Case T-29/91

Claudia Castelletti and Others
v
Commission of the European Communities

(Inadmissibility)

Summary of the Order

Officials — Actions — Action for damages brought without the pre-litigation procedure in accordance with the Staff Regulations — Inadmissibility
(Staff Regulations, Arts 90 and 91)

ORDER OF THE COURT OF FIRST INSTANCE (Third Chamber)
6 February 1992 *

In Case T-29/91,

C. Castelletti, Y. Demory-Thyssens, C. Eischen-Gadenne, B. Keller, G. Kreibich, G. Lambertz, L. Passera and A. Thielmans, officials of the Commission of the European Communities, represented by Marcel Slusny and Olivier-Marie Slusny,

* Language of the case: French.

of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Ernest Arendt, 4 Avenue Marie-Thérèse,

applicants,

v

Commission of the European Communities, represented by Sean van Raepenbusch, a member of its Legal Service, acting as Agent, with an address for service in Luxembourg at the office of Roberto Hayder, a representative of the Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for damages for material and non-material damage allegedly suffered by the applicants as a result of their non-admission to Competition COM/B/2/82 from 25 February 1982,

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

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

Registrar: H. Jung,

makes the following

Order

1 By application lodged at the Registry of the Court of First Instance on 30 April 1991, Claudia Castelletti, Yvonne Demory-Thyssens, Carmen Eischen-Gadenne, Bardel Keller, Gudrun Kreibich, Gerda Lambertz, Lucia Passera and Antonietta Thielemans, officials of the Commission of the European Communities, sought an order that the Commission pay each of them the sum of BFR 200 000 in respect of material damage and the sum of BFR 100 000 in resect of non-material damage, the whole by way of damages and subject to increase in the course of the proceedings.

The background to the dispute

2 By applications lodged at the Registry of the Court of Justice in December 1984, Vincenzo Sorani and ten other officials of the Commission, and Hermanus Adams and fifty-two other officials and agents, brought two actions seeking the annulment of the decision of the Selection Board for Internal Competition COM/B/2/82 that they should not be admitted to the tests for that competition (Cases 293/84 and 294/84). The notice of competition in question related to a reserve list of administrative, secretarial and technical assistants in career bracket Grades 5 and 4 of Category B.

3 In Case 293/84 *Sorani* v *Commission* [1986] ECR 967 and Case 294/84 *Adams* v *Commission* [1986] ECR 977, the Court annulled the decisions by which the Selection Board had refused to admit the applicants in those cases to the tests, on the ground that they had not had an opportunity to state their views on the opinions expressed on them to the Selection Board by their superiors. Following those judgments, in June 1986 the Selection Board invited the candidates concerned to appear before it so that they could reply to the questions which had previously been put to their superiors. By letter of 11 July 1986, the candidates were informed that the decision of June 1984 not to admit them to the tests had been confirmed.

4 Following complaints lodged by certain candidates against the decision of July 1986, the Selection Board invited those candidates to appear before it a second time, in order to give them an opportunity to state their views on the replies given by their superiors to the questions which the Board had put to them. By letter of 12 February 1987, the officials concerned were informed that the Selection Board did not consider that there were any grounds for altering its decision concerning them which had been communicated to them on 11 July 1986.

5 In Cases 100/87, 146/87 and 153/87 *Basch* v *Commission* [1989] ECR 447, the Court of Justice annulled the decision of the Selection Board in Competition COM/B/2/82 not to admit the applicants to the tests for that competition on the grounds that it did not contain an adequate statement of the reasons on which it was based and that the procedure followed by the Selection Board was irregular.

6 In that judgment, the Court held *inter alia*:

'However, when a selection board carries out such a review of applications, in particular in order to remedy a serious irregularity, it must do so with the required diligence and with particular care. In the present case the selection board relied on the notes and personal recollections of its members, which were liable to be incomplete and inaccurate, in order to reconstruct opinions expressed some three years earlier regarding a very large number of candidates. It is also apparent from the documents before the Court that a number of opinions thus reconstructed directly conflict with other documents, including, for example, periodic reports, concerning the manner in which certain candidates discharged their duties. By acting in that way the selection board committed a serious irregularity and therefore the contested decisions must be annulled.

It follows from the foregoing, without its being necessary to consider the other submissions and arguments put forward by the applicants, that the decision of the selection board for Competition COM/B/2/82 not to admit the applicants to the tests for that competition must be annulled on the grounds that it did not contain an adequate statement of the reasons on which it was based and that the procedure followed by the selection board was irregular.'

7 In compliance with this judgment, the Director of Personnel at the Commission decided to invite the Selection Board to resume its proceedings from the stage where they had been declared by the Court to be vitiated by irregularity.

8 By a memorandum of 26 June 1989, he indicated this to, among others, the applicants; the memorandum reads as follows:

'*Re*: Resumption of Competition COM/B/2/82 in compliance with the judgment of the Court of Justice of 28 February 1989 in Cases 100/87, 146/87 and 153/87 for the successful applicants in that case.

In order to comply with the judgment of the Court of Justice dated 28 February 1989, the appointing authority has decided to restart the proceedings of the

Selection Board for the internal competition for advancement from Category C to Category B for which you had applied, at the stage where the procedure followed by the Selection Board with regard to your application was held by the Court to be irregular.

For this purpose, the Selection Board is to be forthwith reconstituted with its original members, unless they are no longer eligible, and will resume its proceedings in compliance with the judgment of 28 February 1989.

Those candidates declared admissible to the tests will be notified by the usual administrative channels of the date of the tests . . . '

9 The Selection Board resumed its proceedings and moved on to the subsequent phase of admission to the competition.

10 Before that stage in the procedure was completed, Franz Josef Klein, President of the Union of European Civil Servants, as representative and in the name of the candidates for the tests, by memoranda of 18 September 1989 lodged complaints (Nos R/225/89 to 249/89) under Article 90(2) of the Staff Regulations for Officials of the European Communities against the Director of Personnel's memorandum of 26 June 1989. The complainants further requested to be admitted to the competition without further formality, and to be awarded damages to compensate them for damage suffered. On 20 December 1989, the Commission rejected those complaints by a reasoned decision, which was notified to the complainants by memorandum of 22 December 1989.

11 It is that decision with which action T-17/90, started on 9 April 1990, is concerned.

12 In that case, the applicants claim that the Court should:

1. declare null and void the decision of Mr Valsesia, Director of Personnel, of 26 June 1989;

2. declare that the applicants should be admitted to Competition COM/B/2/82 with no further formality;

3. order that those applicants appointed thereunder should retrospectively enjoy the same benefits as those candidates already appointed or promoted, with effect from 1982;

4. order the Commission to pay BFR 200 000, subject to increase in the course of the proceedings, by way of damages for material and non-material damage, because of the setback to the applicants' careers;

5. order the Commission to pay the costs.

13 By memorandum of 8 August 1990, the applicants in the present case were informed by the Selection Board that they had been admitted to the next stage of the competition. Between 31 October and 6 November 1990, the applicants lodged complaints, registered between 31 October and 7 November at the Secretariat-General of the Commission. They sought from the administration the 'retroactive measures necessary to restore equality between [the complainants and their] colleagues, which means that [they should] be considered to have been admitted to the next stage of the competition as from 1982; [their] careers should accordingly be adjusted'. Those complaints further sought damages for material and non-material damage. No express reply was made to the complaints.

14 Those are the circumstances in which the applicants started the present action on 30 April 1991.

Forms of order sought

15 The applicants claim that the Court should:

1. join the present action, the application in Case T-17/90, and those actions to which they refer;

2. order the Commission to pay each of them the sum of BFR 200 000, subject to increase in the course of the proceedings, by way of damages for material damage;

3. order the Commission to pay each of them the sum of BFR 100 000, subject to increase in the course of the proceedings, by way of damages for non-material damage;

4. order the Commission to pay interest at the rate of 8% on the damages, with effect from the complaints preceding the commencement of proceedings in Case T-17/90;

5. order the Commission to pay the costs.

16 The Commission contends that the Court should:

1. rule that the application is inadmissible;

2. make an appropriate order as to costs.

17 With regard to the plea of inadmissibility, the applicants contend that the Court should:

1. dismiss the defendant's plea of inadmissibility, or reserve the decision thereon for the final judgment;

2. order the joinder of Cases T-17/90 *Alloisio* v *Commission*, T-28/91 *Blieschies* v *Commission* and T-29/91 *Castelletti* v *Commission* on account of the connection between them.

Pleas in law and arguments of the parties regarding admissibility

18 The Commission's principal argument is that in so far as the subject-matter of the present action is wholly covered by that in T-17/90 and has the same legal basis, the action is inadmissible on the grounds of *lis pendens*. It refers in this connection to the judgments of the Court of Justice in Cases 58/72 and 75/72 *Perinciolo* v *Council* [1973] ECR 511 and Cases 45/70 and 49/70 *Bode* v *Commission* [1971] ECR 465, from which it deduces that the applicants have no interest in bringing these proceedings.

19 The Commission alleges, in the alternative, that the administrative procedure prior to this action was not properly followed and that the action should be dismissed, for this second reason, as inadmissible. In so far as it concerns claims for damages, the action should have been preceded by requests and complaints as provided for in Article 90 of the Staff Regulations. The present action, which — according to the Commission — simply reaffirms certain of the claims made in Case T-17/90, could therefore have been brought only against the rejection of a complaint lodged within three months following the decision of 22 December 1989, by which the Commission rejected the initial requests made in Complaints R/225/89 to R/249/89 of 18 September 1989. Since the present action was brought on 30 April 1991 and preceded by complaints lodged between 31 October and 6 November 1990, it is accordingly inadmissible.

20 The applicants argue that they do have a proper interest in bringing proceedings, since the defendant considered that their first action was premature inasmuch as it concerned a preparatory measure, and that they have the right to put forward their arguments again since acts in the nature of decisions have now replaced allegedly preparatory measures. As far as concerns the plea of *lis pendens*, that objection is

applicable only if there is already a judicial decision, even if that decision is given simultaneously with the decision on the issue of *lis pendens* in the second proceedings.

21 The applicants then allege that, since they have not even lodged their reply in Case T-17/90, the Court, which is not fully acquainted with their arguments in that case, is accordingly not at present in a position to give judgment. Furthermore, the applicants raise the question whether it does not rather follow from the observations submitted by the defendant that the cases should be joined on account of the connection between them.

22 In the alternative, the applicants maintain that they cannot formulate their contentions in a complaint in the same way as in an action. According to them, they can only request the appointing authority to correct their situation, and in particular to withdraw the disputed measure, but they cannot ask for damages since the appointing authority has no power to make such an award.

Pleas in law and arguments of the parties as to the substance

23 In support of their claim for compensation, the applicants maintain that their careers will be significantly set back, possibly by eight years and even more, in comparison with those of colleagues who from the initial scrutiny of the applications were admitted to the tests for the competition in question.

24 As far as concerns the material damage to them, they claim that they should be awarded a sum of BFR 200 000, as compensation for the fact that they did not obtain advancement to Category B or were unable to obtain a promotion in that category. As far as concerns non-material damage, they claim that they should be awarded a sum of BFR 100 000, as compensation for the fact that they have been waiting since 1982 for their case to be dealt with and that that did not happen until 1991, after they had had to suffer the anguish of four legal actions.

Legal assessment

25 When an action brought before the Court is manifestly inadmissible, the Court may, in accordance with Article 111 of its Rules of Procedure, by reasoned order give a decision on the action without taking further steps in the proceedings. In this case, the Court considers that it has sufficient information from the documents before it and it concludes that no further steps in the proceedings should be taken.

26 As to the plea of inadmissibility raised by the defendant as its main argument, namely the objection referred to by it as '*lis pendens*', it should be noted that since the proceedings in the action lodged at the Court Registry under number T-17/90 between the same parties have not yet finished, the Court should not, at the current stage of the procedure in this case, rule on the plea of inadmissibility in issue.

27 It should accordingly be considered whether the present action is rendered inadmissible by the plea raised in the alternative by the Commission.

28 The pre-litigation procedure laid down by Article 90 of the Staff Regulations is divided into two stages. Under Article 90(1), any person to whom the Staff Regulations apply may submit to the appointing authority a request that it take a decision relating to him. If there is an unfavourable reply or no decision is taken, such person may submit to the appointing authority a complaint against its express or implied decision, in accordance with the requirements of Article 90(2) of the Regulations. The complaints procedure is intended to enable the appointing authority to reconsider its decision in the light of any objections put forward by the complainant (see the judgment in Case 101/79 *Vecchioli* v *Commission* [1980] ECR 3069, at paragraph 31), and the whole of the pre-litigation procedure established by Article 90 is intended to permit and encourage the amicable settlement of differences which have arisen between officials and the administration (see the judgment in Case 142/85 *Schwiering* v *Court of Auditors* [1986] ECR 3177, at paragraph 11).

29 As far as concerns the admissibility of a claim for compensation, it is clear from the case-law of the Court of Justice, as analysed by the Court of First Instance (see the judgments of the Court of First Instance in Case T-27/90 *Latham* v *Commission* [1991] ECR II-35, at paragraph 38, and Case T-5/90 *Marcato* v *Commission* [1991] ECR II-731, at paragraph 49), that it is only where there is a direct link between an action for annulment and a claim for compensation that the latter is admissible as incidental to the action for annulment, without having to be preceded by a request from the party concerned inviting the appointing authority to grant compensation for the damage allegedly suffered and by a complaint in which the complainant disputes the validity of the implied or express rejection of his request.

30 However, when as in the present case the action solely seeks compensation for material and non-material damage allegedly caused by the fact that the applicants were not admitted to the tests for a competition until eight years had elapsed and after several legal actions, and that action is based not on a measure whose annulment is requested but on a whole series of wrongful acts and omissions by the administration, it is imperative that the administrative procedure preceding the commencement of the action was started by a request by the persons concerned requesting the appointing authority to compensate them for the damage.

31 In this context, the Court observes that neither the memorandum of 18 September 1989 lodged in the name of the applicants nor the complaints they submitted between 31 October 1990 and 6 November 1990 were preceded or followed within the required time limits by other steps taken vis-à-vis the administration, as required by Article 90 of the Staff Regulations.

32 Accordingly, even if the abovementioned complaints were to be construed as requests within the meaning of the Staff Regulations, it is common ground that the pre-litigation procedure was not carried out in two stages in accordance with Articles 90 and 91 of the Staff Regulations. It clearly follows that the action was not brought in compliance with the conditions laid down by the Staff Regulations and that it is thus manifestly inadmissible.

33 The action must, therefore, be dismissed, without its being necessary to rule in this case on the applicants' request that Cases T-17/90, T-28/91 and T-29/91 be joined.

Costs

34 In accordance with 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. However, under Article 88 of those Rules, in actions brought by Community servants the institutions are to bear their own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby orders:

1. The action is dismissed as inadmissible;

2. The parties shall bear their own costs.

Luxembourg, 6 February 1992.

H. Jung
Registrar

B. Vesterdorf
President