classification of a letter as a complaint is a matter for appraisal by the Court alone and is not determined by the intention of the parties. There are cases prior to 1989 in which the Court of Justice ruled that a document could be treated as a request or a complaint on the ground of its tenor, even though it did not expressly purport to be such. [10] It is, however, in the case-law of the Court of First Instance that the approach has become crystallised in a particular form of words. [11]

35. It should be stressed that the Court's power is not a device for dismissing unwelcome cases on grounds of inadmissibility; there must be some compelling reason for deeming a document to be something other than it was intended to be. The overriding criterion must be that of legal certainty; the time-limits are mandatory and matters of public policy, and it must be possible to determine the event which triggers them with certainty. Thus, on the one hand, a staff member may not submit a series of ambiguous documents and decide only later, in the light of subsequent procedural requirements, which of them should be regarded as triggering which time-limits; on the other hand, the Court should not, without good reason, reclassify documents which have been treated in a particular way by the parties and thereby redefine the procedural rights on the basis of which they have been acting.

36. In the present case, the letter of 5 November 1997 contained the statement by Mr Politi's lawyer that, if the decision not to renew his contract were not withdrawn and a decision to renew it taken within two weeks, 'I can only advise my client to submit a complaint within the meaning of Article 90(2) of the Staff Regulations and Article 46 of the Conditions of Employment of Other Servants to the competent authority...'. That statement clearly implies that the letter itself was not intended as such a complaint, although the Court of First Instance considered it irrelevant. [12] Furthermore, the letter of 31 December 1997 clearly bears the title

10 — See Case 30/68 *Lacroix* v *Commission* [1970] ECR 301, paragraph 4 of the judgment; Case 19/72 *Thomik* v *Commission* [1972] ECR 1155, paragraph 4; Case 178/80 *Bellardi-Ricci* v *Commission* [1981] ECR 3187, paragraph 9 (although in this case the Court only accepted that a letter not purporting to be a request could be classified as such, without in fact so classifying it); and Joined Cases 23/87 and 24/87 *Aldinger and Another* v *Parliament* [1988] ECR 4395, paragraph 13.

11 — Beginning with Case T-1/90 *Pérez-Mínguez Casariego* v *Commission* [1991] ECR II-143, paragraph 38 of the judgment, and most recently in the order of 8 December 1999 in Case T-108/99 *Reggimenti* v *Parliament* ECR II-1205, paragraph 26.

12 — Paragraph 34 of the order under appeal.

'Complaint submitted under Article 90(2) of the Staff Regulations of Officials of the European Communities'.

37. As against those considerations, however, the letter of 5 November 1997 bears all the hallmarks of a complaint. It criticises, on specific legal grounds, both Mr Politi's final evaluation report and the decision not to renew his contract (both acts adversely affecting him), and it specifically seeks the withdrawal of that decision and the renewal of the contract. Those aspects of the letter are clearly set out and analysed in paragraphs 29 to 33 of the order under appeal, in which the Court of First Instance compares them with the characteristics of a complaint and draws the conclusion that the letter must be classified as such. It was, I consider, entirely justified in making that finding. It would be very difficult to establish that such a document did not constitute a complaint for the purposes of Articles 90 and 91 of the Staff Regulations.

38. The argument that it was not a complaint because it was intended to seek an amicable solution does not stand up to scrutiny. The Court of Justice stated in *Lacroix*: 'Although it is true that this letter did not expressly request the withdrawal of the decision in question, it is, however, quite apparent from it that the applicant was trying by this approach through official channels to obtain an amicable settlement of his complaints' and treated that letter as a complaint. It held in *Thomik* that a letter which 'clearly sought a decision reversing that [previously] conveyed' must be regarded as a complaint, and in *Aldinger* that letters which 'clearly express the applicants' wish to challenge the appointing authority's decision' constituted complaints.

39. Nor can any support be derived from the argument that Mr Politi's lawyer had no authority to submit a complaint; it has not been suggested that he did not have authority to write the letter which he did write, and that letter must be classified on the basis of its characteristics. In that regard, it may be pointed out that whether the letter from the Foundation's lawyer can be considered a valid reply to the complaint

or not cannot affect the status of the complaint itself.

40. The letter of 5 November 1997 constituted a complaint not only in respect of the decision not to renew Mr Politi's contract, but also in respect of his evaluation report. Although the request for the withdrawal of the report was not explicit, it was inherent in that letter, which alleges in particular an inadequate statement of reasons, contrary to Article 190 of the EC Treaty (now Article 253 EC), Article 25 of the Staff Regulations and Article 54 of the Conditions of Employment. Since the report was by that stage a definitive document, such a claim could only constitute a challenge to its validity. Moreover, it is clear that the criticism of the evaluation report was entirely bound up with the request to have the decision not to renew the contract withdrawn, and not a self-standing claim; in view of the highly critical assessment, it could not have been credibly argued that Mr Politi's contract should be renewed as long as the report stood.

41. In view of those considerations, I take the view that the Court of First Instance was justified in considering that Mr Politi had submitted a complaint on 5 November 1997 and could not reopen the period for bringing an action by submitting a subsequent complaint.

42. The remaining grounds of appeal may be dealt with briefly. The submission that the letter of 31 December 1997 was wrongly categorised as an 'additional memorandum' is entirely dependent on the categorisation of the first letter. To the extent that the first letter was a complaint, the second could not be. The third ground of appeal and the alternative argument raised by Mr Politi in his reply seem wholly misconceived. They imply that the Staff Regulations allow officials a full period of three months within which not only to submit a complaint but also to modify, extend or withdraw and replace that complaint, the four-month period for a reply commencing only once the official has decided on the finalised form. That is clearly contrary to the principle of legal certainty, to the terms of Articles 90 and 91 of the Staff Regulations and to consistent practice. A complaint may be expanded upon during the course of the pre-litigation procedure [13] with the result that pleas raised in 'additional memoranda' may be raised also in a subsequent Court action, but that can have no effect on the time-limit triggered by the submission of the complaint itself.

13 — See Case T-159/95 *Dricot and Others* v *Commission* [1997] ECR-SC II-1035, paragraphs 22 to 25 of the judgment, cited by Mr Politi and in the order under appeal.

Conclusion

43. I therefore consider that the Court should:

— dismiss the appeal; and

— order the appellant to pay the costs.