

JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber)
1 December 1994

Case T-54/92

Johann Schneider
v
Commission of the European Communities

(Officials – Staff report – Delay in drawing up the report – Application for annulment and damages)

Full text in German II - 887

Application for: annulment of the applicant's staff report for the period from 1987 to 1989 and for an order requiring the Commission to pay the applicant ECU 10 000 by way of compensation.

Decision: Application dismissed.

Abstract of the Judgment

The applicant is a scientific official (Grade A 5) at the Commission, assigned to the Joint Research Centre at Ispra.

On 31 July 1991, the applicant submitted a complaint about the delay in drawing up his staff report for the period from 1987 to 1989. His report was drawn up and signed by him, without comment or request for a referral to an appeal assessor, on 6 September 1991. No action was therefore taken on the complaint.

On 4 December 1991 the applicant submitted a second complaint concerning his staff report for the period from 1987 to 1989. That complaint was drawn up in two copies, one of which was sent to his immediate superior on 5 December 1991 and the other sent by mail to the General Secretariat of the Commission in Brussels where it was registered on 10 December 1991.

The applicant criticized the institution for having curtailed the reporting period by six months, restricting it to a period of 18 months ending on 31 December 1988, and for having been extremely tardy in drawing up the report, thereby jeopardizing his chances of promotion and placing him in a situation of legal uncertainty. In so far as that delay cannot be remedied, the applicant claims the sum of ECU 10 000 by way of compensation for non-material damage.

By decision notified to the applicant by letter of 28 April 1992, the appointing authority rejected that second complaint.

I -- The claim for the annulment of the staff report

1. Admissibility

(a) Time-limits for lodging complaints

The Commission, basing itself on internal rules requiring the complaint to be submitted in its original version to the appointing authority, goes on to argue that in this case the complaint is out of time since it was registered at its General Secretariat on 10 December 1991, that is, more than three months after signature of the staff report on 6 September 1991. The Court of First Instance rejects those

arguments, emphasizing that, according to Article 90(3) of the Staff Regulations, requests and complaints must be submitted through the immediate superior and that the institutions are not competent to derogate from an express rule in the Staff Regulations by means of an implementing provision or, *a fortiori*, by means of an administrative communication. In the present case, the immediate superior initialled the complaint on 5 December 1991. The period prescribed in Article 90(2) of the Staff Regulations was therefore observed (paragraphs 15 to 19).

(b) Exhaustion of the internal appeal procedure

The Court of First Instance notes that a staff report constitutes an act adversely affecting an official against which the official may either bring an action directly before the Court of First Instance or a complaint under Article 90(2) of the Staff Regulations (paragraph 21).

See: T-1/91 *Della Pietra v Commission* [1992] ECR II-2145, paras 23 and 24

Although normally it is desirable to exhaust the internal procedures provided for by the general implementing provisions enabling an official to request, within a time-limit of two weeks, referral to an appeal assessor, the Court of First Instance considers that those provisions cannot derogate from the abovementioned Staff Regulations allowing the official to bring an action before the Court of First Instance or to submit a complaint to the appointing authority against a staff report which he has signed without previous referral to the appeal assessor. Failure to make use of the internal appeal procedure does not therefore entail the inadmissibility of the action (paragraph 22).

2. Substance

(a) The plea in law alleging delay in drawing up the staff report

The Court of First Instance considers that, in the absence of exceptional circumstances, the delay in bringing to an end the reporting procedure cannot, of itself, affect the validity of the staff report or justify the annulment thereof. If a

staff report could be annulled solely on the ground that it was out of time it would become impossible to draw up a valid report after the expiry of a certain period and, secondly, the report intended to replace the annulled report could not, in any event, be any the less belated than the original report (paragraphs 26 and 27).

See: T-63/89 *Latham v Commission* [1991] ECR II-19, para. 15

(b) The plea in law alleging material errors and omissions in the staff report

So far as concerns the period covered by the staff report, the Court of First Instance considers that the applicant has not adduced any evidence that the reference period had been reduced by six months. The title of the staff report specifies a period of two years, which is not contradicted by any indication to the contrary. Moreover, the applicant has signed the report without adding his comments, which he could have done if he had considered it appropriate or necessary to do so (paragraph 34).

In any event, the Court of First Instance notes that, according to Article 43 of the Staff Regulations, officials are the subject of a periodical report made at least once every two years, which in itself does not preclude the drawing up of a report for a shorter period. Accordingly, the fact that a staff report only covers a period of 18 months is not such as to affect its validity (paragraph 35).

So far as concerns the failure to mention a specific task, the Court of First Instance states that, where an official considers that a factor such as the mention of a specific project by name is missing from his report, it is for him to add his own comments in that regard and, where appropriate, to have the matter referred to the appeal assessor (paragraph 38).

II – The claim for compensation

Admissibility

The Court of First Instance observes that the first sentence of Article 91(1) of the Staff Regulations governs the second, so that that provision confers unlimited jurisdiction on the Court of First Instance only where there is a dispute regarding the legality of an act adversely affecting an official (paragraph 49).

See: 32/68 *Grasselli v Commission* [1969] ECR 505, para. 10; T-20/92 *Moat v Commission* [1993] ECR II-799, para. 46

Moreover, according to Article 91(2) of the Staff Regulations, an appeal to the Court of First Instance lies only if the appointing authority has previously had a complaint submitted to it pursuant to Article 90(2) of the Staff Regulations within the period prescribed therein, and if that complaint has been rejected by an express or an implied decision. The complaint itself must be directed against an act adversely affecting the official (paragraph 50).

It follows that the pre-litigation procedure required by the Staff Regulations prior to an action for compensation differs according to whether or not the original circumstance complained of by the official constitutes an act adversely affecting him within the meaning of the Staff Regulations (paragraph 51).

If the official wishes to challenge an act adversely affecting him, he may submit a complaint to the appointing authority directly and, if it is rejected, bring an action before the Court of First Instance for the annulment of the act adversely affecting him, payment of compensation, or both (paragraph 52).

See: 9/75 *Meyer-Burckhardt v Commission* [1975] ECR 1171, paras 10 and 11; T- 84/91 *Meskens v Parliament* [1992] ECR II-2335, para. 42

On the other hand, if the circumstance complained of by the official does not constitute an act adversely affecting him within the meaning of the Staff Regulations, he can initiate the procedure only by submitting to the appointing authority a request under Article 90(1) of the Staff Regulations, which, if rejected, constitutes a decision adversely affecting him against which he may submit a complaint and which may be the subject of an action for annulment and/or an action for compensation (paragraph 53).

See: T-5/90 *Marcato v Commission* [1991] ECR II-731; T-64/91 *Marcato v Commission* [1992] ECR II-243, paras 32 to 34; T-72/91 *Moat v Commission* [1992] ECR II-1771, paras 40 and 41; *Della Pietra*, cited above, para. 34; T-50/92 *Fiorani v Parliament* [1993] ECR II-555, paras 40, 41, 45 and 46; T-17/90, T-28/91 and T-17/92 *Camara Alloisio and Others v Commission* [1993] ECR II-841, para. 45; T-27/92 *Camera-Lampitelli and Others v Commission* [1993] ECR II-873, para. 26; T-65/91 *White v Commission* [1994] ECR-SC II-23, para. 137

The Court of First Instance finds that in this case a distinction must be made between the applicant's claim for annulment and his claim for compensation. In the context of the former, the applicant seeks the annulment of an act adversely affecting him, namely his staff report. On the other hand, the claim for compensation concerns the failure by the administration to take action during the period preceding the aforementioned act. It follows that the non-material damage for which compensation is sought does not follow from an act adversely affecting an official within the meaning of the Staff Regulations, but arises from a service-related fault which is independent of such an act (paragraphs 58 and 59).

See: T-79/92 *Ditterich v Commission* [1994] ECR-SC II-907

In those circumstances, the administrative procedure preceding the bringing of an action, in so far as the latter includes a claim for compensation, should, in accordance with Articles 90 and 91 of the Staff Regulations, necessarily have comprised two stages, namely a request followed by a complaint (paragraph 60).

The Court of First Instance notes, furthermore, that the purpose of the pre-litigation administrative procedure is to permit an amicable settlement of disputes between the Community institutions and their officials or servants. Where the official seeks compensation for the non-material damage caused, in his opinion, by a delay in drawing up his staff report, the two-stage pre-litigation procedure encourages such an amicable settlement of disputes and facilitates the identification of the points which are actually at issue between the parties. The Court of First Instance is not unaware that such a rule means that, in certain circumstances, the official concerned must initiate two separate pre-litigation procedures which may lead to two separate actions, one based on a claim for annulment and the other based on a claim for compensation, but it considers that such an approach is required by the clear and strict wording of the Staff Regulations (paragraph 62).

Since in this case there has been no two-stage pre-litigation procedure, the claim for compensation must be dismissed as inadmissible (paragraph 63).

Operative part:

The application is dismissed.