Case T-67/91

Francesco Torre
v
Commission of the European Communities

(Inadmissibility)

Order of the Court of First Instance (Fourth Chamber), 25 February 1992 II - 261

Summary of the Order

Officials — Actions — Prior complaint through administrative channels — Time-limits — Matter of public policy — Act adversely affecting an official — Confirmatory measure — Distinction between a complaint and a request within the meaning of Article 90(1) of the Staff Regulations — Rejection of the complaint — Action out of time — Inadmissibility
(Staff Regulations of Officials, Arts 90 and 91)

ORDER OF THE COURT OF FIRST INSTANCE (Fourth Chamber)
25 February 1992 *

In Case T-67/91,

Francesco Torre, an official of the Commission of the European Communities, residing in Strassen (Luxembourg), represented by Jean-Noël Louis, Thierry

* Language of the case: French.

Demaseure and Véronique Leclercq, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Fiduciaire Myson SARL, 1 Rue Glesener,

applicant,

v

Commission of the European Communities, represented by Joseph Griesmar, Legal Adviser, acting as Agent, assisted by Denis Waelbroeck, of the Brussels Bar, with an address for service in Luxembourg at the office of Roberto Hayder, a national civil servant seconded to the Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for annulment of the Commission decision limiting reimbursement of the removal expenses incurred by the applicant to LFR 258 500,

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

composed of: R. García-Valdecasas, President, R. Schintgen and C. P. Briët, Judges,

Registrar: H. Jung,

makes the following

Order

Facts and procedure

Mr Francesco Torre was assigned to the Press and Information Office of the Commission of the European Communities in Rome from 1983. By decision of 10 August 1990, which took effect on 1 September 1990, he was transferred to Luxembourg. For the purpose of the removal of his furniture from Rome to Luxembourg, the applicant obtained three estimates amounting to LFR 309 566, LFR 277 922 and LFR 322 000 respectively, the last of the estimates including the cost of insurance cover.

Since the administration considered those estimates to be too high, it requested another firm to prepare an estimate. That estimate amounted to LFR 165 500, which, after the applicant's protests, was increased to LFR 182 200 in order to take account of an insured value of LFR 10 000 000. Since the applicant also challenged the latter estimate, a representative of the firm inspected the furniture in Rome and on 23 July 1990 prepared a fresh estimate of LFR 258 500, inclusive of all charges, the amendments being justified by 'the type of furniture and the additional services requested by Mr Torre'.

At the end of July 1990 the Commission informed the applicant by telephone of its decision to limit the reimbursement of removal expenses to LFR 258 500.

On 6 August 1990 the applicant had his removal carried out. The firm which he chose carried out the removal for a sum of LFR 277 922, together with a sum of LFR 192 619 for insurance cover, that is a total amount of LFR 470 541.

By memorandum of 14 August 1990, sent to the applicant's address in Rome, Mr Llanso, Principal Administrator in the Directorate-General for Personnel and Administration, informed Mr Torre as follows:

'After considering the estimates which you submitted for the purposes of your removal from Rome to Luxembourg, I must inform you that the amount of LFR 258 500 (estimate from the firm Daleiden) has been accepted as the limit of the reimbursement provided for in Article 9 of Annex VII to the Staff Regulations of Officials which can be made to you whichever removal firm you ultimately consider you have to employ.'

The applicant maintains, without being contradicted, that he became aware of that memorandum only on 3 September 1990, on taking up his duties in Luxembourg.

6 On 24 September 1990 the applicant sent to the administration a memorandum which he described as a 'request . . . pursuant to the procedures provided for in Article 90(1) of the Staff Regulations'. In that memorandum, he acknowledged receipt of the administration's memorandum of 14 August 1990, criticized the estimate for LFR 258 500 and maintained that the estimates which he submitted himself reflected the actual price. After drawing attention in particular to the fact that in 1983 the same administrative department had granted for the same removal in the opposite direction, Luxembourg to Rome, payment of an amount of LIT 9 450 000, he concluded as follows: 'I beg you to reconsider my case and to adopt a positive decision in my respect by granting payment of the invoice from the firm . . . in the sum of LIT 10 100 000, plus 2% of that amount for insurance. That invoice reflects the actual value of the services rendered to me and its amount is reasonable and reflects the market price.'

7 By memorandum of 29 October 1990 addressed to Mr Torre, Mr Llanso recalled the background to the case and concluded as follows:

'As regards your argument that account should be taken of tariffs approved by the administration in Brussels on the basis of an estimate submitted some years ago, I have already explained that neither the administration nor the financial controller can be bound, when confronted with situations in which the facts are different, by a previous administrative decision.

For all the foregoing reasons I regret to have to inform you that I am unable to take action on your complaint and that the amount of LFR 258 500 (amended

estimate from Daleiden, a copy of which you will find attached hereto) is confirmed as being the limit up to which the reimbursement provided for in Article 9 of Annex VII to the Staff Regulations can be made.'

By memorandum sent on 3 December 1990 to Mr Llanso the applicant informed him that his memorandum of 24 September 1990 had been submitted pursuant to Article 90(1) of the Staff Regulations. He asked for confirmation that the administration's memorandum of 29 October 1990 constituted the official reply by the appointing authority to his formal request. He requested a speedy reply in order to be able 'to lodge a complaint within the time-limit against that decision adversely affecting me'.

By memorandum of 13 December 1990 the administration informed the applicant that the memorandum of 14 August 1990, confirmed and explained by the memorandum of 29 October 1990, constituted the appointing authority's official decision in relation to the limit up to which the reimbursement provided for in Article 9 of Annex VII to the Staff Regulations could be granted to him.

By letter dated 29 January 1991, registered at the General Secretariat of the Commission on 1 February 1991, the applicant stated he was lodging a complaint under Article 90(2) of the Staff Regulations against Mr Llanso's decision, notified to him by memorandum of 29 October 1990, limiting the reimbursement of his removal expenses to LFR 258 500. After reiterating the facts, he pleaded, in support of his claims, infringement of Article 9 of Annex VII to the Staff Regulations and breach of the principle of the protection of legitimate expectations and the duty to have regard for the welfare of officials. He concluded by requesting the administration to annul the decision notified to him by letter of 29 October 1990 from Mr Llanso and to adopt a fresh decision granting him reimbursement of the removal expenses actually incurred.

In his reply of 11 June 1991 to that complaint, the Director-General of the Directorate-General for Personnel and Administration, Mr Frans de Koster, made, in the section headed 'law' in particular the following statements:

'It is necessary to point out first of all that the act adversely affecting the complainant is constituted by the administration's decision of 14 August 1990. The second decision of 29 October 1990 against which the complaint is formally directed only confirmed the first decision and is therefore not a measure which is open to challenge.

Article 90(2) of the Staff Regulations states that a complaint must be lodged within a period of three months and that the period starts to run on the date of notification of the decision to the person concerned, but in no case later than the date on which he received such notification, if the measure affects a specified person.

Since the present complaint is out of time in relation to the original act adversely affecting the official and the confirmatory decision of 24 October 1990 was not capable of reopening the time-limit, the Commission reserves its right to raise an objection of inadmissibility in any proceedings relating to its decision to limit the reimbursement of Mr Torre's removal expenses to LFR 258 000. Nevertheless, it considers that it has to reply to the present complaint, as it does generally in the interests of good relations with its staff even where complaints are out of time.'

As regards the merits, the Director-General, in rejecting the complaint, relied on Article 9 of Annex VII to the Staff Regulations and the case-law relating to that provision.

12 Those were the circumstances in which, by application lodged on 23 September 1991 at the Court Registry, the applicant brought the present action for the annulment of the Commission's decision limiting reimbursement of the removal expenses incurred by him to LFR 258 500 and for an order that the Commission pay the costs.

13 In support of his action, the applicant pleads, first, infringement of Article 9 of Annex VII to the Staff Regulations and, secondly, breach of the duty to have regard for the welfare of staff and of the principle of the protection of legitimate expectations.

4 Without lodging a defence on the substance of the case, the Commission raised an objection of inadmissibility which was lodged on 20 November 1991 at Court Registry.

5 The applicant lodged observations which were registered on 7 January 1992 at the Court Registry and in which he seeks the dismissal of the objection of inadmissibility.

Admissibility

6 Under Article 111 of the Rules of Procedure of the Court of First Instance, where an action is manifestly inadmissible, the Court of First Instance may, by reasoned order, and without taking further steps in the proceedings, give a decision on the action. In the present case the Court of First Instance considers that it has sufficient information from the documents in the case and that it is not necessary to take further steps in the proceedings.

7 In support of its objection of inadmissibility the defendant maintains that the complaint of 29 January 1990 is out of time, which means, in accordance with Article 91(2) of the Staff Regulations, that the action is inadmissible. It states in that respect that only the administration's decision of 14 August 1990 constitutes the act adversely affecting the applicant against which an action may be brought, since the administration's memorandum of 29 October 1990 against which the complaint was formally directed is only confirmatory of the decision of 14 August 1990 and in consequence no action can be brought against it. Accordingly, the complaint of 29 January 1991 was not lodged within the period of three months laid down in Article 90(2) of the Staff Regulations since the confirmatory memorandum of 29 October 1990 could not cause the period to be reopened. The defendant adds that the applicant himself stresses on several occasions in his application that the memorandum of 29 October 1990 'confirms' the decision of 14 August 1990. The defendant therefore concludes that the Court should declare the action inadmissible.

8 In his observations on the objection of inadmissibility the applicant contends that the decision of 14 August 1990 is vitiated by failure to state reasons or, at the very least, serious inadequacy of the reasons given, and was not notified to him in

sufficient time to enable him to call upon the removal firm selected by the Commission. That failure to state reasons in the decision of 14 August 1990 was remedied only by the dispatch of the memorandum of 29 October 1990 which, therefore, could not be presented as a simple confirmatory decision. The Commission, moreover, itself recognized that the memorandum of 14 August 1990 had been confirmed and that 'the reasons for it' had been stated in the memorandum sent on 29 October 1990 by Mr Llanso to the applicant. That memorandum of 29 October 1990 accordingly constitutes a fresh decision duly adopted confirming and regularizing the decision irregularly adopted on 14 August 1990 on the conclusion of a re-examination of the facts in the case. It follows that the period for submitting a complaint began to run only from the date on which the said memorandum of 29 October 1990 came to the knowledge of the applicant.

The applicant concludes that the complaint which was received by the Commission by telefax on 29 January 1991 was lodged within the time-limit. He therefore contends that the objection of inadmissibility should be dismissed.

19 The Court points out *in limine* that, as has been consistently held (see judgment in Case T-54/90 *Lacroix* v *Commission* [1991] ECR II-749) the time-limits laid down for submitting complaints and commencing actions are a matter of public policy and even where the administration has replied at the pre-litigation stage to the arguments put forward by the complainant on the substance of his claim, the Court of First Instance is not exempted from the obligation to check that the time-limits laid down by the Staff Regulations have been complied with.

20 In the present case the administration took care in its reply to the complaint to stress the belated nature of the complaint. It is therefore necessary to verify whether the application is in order from the point of view of compliance with the time-limits laid down in the Staff Regulations.

21 It is appropriate in that respect to recall to mind the general structure of the pre-litigation procedure provided for in Articles 90 and 91 of the Staff Regulations. Those articles make the admissibility of an action brought by an official against the institution to which he belongs subject to the requirement that the prior administrative procedure has been duly observed. Where an official wishes the appointing authority to take a decision relating to him the administrative

procedure must be initiated by a request on his part to the appointing authority to take that decision in accordance with Article 90(1). It is only against a decision rejecting that request, which in the absence of a reply from the administration is deemed to be made upon the expiry of a period of four months, that the person concerned may submit a complaint to the appointing authority within a fresh period of three months in accordance with Article 90(2). On the other hand, where there is already a decision adopted by the appointing authority and it constitutes an act adversely affecting the official, it is clear that a request within the meaning of Article 90(1) of the Staff Regulations would be pointless and the official must then use the complaints procedure provided for in Article 90(2) should he wish to request the annulment, amendment or withdrawal of the decision adversely affecting him.

2 It must be also be borne in mind that it has been consistently held that under Article 90(1) of the Staff Regulations any person may request the appointing authority to take a decision relating to him. However, that right does not allow an official to set aside the time-limits prescribed in Articles 90 and 91 of the Staff Regulations for submitting a complaint and bringing an action and to challenge, by means of such a request, a prior decision which had not been contested within the time-limit.

3 It must therefore be concluded that once the competent authority has adopted a decision relating to an official and adversely affecting him it is no longer open to him to initiate the pre-litigation procedure at the stage of the request and he must submit directly to the appointing authority a complaint against the act adversely affecting him, as required by Article 90(2) of the Staff Regulations.

4 In the present case there is no doubt that the original decision of 14 August 1990 constitutes an act adversely affecting an official, such an act being defined as one which directly and immediately affecting the legal position of the person concerned. It was in the memorandum of 14 August 1990 that the administration unambiguously adopted the contested decision to limit the amount of the reimbursement due to Mr Torre to LFR 258 500. It is therefore that act which directly and immediately affected his legal position. Furthermore, from the very outset the administration, in its exchange of correspondence with the applicant, left no doubt concerning the fact that it was the memorandum of 14 August 1990 which constituted the definitive decision of the appointing authority.

25 The decision of 29 October 1990 merely confirmed the decision of 14 August 1990 and cannot be regarded as a 'new decision' since it does not contain any new factor in relation to the legal or factual situation existing when the decision of 14 August 1990 was adopted; the administration even stated that the amount of LFR 258 500 was 'confirmed' as being the limit of the reimbursement. The fact that the decision of 14 August 1990 may be found wanting for the lack of any — or any adequate — statement of reasons is also irrelevant. At most, that fact would give the applicant a right of action under Article 25 of the Staff Regulations but it would not mean that the decision was non-existent.

26 It follows from the foregoing considerations that, following the decision of 14 August 1990 which came to the applicant's knowledge on 3 September 1990, he should have directly submitted a complaint under Article 90(2) of the Staff Regulations within the time-limit laid down in that provision instead of making, as he did, a request under Article 90(1) of the Staff Regulations.

27 On 24 September 1990 the applicant sent to the administration a memorandum which he described as a request under Article 90(1) of the Staff Regulations by which he contested the substance of the memorandum of 14 August 1990.

28 However, it is for the Court of First Instance to determine the precise legal nature of that memorandum, since the classification of a letter as a request or complaint is, according to the case-law (see the order of the Court of First Instance in Case T-14/91 *Weyrich* v *Commission* [1991] ECR II-235 and the judgment of the Court of First Instance Case T-1/90 *Perez Minguez Casariego* v *Commission* [1991] ECR II-143) a matter for the courts alone and not for the parties. The fact that the applicant described his memorandum of 24 September 1990 as a request is therefore irrelevant.

29 It should also be noted that it has been consistently held that a letter from an official which does not expressly request the withdrawal of the decision in question but is clearly intended to achieve an amicable settlement of his complaints

(judgment of the Court of Justice in Case 30/68 *Lacroix* v *Commission* [1970] ECR 301 and in Case 19/72 *Thomik* v *Commission* [1972] ECR 1155), or likewise a letter which clearly expresses the applicant's intention to challenge the decision which adversely affects him (see the judgment of the Court of Justice in Joined Cases 23 and 24/87 *Aldinger and Another* v *Parliament* [1988] ECR 4395 and the order of the Court of First Instance in *Weyrich* v *Commission*, cited above) constitutes a complaint.

30 In the present case it is clear from the very terms of the letter of 24 September 1990 that the applicant intended to obtain satisfaction with respect to his complaints and that he was challenging the decision of 14 August 1990 which adversely affected him. The letter of 24 September 1990 therefore constitutes a complaint within the meaning of Article 90(2) of the Staff Regulations and not merely a request within the meaning of Article 90(1) of the Staff Regulation, as the applicant maintains.

31 It follows from those considerations that the complaint submitted on 24 September 1990 against the decision of 14 August 1990, of which the applicant became aware on 3 September 1990, was not submitted out of time.

32 However, it also follows that the other letters which the applicant sent to the Commission, and in particular the letter of 29 January 1991 which he described as a 'complaint', cannot constitute either requests or complaints but must be regarded as purely reiterative of the complaint of 24 September 1990. They cannot therefore prolong the pre-litigation procedure (see the order of the Court of First Instance in *Weyrich* v *Commission*, cited above).

33 As has been stated, since the time-limits under the Staff Regulations are a matter of public policy, the Court finds itself obliged to consider of its own motion the admissibility of the action not only in relation to the period prescribed for submitting the complaint, but also in relation to the period prescribed for making the application to the Court, which was lodged in the present case on 23 September 1991. It is necessary, first of all, to consider the date of the Commission's reply to the complaint of 24 September 1990.

34 The Court considers that it is the memorandum of 29 October 1990 from the administration, signed by Mr Llanso and addressed to the applicant in reply to the memorandum of 24 September 1990, which constitutes a decision for the purposes of the second paragraph of Article 90(2) of the Staff Regulations. It must be held that Mr Llanso, as Principal Administrator in the Directorate-General for Personnel and Administration, was qualified to take such a decision, since it was Mr Llanso himself who signed the original decision of 14 August 1990 and the memorandum of 13 December 1990 from the administration describes that memorandum of 14 August 1990 as being an 'official decision of the appointing authority'. It follows that the period of three months for bringing an action expired on 29 January 1991.

35 Even assuming that the Court did not consider the memorandum of 29 October 1990 as constituting a decision of the appointing authority, an implied decision of rejection of the complaint came into being, pursuant to Article 90(2), *in fine*, of the Staff Regulations, on the expiry of a period of four months, namely on 24 January 1991. It follows that, in that hypothetical case, the period of three months for bringing an action expired on 24 April 1991.

36 In either case, therefore, the action brought on 23 September 1991 was out of time.

37 It should be added, moreover, that the letter sent on 11 June 1991 by the Commission to Mr Torre in reply to his memorandum of 29 January 1991, which he described as a complaint, is of no consequence. As has been consistently held, the express rejection of a complaint after the period for bringing an action against the implied rejection has expired and containing no new factor in relation to the legal or factual position obtaining at the time of the implied rejection, constitutes a purely confirmatory measure which is not capable of having an adverse effect (see the judgments of the Court of Justice in Case 58/69 *Elz* v *Commission* [1970] ECR 507, Case 79/70 *Müllers* v *ESC* [1971] ECR 689 and Case 23/80 *Grasselli* v *Commission* [1980] ECR 3709). In the present case, on 11 June 1991 the period of three months for bringing an action against the implied rejection on 24 January 1991 had expired and the letter of 11 June 1991 contained no new factor in relation to the situation obtaining at the time of the implied rejection. Accordingly, that letter has not the slightest legal effect on which the applicant may rely. In particular, it could not reopen the period for bringing an action.

38 It follows from all those considerations that the action must be dismissed as inadmissible.

Costs

39 Under 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 if they have been applied for in the successful party's pleadings. Nevertheless, under Article 88 of those Rules, in proceedings between the Communities and their servants the institutions are to bear their own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber)

hereby:

1. Dismisses the application as inadmissible;

2. Orders the parties to bear their own costs.

Luxembourg, 25 February 1992.

H. Jung
Registrar

R. García-Valdecasas
President