

ORDER OF THE COURT OF FIRST INSTANCE (Second Chamber)
25 October 1996

Case T-26/96

Orlando Lopes
v
Court of Justice of the European Communities

(Officials – Action for annulment – Act adversely affecting an official –
Preparatory act – Claim for compensation – Inadmissible)

Full text in French II - 1357

Application for:

annulment of a memorandum from the Head of the Portuguese Translation Division of the Court of Justice of 21 January 1994 and of a document headed 'Analysis of sample I' dated 29 June 1995, both of which were lodged by the defendant in reply to written questions from the Court of First Instance in Joined Cases T-547/93 and T-280/94 *Lopes v Court of Justice*; annulment of the decision of the Registrar of the Court of Justice communicated by a memorandum of 21 July 1995 not to grant the applicant's request of 7 July 1995 to put a stop to alleged abuse of powers or authority; annulment of the decision of the Complaints Committee of the Court of Justice of 22 January 1996 rejecting the complaint lodged on 3 October 1995 by the applicant; and compensation for the material and non-material damage which he considers he has suffered as a result of the conduct of servants of the Court.

Decision:

Application dismissed. Applicant ordered to pay the costs in their entirety.

Abstract of the Order

The applicant is a lawyer-linguist in Grade LA 6 in the Portuguese Translation Division of the defendant institution.

In reply to questions put by the Court of First Instance in Joined Cases T-547/93 and T-280/94 *Lopes v Court of Justice* (cases disjoined for the purposes of judgment; see the two judgments of the Court of First Instance in [1996] ECR-SC II-185 and II-239) the defendant lodged at the Registry on 29 June 1995 *inter alia* the following:

- a memorandum from the Head of the Portuguese Language Division to the Director of Translation dated 21 January 1994 concerning the procedure for filling the posts advertised in Vacancy Notices CJ 68/92 and CJ 82/93 ('the memorandum of 21 January 1994');
- a document headed 'Analysis of sample I', in which the defendant made a critical analysis of samples of the applicant's translations produced in support of its action ('the analysis of sample I').

On 7 July 1995 the applicant addressed to the Registrar of the Court of Justice a 'request under Article 90(1) of the Staff Regulations (...) seeking to have terminated the abuses of power or authority by the head of and the revisers in the Portuguese Translation Division'.

The Registrar of the Court of Justice replied by memorandum of 21 July 1995 that he could not accede to that request. He stated that according to the Director of Translation and the official replacing the Head of the Portuguese Translation Division in his absence the request by the reviser complained of by the applicant was common practice in the division, that the comments he made were prompted mainly by the applicant's failure to abide by the guidelines applicable in the division and the rules intended to ensure consistency between documents and in terminology

and that therefore it was not possible to regard the reviser's conduct as amounting to an abuse of power or authority. He also considered that the technical problems of translation mentioned by the applicant were matters to be resolved within the division.

On 3 October 1995 the applicant addressed a complaint to the appointing authority, registered under no Cont. 22/95-R, in which he requested:

- the annulment of that part of the memorandum of 21 July 1994 which contained the following comment: '[Mr Lopes] has not cooperated in the efforts made by the division to speed up publication of the Reports; his attitude tends to be negative';
- the annulment of the 'analysis of sample I';
- the annulment of the memorandum of 21 July 1995;
- damages with interest, amounting to not less than BFR 20 000 000 by way of compensation for the material and non-material damage allegedly caused by the conduct of his superiors.

The Complaints Committee of the Court of Justice stated in its decision of 22 January 1996 that:

- it manifestly had no jurisdiction to entertain the request for the annulment of the memorandum of 21 January 1994 and the analysis of sample I since those measures formed part of the case-file before the Court of First Instance in Joined Cases T-547/93 and T-280/94, which were still pending before it;
- the request for the annulment of the memorandum of 21 July 1995 was inadmissible because the memorandum addressed essentially matters concerning the revision of the translations made by the complainant, so that it did not produce binding legal effects such as to affect his interests and therefore did not constitute an act adversely affecting him;

- it rejected as unfounded the request for damages with interest on the ground that neither fault nor injury had been established.

Law

The jurisdiction of the Court of First Instance to entertain the action

The defendant institution raised an objection of *res judicata*, which applies where two actions are between the same parties, concern the same subject-matter and are based on the same grounds. The act whose annulment is sought is an essential element in defining the subject-matter of an action (paragraph 14).

See: 172/83 and 226/83 *Hoogovens Groep v Commission* [1985] ECR 2831, para. 9; 358/85 and 51/86 *France v Parliament* [1988] ECR 4821, para. 12; T-28/89 *Maindiaux and Others v ESC* [1990] ECR II-59, para. 23; T-162/94 *NMB France and Others v Commission* [1996] ECR II-427, paras 37 to 39

Since the ‘acts’ challenged in this action are undeniably not the same as those which were the subject of the claims for annulment in Cases T-547/93 and T-280/94, the Court of First Instance has jurisdiction to entertain this action (paragraphs 15 and 16).

Admissibility of the claims for annulment

Since the conditions of admissibility of an action are a matter of public policy the Court of First Instance may consider them of its own motion and such consideration is not restricted to the grounds of inadmissibility put forward by the parties. In particular it is for the Court alone, regardless of the arguments of the parties, to

determine whether, first, there was an act adversely affecting the official on which the initiation of the precontentious stage provided for in Article 90(2) of the Staff Regulations could be based, and, secondly, to determine the legal status to be attributed to the documents addressed by the official to his institution, a matter which depends exclusively on the Court's assessment and not on the will of the parties (paragraph 17).

See: T-130/89 *B v Commission* [1990] ECR II-761, paras 13 and 14; T-34/91 *Whitehead v Commission* [1992] ECR II-1723, para. 19; T-37/93 *Stagakis v Parliament* [1994] ECR-SC II-451, para. 17

The comments contained in the memorandum of 21 January 1994

For the purposes of Article 90(2) of the Staff Regulations only acts or measures which produce binding legal effects such as to affect the interests of an official by bringing about a distinct change in his legal position can be regarded as acts adversely affecting him. They must issue from the appointing authority and must contain a decision. Acts preparatory to a decision do not adversely affect officials and an applicant may rely on defects in acts prior to the decision and closely linked to it only in the context of an action challenging the decision adopted at the end of the procedure (paragraph 19).

See: 11/64 *Weighardt v Commission* [1965] ECR 365; 32/68 *Grasselli v Commission* [1969] ECR 505, paras 4 to 7; 78/87 and 220/87 *Santarelli v Commission* [1988] ECR 2699; 346/87 *Bossi v Commission* [1989] ECR 303, para. 23; T-64/89 *Automec v Commission* [1990] ECR II-367, para. 42; *Whitehead v Commission*, cited above, para. 21; T-50/92 *Fiorani v Parliament* [1993] ECR II-555; T-57/92 and T-75/92 *Yorck von Wartenburg v Parliament* [1993] ECR II-925; T-6/93 *Pérez Jiménez v Commission* [1994] ECR-SC II-497; T-586/93 *Kotsonis v ESC* [1995] ECR-SC II-203, para. 28; T-547/93 *Lopes v Court of Justice*, cited above, para. 55

The memorandum of 21 January 1994 contains a comparative assessment of the merits of the candidates prepared by staff in the defendant's administration division in order to assist the appointing authority in making its choice. A document of that kind, which is in no way a decision and whose sole purpose is to inform the appointing authority's choice in the context of a procedure for filling a particular post cannot be challenged otherwise than incidentally in the context of an action challenging the only act capable of annulment to which it may be attached, that is to say, the decision rejecting the applicant's candidature for the posts in question (paragraph 20).

See: T-108/92 *Caló v Commission* [1994] ECR-SC II-213, para. 13; *Pérez Jiménez v Commission*, cited above, paras 34 to 38; T-562/93 *Obst v Commission* [1995] ECR-SC II-737, paras 23 and 24

As regards the applicant's argument that the memorandum of 21 January 1994 must be assimilated to the staff report referred to in Article 43 of the Staff Regulations and therefore regarded as an act which may form the subject-matter of an action, although the Court held in *Küster v Parliament* that an action challenging a staff report was admissible, that decision was based expressly on the more or less significant role played by such reports each time the official is considered for promotion or takes part in a competition within the meaning of Article 29 of the Staff Regulations. That approach cannot be extended to cover documents which, like that at issue here, are solely intended to assist the administration in making a particular decision, to which it is therefore closely linked (paragraph 22).

See: 122/75 *Küster v Parliament* [1976] ECR 1685, para. 8

Even if the memorandum contained information neither placed in the applicant's personal file nor brought to his knowledge prior to the adoption of the decisions challenged in Case T-280/94, it had no decisive influence as regards the rejection of his application for the posts concerned. Consequently, the document was purely

a preparatory one which did not adversely affect the applicant for the purposes of Article 90(2) of the Staff Regulations (paragraph 25).

The analysis of sample I

The contested 'act', which is a document of a technical nature purporting to comment on a number of errors of translation or use of legal terminology made by the applicant and thereby to support the main reason for rejecting his various applications for promotion, namely his inability to translate normally without revision, was drawn up solely for the purposes of the defence in Cases T-547/93 and T-280/94. It was in any event excluded from the case-file by the judgment in Case T-280/94 – for reasons not germane to the claims advanced here by the applicant – and the Court of First Instance therefore took no account of it in its assessment (paragraph 27).

A document of that nature represents the normal exercise of the rights of the defence in the context of proceedings before the Court of First Instance and cannot, as a matter of principle, be classified either as an act adversely affecting the official for the purposes of Article 90(2) of the Staff Regulations, or as a report concerning the official's ability or conduct within the meaning of Article 26 of the Staff Regulations. The applicant's legal situation is in no way affected by such a document, which does not affect his rights under the Staff Regulations (paragraph 28).

The memorandum of 21 July 1995

Article 90(1) of the Staff Regulations provides that any official may submit to the appointing authority a request that it take a decision relating to him. Article 90(2) provides that any official may submit to the appointing authority a complaint against an act adversely affecting him either where the said authority has taken a decision

or where it has failed to adopt a measure prescribed by the Staff Regulations. The concept of an act adversely affecting a person thus covers both decisions and failure by the administration to adopt a measure expressly or impliedly prescribed by the Staff Regulations in order to safeguard the rights of officials (paragraph 31).

See: T-6/91 *Pfloeschner v Commission* [1992] ECR II-141

As regards the admissibility of the claims for the annulment of the memorandum of 21 July 1995, the Court finds that the applicant's 'request' of 7 July 1995 essentially concerned, in the first place, administrative matters relating to the organization and supervision of work within the division to which the applicant was assigned and, in the second place, linguistic matters connected with the appropriateness of the revision of his translations (paragraph 33).

The implementation within a translation division of internal instructions designed to ensure good performance and consistency in the language of the texts published in the Reports is not, in principle, liable to affect the material or financial situation of the officials concerned, or their position under the Staff Regulations. Consequently, the refusal of the appointing authority to intervene, at the request of an official, in the implementation of such instructions cannot be regarded, in the absence of special circumstances, as failure to adopt a measure required by the Staff Regulations in order to guarantee the rights of the officials. That is particularly so in view of the fundamental duty of loyalty and cooperation every official has *vis-à-vis* the authority to which he is subject and his superiors. That duty, of which Article 21 of the Staff Regulations is a specific expression, entails the obligation to abide by common departmental rules and guidelines, particularly those concerning administration and work supervision, subject to the provisions contained in the third paragraph of Article 21 of the Staff Regulations (paragraph 34).

See: 3/66 *Alfieri v Parliament* [1966] ECR 437, at p. 448; T-146/89 *Williams v Court of Auditors* [1991] ECR II-1293, para. 72; T-80/92 *Turner v Commission* [1993] ECR II-1465

The administrative authority has a wide discretion in determining the arrangements for the performance of the duties of officials and other servants in the interest of the Community civil servant. It follows that purely internal measures of organization, in particular those concerning administration and work supervision, cannot be the subject of an application to the Court as they do not affect the legal or material position of the official affected by such a measure (paragraph 35).

See: *Grasselli v Commission*, cited above; 129/75 *Hirschberg v Commission* [1976] ECR 1259; 66/83, 67/83, 68/83 and 136/83, 137/83, 138/83, 139/83 and 140/83 *Hattet and Others v Commission* [1985] ECR 2459; T-47/90 *Herremans v Commission* [1991] ECR II-467; T-69/92 *Seghers v Council* [1993] ECR II-651, para. 29

Since purely internal measures cannot be the subject of an application to the Court they also cannot form the subject-matter of a complaint under Article 90(2) of the Staff Regulations, or even a request under Article 90(1) thereof. In any event, the decision, whether express or implied, to reject such a request is not an act adversely affecting the official and cannot therefore be the subject of an application to the Court (paragraph 36).

As regards the 'request' for assistance made by the applicant, seeking to have terminated the abuse of powers or authority committed by his superiors which consist in particular in provocation and damage to his work, it should be noted that Article 24, first paragraph, of the Staff Regulations requires that where there are serious accusations as to the integrity of an official in carrying out his duties, the administration is to take all necessary steps to establish whether the accusations are justified, and where they are not, must refute them and do everything possible to restore the good name of the official concerned (paragraph 40).

See: 128/75 *Mr N. v Commission* [1976] ECR 1567, para. 10

Requests made by superiors to an official which seek to guarantee the proper functioning of a translation division and which consist in substance in the complaint that he has not abided by the general guidelines applicable to the division and the rules designed to ensure consistency between documents and in terminology cannot be regarded as serious accusations as to the integrity of a translator, still less as ‘defamatory’ or ‘attacks [to his person]’.

The applicant’s rights were in no way prejudiced by the conduct of the administration of which he complains, there being no obligation on the administration under the Staff Regulations to take any measure in the nature of a decision in reply to his ‘request’, and consequently its refusal to accede to it cannot be regarded as an act adversely affecting the official (paragraph 42).

In any event, the applicant’s so-called ‘request for assistance’ under the first paragraph of Article 24 of the Staff Regulations is the same as his request that the appointing authority intervene in matters of a purely administrative or technical nature. Consequently, it is subject to the same legal rules. In that regard, the way in which the author describes a letter or a note is in no way decisive for the purpose of the rules in the Staff Regulations governing the pre-contentious procedure, that description being purely a matter for the Court to determine (paragraph 43).

See: T-1/90 *Pérez-Múñez Casariego v Commission* [1991] ECR II-143; T-38/91 *Coussios v Commission* [1991] ECR II-763, para. 25; T-64/91 *Marcato v Commission* [1992] ECR II-243; T-115/92 *Hogan v Parliament* [1993] ECR II-895; T-112/94 *Moat v Commission* [1995] ECR-SC II-135, para. 24; *Kotzonis v ESC*, cited above

The decision rejecting complaint No Cont. 22/95-R

The applicant's complaint is directed against acts which do not adversely affect him. Pursuant to Article 90(2) of the Staff Regulations the complaint must be held inadmissible, and pursuant to Article 91 of the Staff Regulations claims directed against the decision rejecting the complaint are themselves inadmissible (paragraph 45).

Admissibility of the claims for compensation

Where there is a close link between an application for annulment and an action for compensation, the inadmissibility of the claim for annulment entails the admissibility of the claim for compensation (paragraph 46).

See: 4/67 *Muller (née Collignon) v Commission* [1967] ECR 365; *Bossi v Commission*, cited above, para. 31; T-27/90 *Latham v Commission* [1991] ECR II-35, paras 38 to 40; T-20/92 *Moat v Commission* [1993] ECR II-799, para. 46; T-82/91 *Latham v Commission* [1994] ECR-SC II-61, paras 34 to 36

Since the alleged damage was not the result of a measure the annulment of which is sought, but of faults and omissions allegedly committed by the administration, the precontentious procedure must commence with a request for the appointing authority to make good the damage and continue, if appropriate, with a complaint directed against the decision rejecting that request, failing which the action is inadmissible (paragraph 47).

See: T-29/91 *Castelletti and Others v Commission* [1992] ECR II-77; *Marcato v Commission*, cited above; T-17/90, T-28/91 and T-17/92 *Camara Alloisio and Others v Commission* [1993] ECR II-841, paras 45 to 47; T-27/92 *Camera-Lampitelli and Others v Commission* [1993] ECR II-873, paras 26 to 28

In this case, the claim for damages seeks compensation for the damage allegedly suffered by the applicant as a result of the measures against which his application for annulment is directed and is therefore closely linked to it. In any event, the ‘request’ made by the applicant to the appointing authority on 7 July 1995 contains no claim for compensation, and no request that the appointing authority make good the damage (paragraph 48).

Costs

Article 87(2) of the Rules of Procedure provides that the unsuccessful party shall be ordered to pay the costs if they have been asked for in the other party’s pleadings. Article 88 thereof provides that in proceedings between the Communities and their servants the institutions shall bear their own costs, without prejudice to the provisions of Article 87(3), second paragraph. The latter provision states that the Court of First Instance may order a party, even if successful, to pay costs which it considers that party to have unreasonably or vexatiously caused the opposite party to incur (paragraph 50).

Since this action seeks, first, to call in question anew documents which were already examined in detail by the Court of First Instance in Cases T-547/93 and T-280/94 and were judged not to have adversely affected the applicant and, secondly, sets out essentially the same complaints with regard to them, this action constitutes an abuse of procedure before the Court of First Instance and has unreasonably caused the defendant to incur costs (paragraph 53).

In the particular circumstances of this case the applicant is seeking to exploit the remedies afforded by the Staff Regulations solely in order to evade internal orders and instructions received from his superiors which he may not challenge, save where the third paragraph of Article 21 of the Staff Regulations applies (paragraph 54).

Finally, the claim for compensation seeks payment of the sum of BFR 20 000 000, which is manifestly excessive and out of all reasonable proportion to the particular circumstances of the case (paragraph 55).

Operative part:

The application is dismissed as inadmissible.

The applicant is ordered to pay the costs in their entirety.