ORDER OF THE COURT OF FIRST INSTANCE (Third Chamber)
11 May 1992 *

In Case T-34/91,

Edward P. Whitehead, residing in Brussels, represented by Jean-Noël Louis, 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 Sean van Raepenbusch, of the Legal Service, acting as Agent, with an address for service in Luxembourg at the office of Guido Berardis and later at the office of Roberto Hayder, Wagner Centre, Kirchberg,

defendant,

APPLICATION for the annulment of the Commission's decision of 24 July 1990 reassigning the applicant to Brussels and of the decision of 11 October 1990 deducting the sum of BFR 13 115 and applying, with effect from 1 October 1990, the weighting in force in Brussels,

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

composed of: B. Vesterdorf, President, C. Yeraris and J. Biancarelli, Judges,

Registrar: H. Jung,

makes the following

* Language of the case: French.

Order

Facts and procedure

1 Mr Whitehead, a British national, is an official in Grade A 4. He entered the service of the Commission of the European Communities in 1963 as a member of the temporary staff in connection with a Euratom research programme. By decision of 26 March 1965 he was appointed a scientific official and attached to the Directorate-General for Research and Training, Biological Department. He was appointed by decision of 16 December 1965. Since 1 July 1976 he has been attached to Directorate-General XII. He was previously attached to the Nuclear Safety Research Directorate and since September 1990 to the Scientific and Technological Policy Directorate. He was in turn attached to the Institut National Agronomique, Paris, and then from 1968 to 1973 to the International Institute for Genetics and Biophysics, Naples, and finally from 15 June 1973 to 31 August 1990 to the Institute for Biological Chemistry at the University of Rome in connection with the radio protection programme.

2 Since 1987 the budgetary authority has continually reduced the funds for that research programme, the staff of which was reduced from 71 in 1977 to 28 in 1991, which, according to the Commission, led to the following alternative: either to reassign the staff concerned to other scientific or administrative duties or to look with them for a solution enabling their employment to be terminated, such as termination of service or leave on personal grounds.

3 On 19 December 1989 Mr Tanzilli, Head of Division, informed the applicant in a memorandum that he would be reassigned to Brussels as from January 1990. Contrary to what was stated in that memorandum, however, the applicant was not assigned to Brussels as from January 1990. According to the Commission, the reassignment was delayed in order to take account of the personal difficulties which, the applicant alleged, reassignment to Brussels would cause him.

4 By memorandum of 24 July 1990 Mr Tanzilli informed the applicant of his reassignment to Brussels with effect from 1 September 1990 in the following terms:

'Dear Mr Whitehead,

Referring to the previous exchange of letters and to your recent telephone conversation with Mrs Larsen, I confirm your assignment to DG XII-H-1, Brussels, as from 1 September 1990. You will take up duties with Mr Bellemin's team.

Would you kindly confirm receipt of this letter as soon as possible.'

The applicant acknowledged receipt of the memorandum on 25 July 1990.

5 By decision of 25 September 1990 the Director-General of DG XII, in his capacity as appointing authority, declared the applicant to be reassigned to Brussels as from 1 September 1990. According to the applicant, he was not notified of that decision. According to the Commission, the decision was presented to the applicant on three occasions but he refused to acknowledge receipt.

6 The applicant took up his new duties in Brussels on 1 September 1990. On 11 October 1990 he sent the Head of the XII-B unit of the Directorate-General, with a copy to the Director-General, a memorandum in which, in particular, after referring to the aforementioned 'memoranda' from Mr Tanzilli dated 19 December 1989 and 24 July 1990, he referred to the professional and domestic difficulties caused by his reassignment from Rome to Brussels, complained of the management of his career by the Commission while stating that he considered himself to be still assigned to Rome, and finally requested a meeting in order to study the possibility of continuing his research work in Rome, Frascati or Ispra. Nothing came of that memorandum.

7 By memorandum from the Head of the Remuneration and Operating Appropriations Unit dated 11 October 1990 the applicant was informed of the decision to apply the Brussels weighting to his remuneration from October 1990 and to deduct BFR 13 115, representing an overpayment due to the application of the weighting in force in Rome, to his remuneration paid for October 1990.

8 By letter dated 31 December 1990 the applicant pointed out that there had been a deduction from his remuneration for December and he claimed to be unaware of the legal basis enabling the Commission to make such a deduction, for he had not been notified of the decision reassigning him to Brussels and his family still lived in Rome, the place of his main residence. Accordingly he asked for clarification on that point.

9 The Head of the Remunerations and Operating Appropriations Unit replied to that letter by a letter dated 4 February 1991 addressed to the applicant's home in Rome. That letter drew the applicant's attention to the fact that pursuant to Article 64 of the Staff Regulations an official's remuneration has to be weighted at a rate which takes account of the living conditions in the place of employment. It stated that since 1 September 1990 his place of employment had been fixed in Brussels and that

in consequence the weighting applicable to his remuneration was equal to 100 while the weighting applicable until then had been equal to 104.8. It added that the new weighting had been applied for the first time in October 1990. It followed that there had been an overpayment of BFR 13 115 as remuneration for October 1990.

10 The applicant states that he was unaware of that letter until an unspecified date on the occasion of one of his visits to Rome.

11 In those circumstances, the applicant brought the present action which was registered at the Registry of the Court of First Instance on 13 May 1991. By a document lodged on 19 September 1991 he expressly waived his right to lodge a reply.

Pleas in law and arguments of the parties

12 The applicant claims that the Court of First Instance should:

(i) annul the Commission's decision of 24 July 1990 reassigning the applicant to Brussels, inasmuch as it makes no provision for compensation for all the harm caused by that decision to the applicant;

(ii) annul the decision of 11 October 1990 deducting the sum of BFR 13 115 and applying, with effect from 1 October 1990, the weighting in force in Brussels;

(iii) order the Commission to pay the costs.

13 The Commission contends that the Court of First Instance should:

(i) dismiss the application as inadmissible or, at least, as unfounded;

(ii) make an appropriate order for costs.

Admissibility of the application

14 The applicant puts forward three pleas in law in support of his claims. He maintains that the contested decisions are vitiated for failure to state reasons, that the administrative authority was in breach of its duty to have regard for the welfare of staff and infringed Article 38(d) of the Staff Regulations and the principle of equal treatment of officials.

15 Under Article 111 of the Rules of Procedure, when the action is manifestly inadmissible, the Court of First Instance may, by reasoned order, without taking further steps in the proceedings, give a decision on the action. The Court of First Instance (Third Chamber) considers that in the present case it has sufficient information from the documents before it and that there is no need to open the oral procedure.

The admissibility of the claims directed against the memorandum of 24 July 1990 informing the applicant of his reassignment to Brussels from 1 September 1990

16 The applicant maintains that the act which adversely affects him is the decision to reassign him to Brussels. He was informed of that act by the aforementioned memorandum from Mr Tanzilli of 24 July 1990. That decision was challenged by memorandum of 11 October 1990. In the absence of a reply from the administrative authority to that memorandum, there was an implied rejection which the applicant could seek to have annulled.

17 The Commission, for its part, maintains that the application is inadmissible in so far as it is directed against the decision of 24 July 1990. That decision is only a measure implementing the decision of 19 December 1989 to reassign the applicant, contained in a previous memorandum from Mr Tanzilli, which was not open to any misunderstanding with regard to the reassignment which was to take place. That decision became definitive in the absence of any challenge within the time-limits prescribed for steps in the pre-litigation procedure and for the initiation of proceedings. The Commission states that the decision of 19 December 1989 to reassign the applicant to Brussels was adopted after a meeting between the applicant and the Director-General for General Directorate XII, who is also the appointing authority, under the Commission's decision of 11 May 1989 on the decentralization of certain powers relating to staff management in favour of directors-general, published in the Bulletin d'Information Administratives No 597 of 21 June 1989. Consequently, the applicant cannot challenge the decision of 19 December 1989 in an action directed against the measure adopted for its implementation. Inasmuch as they are directed against the decision of 24 July 1990 the claims in the application to the Court, which do not challenge the date on which the measure reassigning the applicant took effect but only the principle of that measure are thus inadmissible, since the decision, on that issue, is purely confirmatory of the decision of 19 December 1989 (judgments of the Court of Justice in Case 27/68 *Renckens* v *Commission* [1969] ECR 255 and Joined Cases 33/79 and 35/79 *Kuhner* v *Commission* [1980] ECR 1677; order of the Court of Justice in Case 372/87 *Progoulis* v *Commission* [1988] ECR 3091; and order of the Court of First Instance in Case T-14/91 *Weyrich* v *Commission* [1991] ECR II-235).

18 In view of the parties' arguments the Court of First Instance considers it necessary to point out that Articles 90 and 91 of the Staff Regulations make the admissibility of an action brought by an official against the institution to which he belongs conditional on the proper observance of the preliminary administrative procedure laid down thereunder (order of the Court of Justice in Case 16/86 *G. P.* v *Economic and Social Committee* [1987] ECR 2409 and the order of the Court of First Instance in the *Weyrich* v *Commission,* cited above). If the official wishes the appointing authority to take a decision relating to him, the administrative procedure must be opened by a request from that official to the authority to take the decision which he seeks, in accordance with Article 90(1) of the Staff Regulations. It is only against a decision rejecting that request, which, in the absence of a reply from the administration, is deemed to have been given after a period of four months, that the person concerned may, within a further period of three months, submit a complaint to the appointing authority in accordance with Article 90(2). On the other hand, where a decision has already been taken by the appointing authority and it adversely affects the official, it is clear that a request, within the

meaning of Article 90(1) of the Staff Regulations, would make no sense and that the official must then use the complaint procedure provided for in Article 90(2) if he intends to seek annulment, reversal or the withdrawal of the decision which adversely affects him (order of the Court of First Instance in *Weyrich* v *Commission*, above).

19 Those rules are mandatory and the parties may not waive them (judgment of the Court of Justice in Joined Cases 122/79 and 123/79 *Shiavo* v *Council* [1981] ECR 473). It is thus for the Court of First Instance alone, whatever the position adopted by the parties, to determine whether in the present case there is an act adversely affecting an official, which thus constitutes the starting point of the pre-litigation phase provided for in Article 90(2) of the Staff Regulations, and to determine the legal nature of the letters sent by the applicant to the Commission. As the Court of First Instance held in Case T-1/90 *Perez-Minguez Casariego* v *Commission* [1991] ECR II-143, the classification of the applicant's letter as a request or complaint is a matter for the Court alone and not in the discretion of the parties. In the light of those principles it is necessary to determine whether in the circumstances of the present case the appointing authority adopted in respect of the applicant a decision capable of adversely affecting him and, if so, whether he initiated against that decision the mandatory prior complaint procedure laid down in Articles 90(2) and 91 of the Staff Regulations. Furthermore, it is necessary to verify whether the time-limits prescribed by those provisions were complied with.

20 In the applicant's view the contested decision, against which he could validly make a complaint in accordance with the provisions of Articles 90(2) and 91 of the Staff Regulations, is constituted by the aforementioned memorandum from Mr Tanzilli of 24 July 1990. While maintaining that that measure is of a purely confirmatory nature, the Commission did not deny that it was in the nature of a decision.

21 As the Court of Justice has consistently held, only acts which are capable of directly and immediately affecting the applicant's legal situation and his position under the Staff Regulations can be regarded as adversely affecting him (see most recently, the judgments in Case 129/75 *Hirschberg* v *Commission* [1976] ECR

1259 and Case 204/85 *Stroghili* v *Court of Auditors* [1987] ECR 389, and the order in *Progoulis* v *Commission*, cited above). The fact that the measure in question emanates from the appointing authority is evidence, according to settled case-law, that it is likely to affect the employee's legal position (judgments of the Court in Case 17/78 *Deshormes* v *Commission* [1979] ECR 189 and Case 806/79 *Gerin* v *Commission* [1980] ECR 3515; and order of the Court in Case 48/79 *Ooms* v *Commission* [1979] ECR 3121). Furthermore, it is necessary to consider the actual contents of the measure in order to determine whether it is in the nature of a decision.

22 In the present case the Director-General of DG XII is the appointing authority by virtue of the Commission's abovementioned decision of 11 May 1989 on the decentralization of certain powers concerning staff management in favour of directors-general. Thus the memorandum signed on 24 July 1990 by Mr Tanzilli, the Head of Division, does not emanate from the appointing authority. Moreover, from the point of view of its contents the memorandum is in the nature of a simple letter informing the person concerned that a measure would be adopted reassigning him to Brussels with effect from 1 September 1990. That measure was in fact adopted on 25 September 1990; it was signed by the competent authority and was in the form of a genuine decision. The Court thus considers that only the measure of 25 September 1990 is in the nature of a decision adversely affecting the applicant and capable accordingly of being the subject of a complaint under the conditions laid down in Articles 90(2) and 91 of the Staff Regulations prior to the initiation of any proceedings before the Court. The Court points out that the claims in the application are in no way directed against that decision, against which in any event the applicant did not initiate the preliminary complaint procedure considered above. Accordingly, the claims in the application on that issue, which are directed against a measure preparatory to the decision adopted by the appointing authority on 25 September 1990, are not admissible.

23 In any event, even assuming, *quod non*, that the applicant's argument that the memorandum for purposes of information sent to him on 24 July 1990 must be regarded as a decision adversely affecting him were accepted, it would be necessary to point out that the claims in the application on that issue would be rejected for failure to comply with the pre-litigation procedure. The Court considers that the memorandum, mentioned above, sent by the applicant to his Director, with a copy to the Director-General, on 11 October 1990 cannot be regarded as constituting a complaint for the purpose of Articles 90 and 91 of the Staff Regulations. In order for an official's act to be regarded as constituting a complaint for the purposes of those

provisions it is necessary that, even without express reference to the said provisions, it should show sufficiently clearly the official's desire to obtain satisfaction on his complaints (judgments of the Court in Case 30/68 *Lacroix* v *Commission* [1970] ECR 301; Case 79/70 *Müllers* v *Economic and Social Committee* [1971] ECR 689 and Case 19/72 *Thomik* v *Commission* [1972] ECR 1155).

24 In the present case analysis of the memorandum of 11 October 1990 shows that it was a simple request for a hearing, made by the applicant, who wished to obtain information regarding his new position. In that respect, the Court points out in particular that the opening and concluding paragraphs of that request for a meeting with the Director are worded as follows:

'Urgent: Dr Tanzilli's notes of 19-12-89 and 24-7-90 to me (copies enclosed).

Dear Mr G.,

I am writing to you as director, DG XII-B to request an urgent meeting in order to clarify what appears to be an irregular situation arising as consequence of the above communications, as well as to discuss the underlying problems as illustrated below.

...

The meeting I am urgently requesting with you should therefore also deal with possibilities of me continuing research work in Rome or Frascati where the CCE has many research contracts, and in second place possibilities of development of scientific work at CCR Ispra.'

25 From the point of view of its content and objective that request of 11 October 1990 for information and a hearing was not in the nature of a complaint; nor did it have the formal characteristics of a complaint; it was, moreover, not addressed to the appointing authority through official channels, contrary to the provisions of Article 90(3) of the Staff Regulations. The Court also observes that the applicant does not expressly maintain that he had made a complaint. In particular, in his application he describes that request for a meeting, made to his superior, as 'memorandum' of 11 October 1990 and not as a complaint.

26 In addition, and in any event, if the memorandum of 11 October 1990 were to be considered, *quod non*, as constituting a request within the meaning of Article 90(1) of the Staff Regulations, it would have to be pointed out that that request was not followed by a complaint directed against the implied decision of rejection resulting from the silence maintained by the Commission for four months, and that accordingly the present application was not preceded by a proper pre-litigation procedure.

27 It follows from the foregoing that, without it being necessary for the Court to consider the plea of inadmissibility put forward by the Commission, the claims in the application for the annulment of the memorandum of 24 July 1990 are not admissible, since that memorandum is not in the nature of an act adversely affecting the applicant and furthermore that, in any event, the applicant did not, prior to bringing his action, make a genuine complaint under the conditions laid down in Articles 90 and 91 of the Staff Regulations.

Admissibility of the claims directed against the measure of 11 October 1990 applying the Brussels weighting to the applicant's remuneration

28 The memorandum sent to the applicant on 11 October 1990 by the Head of the Remuneration and Operating Appropriation Unit informed him that the Rome weighting had been wrongly applied to his salary for October 1990 and that in consequence there would be a deduction from the salary for December 1990 of BFR 13 115, representing the overpayment. The Court considers that such a measure, which alters the employee's financial situation, affects his legal situation and constitutes a decision adversely affecting him (judgment of the Court in Case 56/72 *Goeth* v *Commission* [1973] ECR 181).

29 The applicant maintains that that decision was challenged by a complaint of 31 December 1990, which was replied to by letter of 4 February 1991 of which he had knowledge at an uncertain date. The applicant may therefore bring an action for annulment against the said decision.

30 The Commission has not raised a plea in bar against that head of claim and has not denied that the applicant's memorandum of 31 December 1990, to which it replied on 4 February 1991, was a complaint within the meaning of Article 90(2) of the Staff Regulations.

31 As stated above, it is for the Court to consider of its own motion whether the second head of claim is admissible and to determine the legal nature of the applicant's

letter of 31 December 1990, which is a matter solely for the Court and is not within the parties' discretion.

32 As in the case of the applicant's memorandum of 11 October 1990, considered above, the Court points out that the applicant's memorandum of 31 December 1990, which was sent to the Head of the Remuneration and Operating Appropriations Unit with regard to the decision which the latter had adopted in respect to him on 11 October 1990, cannot be characterized as a complaint for the purposes of Articles 90 and 91 of the Staff Regulations since it does not show sufficiently clearly the applicant's desire to obtain satisfaction on the matters of which he complains. In that memorandum the applicant confines himself to mentioning that there had been a deduction from his remuneration for December 1990 and that since he had received no notification of a decision from the appointing authority stating that he was reassigned to Brussels, he considered himself to be still seconded to Rome where he had his main residence and his family lived. In conclusion, he asked the administrative authority for clarification about his position. The concluding paragraph of the memorandum is worded as follows:

'I would be grateful if you would kindly give me a clarification of this point.'

33 Such a request for clarification cannot, by reason of its content and form, be regarded as constituting a complaint within the meaning of Article 90(2) of the Staff Regulations. It is moreover clear from the Commission's reply of 4 February 1991 that it did not treat the applicant's memorandum as a complaint. Furthermore, that memorandum cannot be regarded as a request, since there had been a decision and since, as stated above (see paragraph 18), where the appointing authority has already adopted a decision, it is clear that a request within the meaning of Article 90(1) would make no sense and that the official must then use the complaint procedure provided for in Article 90(2) if he intends to seek the annulment, amendment or withdrawal of the act adversely affecting him.

34 Accordingly in the absence of a complaint at the pre-litigation stage, made under the conditions laid down in Article 90(2) to the administrative authority, the claim for the annulment of the decision of 11 October 1991 is also not admissible.

35 It follows from that that the action must be dismissed as manifestly inadmissible.

Costs

36 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. However, Article 88 of those Rules provides that in proceedings between the Communities and their 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 are ordered to bear their own costs.

Luxembourg, 11 May 1992.

H. Jung — B. Vesterdorf

Registrar — President