

JUDGMENT OF THE COURT OF FIRST INSTANCE (Second Chamber)
12 December 1996 *

In Case T-99/95,

Peter Esmond Stott, represented by **Kenneth Parker QC** and **Rhodri Thompson**,
Barrister, of the Bar of England and Wales, having an address for service in
Luxembourg at the Chambers of Messrs Elvinger and Hoss, 15 Côte d'Eich,

applicant,

v

Commission of the European Communities, represented by **Hans Gerald Cross-
land** and **Julian Currall**, of its Legal Service, acting as Agents, with an address for
service in Luxembourg at the office of **Carlos Gómez de la Cruz**, of its Legal Ser-
vice, Wagner Centre, Kirchberg,

defendant,

APPLICATION for annulment of the decision of 28 September 1994 by which
the Commission rejected the applicant's complaint against a decision of the Direc-
tor of JET of 13 June 1994 refusing to appoint him as a member of the Commis-
sion's temporary staff, and for reparation of the damage suffered as a result of that
decision,

* Language of the case: English.

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

composed of: H. Kirschner, President, C. W. Bellamy and A. Kalogeropoulos,
Judges,

Registrar: B. Pastor, Principal Administrator,

having regard to the written procedure and further to the hearing on 28 March
1996,

gives the following

Judgment

Legislative background

- 1 The Joint European Torus (JET), Joint Undertaking ('JET' or 'the Joint Undertaking') was established by Council Decision 78/471/Euratom of 30 May 1978 (OJ 1978 L 151, p. 10), adopted under Articles 46, 47 and 49 of the Treaty establishing the European Atomic Energy Community ('the EAEC Treaty'). Its duration was extended first until 31 December 1992 by Council Decision 88/447/Euratom of 25 July 1988 (OJ 1988 L 222, p. 4), then until 31 December 1996 by Council Decision 91/677/Euratom of 19 December 1991 (OJ 1991 L 375, p. 9) and finally until 31 December 1999 by Council Decision 96/305/Euratom of 7 May 1996 (OJ 1996

L 117, p. 9). Its aim is to construct, operate and exploit, as part of the Community Fusion Programme and for the benefit of the participants therein, a large torus facility of the Tokamak type and its auxiliary facilities ('the Project').

- 2 Under Article 1 of the Statutes of JET ('the Statutes'), annexed to Decision 78/471, the seat of JET is at Culham, in the United Kingdom, at the United Kingdom Atomic Energy Authority ('the UKAEA' or 'the host organization'). The members of the Joint Undertaking are at present the EAEC, the host organization (the UKAEA), the undertakings equivalent to the UKAEA in other EAEC Member States and the Swiss Confederation.

- 3 The organs of the Joint Undertaking are the JET Council and the Director of the Project (Article 3 of the Statutes). The JET Council, composed of representatives of the members of the Joint Undertaking, is responsible for the management of the Joint Undertaking and takes the basic decisions for implementing the Project (Article 4).

- 4 Article 8 of the Statutes concerns the Project Team. Under Article 8.1, it is composed of staff coming from the members of the Joint Undertaking as provided for in Article 8.3 (which provides that the members of the Joint Undertaking are to make qualified staff available to it) and of 'other personnel'. Recruitment of both categories of staff is governed by Article 8.4 and 8.5:
 - under Article 8.4, 'staff made available by the host organization shall remain in the employment of the host organization on the terms and conditions of service of that organization and be assigned by the latter to the Joint Undertaking'; and

- under Article 8.5, ‘unless decided otherwise in special cases in accordance with the procedures for the assignment and management of staff to be decided by the JET Council, staff made available by the members of the Joint Undertaking other than the host organization as well as other personnel shall be recruited by the Commission for temporary posts in accordance with the “conditions of employment of other servants of the European Communities” and assigned by the Commission to the Joint Undertaking’.

Under Article 8.8 of the Statutes, each member organization must undertake to re-employ the staff whom it placed at the disposal of the Project and who were recruited by the Commission for temporary posts, as soon as the work of such staff on the Project has been completed (the so-called ‘return ticket’ system).

- 5 Those provisions are supplemented by the ‘Supplementary Rules concerning the Assignment and Management of the Staff of the JET Joint Undertaking’ (‘the Supplementary Rules’) adopted by the JET Council under Article 8.5 of the Statutes.

Facts and procedure

- 6 The applicant is a United Kingdom national and a member of the UKAEA staff assigned to JET since 2 April 1979. He has been Head of JET Experimental Division 1 since 1981, an assignment extended most recently by decision of the JET Council of 17/18 June 1992 (see Annex A2.3 to the application).
- 7 On a number of occasions, the applicant sought to change his status from that of UKAEA employee assigned to JET to that of member of the temporary staff of the Community. In particular, he was one of the applicants in Joined Cases 271/83,

15/84, 36/84, 113/84, 158/84, 203/84 and 13/85 *Ainsworth and Others v Commission and Council* [1987] ECR 167, ('the *Ainsworth* judgment'). He is also one of the 206 signatories of Petition No 188/90 to the European Parliament, of 22 February 1990. On three occasions (in 1986, 1989 and 1992), he was placed on reserve lists for senior scientific posts within the Community and in 1989 was offered a post as Head of Division in the thermonuclear fusion programme within the Directorate-General for Science, Research and Development (DG XII), which he had to refuse for personal reasons.

- 8 By letter of 18 January 1993, the applicant requested the Director of JET to engage him as a member of the temporary staff of the Community. Since that request was left unanswered, the applicant submitted a complaint dated 12 August 1993 against its implied rejection. That complaint was rejected by decision of the Commission dated 14 January 1994, against which the applicant brought an action before this Court (Joined Cases T-177/94 and T-377/94 *Altmann and Others v Commission* [1996] ECR II-2041, 'the *Altmann* judgment').
- 9 By letter of 3 December 1993 (Annex A2.6 to the application), the applicant requested the Director of JET to make arrangements for his employment on the temporary staff of the Commission on the basis of a 'return ticket' issued to him by the Swedish member of JET, the Swedish Natural Science Research Council, in the form of an offer of re-employment made on 7 October 1993 by Professor J. R. Drake on behalf of the Swedish Royal Institute of Technology ('the RIT') (Annex A2.4 to the application). In the same letter, the applicant pointed out that, several months previously, the Director of JET had drawn his attention to the fact that he would be eligible for a Euratom post if he obtained a 'return ticket' from one of the members of JET.

- 10 The Director of JET replied to the applicant by letter of 11 January 1994, which reads as follows (Annex A2.7 to the application):

‘I acknowledge receipt of your letter of 3 December 1993, requesting that you be transferred to a JET Euratom post.

When we discussed your possible eligibility for a Euratom appointment at JET some time ago, I pointed out that one of the requirements is that you should have a valid “return ticket” from an Association other than the AEA. The letter from Drake to you dated 7 October 1993 (which you copied to me) does not constitute a guarantee of re-employment.’

- 11 By letter of 16 May 1994 (Annex A2.9 to the application), the applicant forwarded to the Director of JET a further letter from the RIT, dated 2 May 1994 (Annex A2.8 to the application), which, he maintained, constituted the guarantee of re-employment required in the letter of 11 January 1994, since it was couched in similar terms to those of many other ‘return tickets’ accepted by JET in the past. At the same time, he reiterated his request for arrangements to be made with a view to his recruitment to the Euratom temporary staff and specified that his intention was to resign from the post he held with the UKAEA after receiving a satisfactory offer from the Commission but before taking up employment with it.
- 12 By letter of 13 June 1994 (Annex A2.10 to the application), the Director of JET replied to the applicant in the following terms:

‘As the Commission is currently scrutinising the recruitment of temporary agents for assignment to JET posts in the light of budgetary difficulties and in the context of JET ending on 31 December 1996, I regret to inform you that I am not in a position at present to proceed further with your request.’

- 13 By letter sent to the Secretary-General of the Commission on 7 September 1994 (Annex A2.11 to the application), the applicant submitted a complaint, registered on 13 September 1994 under No R-654/94 (Annex A2.1 to the application), pursuant to Article 90 of the Staff Regulations of Officials of the European Communities ('the Staff Regulations') and Article 73 of the Conditions of Employment of Other Servants of the European Communities ('the Conditions of Employment'), against the decision refusing to appoint him contained in the letter of the Director of JET of 13 June 1994.
- 14 In that complaint the applicant argued, *inter alia* (see Annexes A2.13 to A2.19 to the application), that the reasons for the refusal of his request were vague and inadequate, particularly in view of the fact that extension of JET until 1999 had been openly discussed for at least a year and had been endorsed by the JET Council and that a further extension beyond 1999 was a strong possibility. He further argued that the rejection of his request was contrary to the Statutes and the Supplementary Rules and to various statements of the Commission and the UKAEA. The applicant therefore called upon the appointing authority to engage him as a member of the temporary staff of the Community in accordance with Article 8.5 of the Statutes, on the same terms as other JET staff appointed under Article 8.5, to make that appointment promptly and to compensate him for the loss he had suffered.
- 15 The Commission rejected that complaint by decision of 21 December 1994, notified to the applicant by letter dated 28 December 1994, which he signed in acknowledgment of receipt on 11 January 1995 (Annex 3 to the application). As regards the substance of the complaint, the Commission stated, *inter alia*, that:
- the grounds for the rejection of the applicant's request given by the Director of JET in his letter of 13 June 1994 were clear, unequivocal and adequate;
 - by deciding not to proceed with the recruitment of temporary staff in the present context, for the reasons set out in the Director of JET's letter, the Commission had remained within the limits of its discretionary power, had

acted in the interests of the service and had been guilty neither of an error of assessment nor of a misuse of power, the complainant having, moreover, provided no evidence that the manner in which that discretionary power was exercised by the Director in this case was in any way unlawful.

- 16 In the same decision, the Commission added a further ground to those given by the Director of JET in his decision of 13 June 1994: it argued that Dr Stott's request and complaint amounted to a request that JET exercise its powers of discretion in respect of recruitment by creating a vacant post with a profile corresponding to that of the Head of Experimental Division 1, or similar, then notifying its staff of the vacancy, as required by Section 5.2 of the Supplementary Rules, and finally eliminating all other candidates for that post so that Dr Stott could be 'appointed' to it once he had resigned from the UKAEA. The Commission considered that such a procedure would clearly be contrary to the interests of the service and would be flawed in both form and substance.
- 17 By application lodged at the Registry of the Court of First Instance on 7 April 1995, the applicant accordingly brought the present action.
- 18 Upon hearing the report of the Judge-Rapporteur, the Court (Second Chamber) decided to open the oral procedure and, by letter of 12 December 1995, requested the Commission to answer certain questions, which it answered by letter registered at the Court on 15 February 1996. The Court also requested the applicant to appear in person.
- 19 The parties presented oral argument and answered the questions put to them orally by the Court at the public hearing on 28 March 1996.

Forms of order sought

20 The applicant claims that the Court should:

- (1) annul the Commission's decision of 28 December 1994 addressed to him;
- (2) order the Commission to instruct the Director of the JET Joint Undertaking to take the steps necessary to enable him to become a member of the temporary staff of the Commission in accordance with Article 8.5 of the Statutes without requiring him first to vacate his current post at JET or to apply for any other post at JET;
- (3) order the Commission to pay him compensation in relation to the difference in his terms and conditions of employment resulting from the failure of the Director of JET to act on the letter sent to him by the applicant on 16 May 1994; and
- (4) order the Commission to pay the costs.

21 The defendant contends that the Court should:

- dismiss the application as unfounded in its entirety; and
- make an appropriate order as to costs.

Admissibility

- 22 The admissibility of an action is an issue of public policy which may be raised by the Court of its own motion; its review is not confined to objections of inadmissibility raised by the parties (Case 294/83 *Les Verts v Parliament* [1986] ECR 1339, at p. 1364; Case T-130/89 *B v Commission* [1990] ECR II-761, paragraphs 13 and 14).
- 23 In the present case, since the applicant is also one of the applicants in the *Altmann* case, the Court must of its own motion consider whether the application is inadmissible by reason of *lis pendens* (Joined Cases 45/70 and 49/70 *Bode v Commission* [1971] ECR 465; Joined Cases 58/72 and 75/72 *Perinciolo v Council* [1973] ECR 511; and Joined Cases 172/83 and 226/83 *Hoogovens Groep v Commission* [1985] ECR 2831). It must also of its own motion consider whether this application has not become devoid of purpose as a result of the annulment by the judgment delivered today in the *Altmann* case of the Commission's decision of 14 January 1994 not to recruit the applicant to a post on the temporary staff of the Community, in which case there would be no need to proceed to judgment.
- 24 As regards the question of *lis pendens*, the present application seeks the annulment of the Commission's decision of 28 December 1994 not to recruit the applicant to a post on the temporary staff of the Community on the basis of a 'return ticket' issued by the Swedish member of the JET Council, whereas the application in the *Altmann* case sought the annulment of the Commission's decision of 14 January 1994 not to recruit the applicants to posts on the temporary staff of the Community as 'other personnel' within the meaning of Article 8.5 of the Statutes. It is clear, moreover, from the pleadings lodged by the parties in the two cases that the pleas in law on which they rely in support of their respective applications are

different. Since the two actions seek the annulment of different measures adopted on different legal bases and raise different pleas in law, there can be no objection on the ground of *lis pendens* (see, *a contrario*, Joined Cases 358/85 and 51/86 *France v Parliament* [1988] ECR 4821, paragraph 12).

- 25 That finding is not invalidated by the fact that the pleas in law and arguments raised by the applicant in *Altmann* contradict, at least to a certain extent, those which he puts forward in support of the present application, inasmuch as in *Altmann* he raises an alternative plea of illegality as regards Article 8.4 and 8.5 of the JET Statutes, whereas in the present case he relies on Article 8.5 in his favour to establish that the contested decision is unlawful.
- 26 In the present case, as noted above, the applicant seeks to be recruited by the Commission to a post on the temporary staff of the Community not as 'other personnel' within the meaning of Article 8.5 of the Statutes but as 'staff made available by the Members of the Joint Undertaking other than the host organization' under the same provision. Nor does he in any way plead the illegality of the JET Statutes but on the contrary maintains that if they are properly applied the Commission should accede to his request. It must be specified in that regard that this Court's finding in the *Altmann* judgment, made in response to the applicants' claims, that, to the extent indicated in paragraphs 131 and 141 of that judgment, the provisions of Article 8.4 and 8.5 of the Statutes are inapplicable cannot preclude Dr Stott from bringing an action for the annulment of a subsequent individual decision without again raising an objection of illegality under Article 156 of the EAEC Treaty.
- 27 The present application is therefore admissible.

The claim for annulment

The subject-matter of the claim for annulment

- 28 The form of order sought by the applicant, as it stands, seeks the annulment only of the Commission's decision of 28 December 1994 rejecting his complaint No R-654/94, and not of the decision of the Director of JET of 13 June 1994, against which that complaint was lodged.
- 29 It has consistently been held, however, that an action before the Court, even if formally directed against the rejection of an official complaint, has the effect of bringing before the Court the decision adversely affecting the applicant against which the complaint was submitted (Case 293/87 *Vainker v Parliament* [1989] ECR 23, Case 224/87 *Koutchoumoff v Commission* [1989] ECR 99, Case 346/87 *Bossi v Commission* [1989] ECR 303 and Case T-33/91 *Williams v Court of Auditors* [1992] ECR II-2499).
- 30 The present action must therefore be deemed to be directed also against the decision of the Director of JET of 13 June 1994.

Substance

- 31 In support of his claim for annulment the applicant puts forward, in substance, four pleas in law, alleging: (a) breach of the duty to have regard for his interests; (b) manifest error of appreciation; (c) abuse or misuse of power; and (d) infringement of Article 8 of the Statutes and of the Supplementary Rules.

- 32 The first three of those pleas can come into play only if the fourth plea is also upheld: if, as the Commission submits in response to that plea, the Statutes and the Supplementary Rules implementing them preclude the change of status sought by the applicant, then the administration had no discretion and was obliged to act as it did. In that event, the applicant would have no legitimate interest in seeking to have the contested decision annulled, since such annulment could only give rise to another decision identical in substance to the decision annulled (Case 117/81 *Geist v Commission* [1983] ECR 2191, paragraph 7, Case T-50/91 *De Persio v Commission* [1992] ECR II-2365, paragraphs 10 and 24, and Case T-43/90 *Díaz García v Parliament* [1992] ECR II-2619, paragraph 54).
- 33 It is therefore appropriate to consider the fourth plea in law first.

The fourth plea — infringement of the Statutes and of the Supplementary Rules

Arguments of the parties

- 34 The applicant refers to the arguments between the parties in the *Altmann* case concerning the 'resign first' rule, setting forth its origins, initial scope and successive embodiments, from its introduction in May 1987 to its reinterpretation by the JET Council in July 1994 following the 'Note of Understanding' between the Commission and the Parliament (see paragraph 49 et seq. below). He claims that the rule has no legitimate or rational justification in law or fact and that its implementation has no other purpose than to prevent those in his position from changing their employer, moving from a relationship with the UKAEA to a relationship with the Community, by compelling them to make themselves redundant before applying for a temporary Community post at JET. It is a deliberate policy implemented

since 1987 by the Director of JET and the JET Council. In that regard, the applicant's complaints in the present proceedings cannot be divorced from those of the applicants in the *Altmann* case, who refer specifically to Dr Stott's situation in support of their allegations.

- 35 More specifically, he maintains that the only practical result of the Commission's approach, as embodied in the new reasoning put forward in the decision of 28 December 1994 to justify the rejection of his request, is to maintain the effect of the 'resign first' rule even after it has been officially abandoned. If that approach were correct, its effect would be that a UKAEA employee assigned to JET could not change employers without his own post being made the subject of a competition and thus without running the risk of losing his present post. He points out that 'rules' of that type have been introduced on various occasions and justified on various grounds since the judgment in *Ainsworth*. He also stresses that those 'rules' have been reworded or reinterpreted at the Commission's own request, after having been presented by the Commission as imposed by the Statutes. The applicant considers that the new principles set out in the contested decision are equally spurious and have been introduced as a replacement for the 'resign first' rule simply to raise another hurdle now that he has satisfied the requirement of a 'return ticket'.
- 36 In the applicant's submission, the Commission's reference to Section 5.2 of the Supplementary Rules to justify its position depends on acceptance that a change of employer is impossible without the creation of a vacancy within JET. He considers that that would only be the case if he were required to resign from JET before applying for a change of employer, as was indeed the position under the 'resign first' rule previously in force. Since that rule no longer applies, the applicant concludes that a person in his position may seek to change employers without thereby creating a vacancy, so that Section 5.2 of the Supplementary Rules no longer applies.

- 37 The applicant goes on to state that the recruitment procedure for a JET post comprises two stages: first, appointment to the post in question following an open competition, then employment either by the Commission on its temporary staff or by the UKAEA. The effect of the Commission's interpretation would be that Dr Stott, whose performance as Head of Experimental Division 1 is in its view entirely satisfactory, would have to repeat the first stage and take part in an open competition which he had already taken and passed in 1981, simply because he wished to reopen the second stage in the procedure. In the applicant's view, such an interpretation is not justified by any provision either of the Statutes or of the Supplementary Rules.
- 38 In its defence, the Commission expressly refrains from making any comment on the applicant's general allegations that since 1987 the recruitment policies implemented at JET have deliberately sought to prevent staff from taking advantage of the ruling in *Ainsworth* and that rules have been adopted in order to prevent staff from transferring from UKAEA employment to the temporary staff of the Commission. In its submission, those allegations and any discrimination which the applicant claims to have suffered are not relevant to the present case, where the only issue is the annulment of the Commission's decision of 28 December 1994 and the consequences flowing therefrom.
- 39 In the present case, the Commission points out that, whilst there is nothing in Article 8 of the Statutes to expressly and unequivocally prevent the change in status sought by the applicant, nor do the Statutes make any provision whatever for such a change. The general thrust of the Statutes, however, taken together with their wording, leads to the conclusion that such a change of status is not possible other than by the procedure described in the contested decision.
- 40 Article 8 of the Statutes, it submits, contemplates only two possibilities: staff are made available to JET either by the UKAEA (remaining in its employment during the Project and afterwards) or by some other member (in which case they become members of the EAEC's temporary staff during the Project and return to that

member on termination of the Project). In that regard, the Commission points out that in the present case the applicant has a contract of employment with the UKAEA, which has made him available to work on the JET Project. It also lays emphasis on the fact that he remains in the UKAEA's employment, referring to Sections 4.5, 5.5, 5.10, 7.2, 8.7, 8.10, 11.5, 12.1 and 13.5 of the Supplementary Rules.

- 41 The Commission also refers to Section 9.1 of the Supplementary Rules, which provides: 'Individuals shall cease to be members of the staff of the Joint Undertaking in the following circumstances: — [...] ii) completion of the period of assignment agreed between the Director, the employer and, where appropriate, the parent organization; iii) termination of the period of assignment before its agreed completion date, at the request either of the Director, the parent organization or the individual concerned; iv) termination of employment for any other reason provided for in the terms or conditions of service of either of the employers'. If a member of staff made available by the UKAEA wishes to terminate his contract with that authority, it points out, such resignation will be governed by Section 9 of the Supplementary Rules and will also mean that the JET post in question falls vacant.
- 42 The Commission goes on to state that if a person applies for a post at JET on the basis of being made available by a member other than the UKAEA with a 'return ticket' from that member, he must respond to a vacancy notice and may be appointed only after undergoing the selection procedure set out in Section 5 of the Supplementary Rules.
- 43 In the Commission's submission, there can sometimes be an overlap between those procedures, for example in the following situation: if a vacancy is advertised within JET, a staff member made available by the UKAEA could seek to be selected on the basis of a 'return ticket' and conduct the negotiations regarding the termination of his contract with the UKAEA, the ending of his assignment to JET by the UKAEA and the commencement of the period for which he is to be made

available by a member other than the UKAEA (together with his appointment to the temporary staff of the Community) so that the expiry of his contract with the UKAEA coincides with the beginning of his new status. That process, however, presupposes the existence of two distinct posts: the JET post for which he was made available by the UKAEA and the JET post for which he is made available by some other member which has provided a 'return ticket'.

- 44 If, on the other hand, the Commission states, a UKAEA employee assigned to JET seeks to be made available by some other member for the post he is occupying, that is to say if he wishes to carry on with the same work and in the same post but with a different employer, the post occupied under the aegis of the UKAEA must first be vacated in order for it to be advertised as a vacant post and to be filled by selection from a number of candidates which would include that employee.
- 45 The Commission considers that such a procedure is the only one available under the Statutes and the Supplementary Rules where a UKAEA employee seeks a change in status whilst retaining the same post, which is precisely the situation of the applicant. That interpretation, moreover, is consistent with the reasoning of the Court of Justice in paragraphs 34 to 38 of *Ainsworth*, to the effect that the special rules applying to UKAEA employees, as distinct from those applying to non-UKAEA employees, were objectively justified in the light of the UKAEA's very special position as JET's host organization.

Findings of the Court

- 46 In substance, the applicant's argument is that, once a staff member made available to JET by the UKAEA succeeds in obtaining a 'return ticket' from a member of JET other than the UKAEA, he meets all the requirements entitling him to seek

recruitment by the Commission to a post on the Community's temporary staff as 'staff made available by the Members of the Joint Undertaking other than the host organization' under Article 8.5 of the Statutes, provided that he resigns at the same time from the UKAEA.

- 47 The Commission has neither denied nor admitted, in its written pleadings, that the letter from the RIT of 2 May 1994 constitutes a valid 'return ticket' for the purposes of Article 8.8 of the Statutes, and that question is neither dealt with in the contested decision nor is it an issue in the present proceedings. The Commission considers, however, that a 'return ticket' issued by a member of JET other than the UKAEA may suffice to meet the requirements for a person to be made available by that member. In its answers to the written questions from the Court in the *Altmann* case, moreover, it expressly maintained that Article 8 of the Statutes did not require staff 'made available' by a member to be already employed by that member but merely that the latter 'undertake to re-employ' staff as laid down in Article 8.8. It is also common ground that many members of the JET Team are regarded as being 'made available' by a member of JET although they have no present employment relationship with that member but merely a promise of future employment (see paragraph 83 of the judgment in *Altmann*).
- 48 The Commission maintains, however, that it is in any event impossible to accede to the applicant's specific request without infringing the Statutes and the Supplementary Rules. It appears from the Commission's arguments, as clarified during the proceedings both in the present case and in the *Altmann* case, that it interprets Article 8.4 of the Statutes generally as requiring UKAEA staff made available to JET to remain in the employment of the UKAEA for the duration of that assignment, failing which they will lose the posts they hold at JET, even if they can find another member organization willing to make them available to JET and to issue them with a 'return ticket' for that purpose.
- 49 The Commission's position, based principally on Article 8 of the Statutes and Section 9.1 of the Supplementary Rules, is that a change of employer of the kind sought by the applicant is not possible unless he first resigns from the UKAEA,

with the automatic result that the post he holds at JET will fall vacant. The corollary of that view is that it is not possible to change employers whilst still retaining the same post with JET: that post necessarily falls vacant on termination of the contractual relationship with the previous employer. The applicant would then, if he wished to be recruited to the temporary staff of the Community, have to apply afresh for the post which had thus fallen vacant or for another vacant post, for which he might have to compete with other candidates.

- 50 That position is expressed for the first time in point 17.4 of the 'Annual Report on Personnel Matters 1986/87' (Annex A8.6 to the application) drafted for the JET Executive Committee meeting of 14 and 15 May 1987 (four months after the *Ainsworth* judgment):

'Staff in the JET Team who wish to change employer within the meaning of the Supplementary Rules, Article 1.1, must in the first instance resign and in accordance with the JET Statutes leave the Project. They may then re-apply to the Project and be considered for selection in the normal way.'

- 51 It is explained in greater detail in a draft document prepared for the meeting of the JET Council of 6 and 7 July 1994, produced in Annex 9 to the application. Although the Commission has submitted that the applicant is wrong to rely on a draft which, it states, was at no stage adopted as a definitive document or decision, it has not challenged either the authenticity or the tenor of the document or the fact that it was drawn up by the JET management. The document reads as follows:

"RESIGN FIRST" RULE

3. This rule was introduced by the JET Director following the reference by the European Court of Justice in the 1987 Judgement to the Commission's decision to

cease the discriminatory practice by which UK nationals selected for JET team posts were required willy-nilly to be recruited in the first instance by the UKAEA. The practice was then amended to allow UK nationals at the time of their application for a JET team post to declare which Member would make them available to the Project.

4. This amendment, it was feared, could allow AEA staff already in team posts to obtain return tickets from Members other than the UKAEA and use these to apply for vacant team posts with the expectation, that if selected, they would gain Euratom status. Indeed, the JET Director believed, probably with good cause, that situations could be contrived to allow this to happen.

5. The JET Director therefore introduced a Rule to prevent this happening which he included in JET Council Paper 90/JC 42/7.2 "*Management Policy relating to the Recruitment and Mobility of Staff*". The paper was noted by the JET Council. The following are the relevant rules:

1.2.1 JET team members may apply for other vacancies in the team. Those who are selected are transferred to their new posts normally within three months of their selection or as otherwise agreed with the Project.

1.2.2 A team member retains his employer during his assignment to JET. This Rule applies regardless of any change in the duties of a team member during his assignment to JET resulting, say, from his transfer to another post within the team. If he relinquishes his employer his assignment to JET ceases forthwith.

6. The practical application of Rule 1.2.2 meant that an AEA member of the JET team who wished to apply for a Euratom-JET post supported by a return ticket from a Member other than the AEA had to resign from the Project and the AEA before applying. This ruling was disputed by the AEA's Legal Adviser but was upheld by the Commission's Legal Service. The latter concluded that this requirement stemmed from the JET Statutes and rested on the principle that a team member cannot be made available by two employers at the same time. This ruling was accepted by the JET Council.'

- 52 Following the Note of Understanding entered into on 4 May 1994 between the Commission and the Parliament (see paragraph 22 of the *Altmann* judgment delivered today), a new version of the 'resign first' rule was adopted, under which a staff member made available to JET by the UKAEA may be assigned to a vacant post by another member of JET, and thus recruited to the temporary staff of the Community under Article 8.5 of the Statutes, provided that at the date of his engagement by the Commission's appointing authority he has ceased to be made available by the UKAEA and has obtained a 'return ticket' from the other member of JET in question (see in particular the memoranda from Mr O'Hara, Director of Personnel at JET, dated 17 November and 6 December 1994 in Annex 10 to the application).
- 53 To apply that rule as thus amended, however, presupposes the existence of two separate posts: the post for which the staff member was originally made available by the UKAEA and the post for which he is henceforth to be made available by the other member providing the 'return ticket'. In a situation of that kind, the previous version of the rule required staff to resign from the UKAEA even before applying for another vacant post if they wished to be made available by another member organization of JET. They may now, in such circumstances, apply first for the post in question and resign from the UKAEA only if successful.

54 However, the amended rule does not make any difference to the situation of staff made available to JET by the UKAEA who wish to be recruited to the temporary staff of the Community through secondment by another member organization whilst retaining the same post at JET. According to the Commission, such staff must first resign from the UKAEA. They must then reapply for the newly-vacant post which they formerly held, possibly in competition with other candidates, thus running the risk of not being reappointed.

55 Thus, to the extent described above, the 'resign first' rule has not been abolished, contrary to what is suggested by the Note of Understanding of 4 May 1994.

56 In order to assess whether that rule is justified, it must be borne in mind that the Commission relies more particularly on Section 9.1. iv) of the Supplementary Rules, which provides: 'Individuals shall cease to be members of the staff of the Joint Undertaking in the following circumstances: — [...] termination of employment for any other reason provided for in the terms or conditions of service of either of the employers'. It must follow, in the Commission's view, that staff made available to JET by the UKAEA cannot enter the employment of another member organization without losing the post they hold at JET, since such a transfer involves a change of employer from the UKAEA to the Community. In contrast, as explained at the hearing by Mr O'Hara, in reply to a question from the Court, staff made available to JET by a member other than the UKAEA and thus recruited by the Commission to the temporary staff of the Community, could freely change 'parent organization' during the course of their assignment without losing their post, since the employer remains the same — the Community. The example was thus given of two staff members made available to JET, one by the French member and the other by the UKAEA, both interested in an offer of employment from the Belgian member maintaining their assignment to JET for the period originally agreed upon: the former would be free to accept the offer while

retaining the same post with JET, by means of a purely administrative operation to indicate the 'change' in the parent organization making him available, whereas the latter could not respond to the offer without losing the post held at JET.

- 57 If that interpretation were to be accepted, the Court could be led to conclude that Section 9.1 of the Supplementary Rules is manifestly incompatible with the general principle of equal treatment and thus inapplicable. The effect of that interpretation would be to restrict the mobility of staff made available to JET by the UKAEA in comparison with the other European research staff at JET, without there being any objective justification for that restriction either in the nature and characteristics of the Joint Undertaking or in the special situation of the host organization. On the contrary, if, as is clear from paragraphs 25 to 27 of the judgment in *Ainsworth*, all candidates for a post at JET are free to approach the parent organization of their choice for the purpose of their initial assignment, they must be equally free to change parent organization during the course of their assignment and, in so far as such freedom is allowed to staff made available to the Joint Undertaking by a member organization other than the UKAEA, it must also be extended to staff made available by the UKAEA.
- 58 In addition, as this Court has found in paragraphs 92 to 117 of the judgment delivered today in the *Altmann* case, the difference in treatment between the staff made available to JET by the UKAEA and the staff made available by the other members of the Joint Undertaking, established by Article 8.4 and 8.5 of the Statutes, is no longer objectively justified. To the extent that the Commission's interpretation of Section 9.1 of the Supplementary Rules helps to maintain that difference in treatment, it too must be rejected.
- 59 However, that interpretation is in no way imposed by the Statutes, which do not preclude JET Team staff made available by the UKAEA from being seconded by another member in the course of their careers. Such persons, by leaving the employment of the UKAEA to join the Commission, merely lose one employer to gain another, without being unemployed in the purely notional interval between the two successive employments. Nor is such an interpretation applied either when

the contract between a staff member and his parent organization is extended or renewed or when the duration of a staff member's assignment, agreed on for a limited period between JET and the parent organization, is extended or renewed (see the case of Dr Stott himself, whose secondment to JET has been renewed on several occasions), even though such events should, according to the Commission's reasoning, lead to the loss of the staff member's post at JET according to a literal application of Section 9.1. ii) and iv) of the Supplementary Rules for UKAEA staff or of Section 9.2 for staff made available by other members. By confining such an interpretation solely to cases such as the applicant's, the Commission is thus artificially extending the scope of those provisions of Section 9 of the Supplementary Rules to cover a hypothesis for which they were clearly not intended.

- 60 In so doing, the Commission is in addition ignoring the nature of recruitment, and thus of the employment relationship, as a means to an end in relation to the selection procedure for a post with JET. In the present case, the applicant has already undergone the selection procedure laid down in Section 5 of the Supplementary Rules, either on his initial recruitment or on applying for the post he at present holds. It is common ground, moreover, that the selection procedure is quite separate from completion of the recruitment formalities by the Commission or the UKAEA, as the case may be, to enable the post in question to be filled in accordance with Article 8.4 or 8.5 of the Statutes: Article 4.2.2(d) of the Statutes makes express provision in that regard for the Director and senior staff of the Project, and Section 5 of the Supplementary Rules does the same for other staff. It is clear from the documents before the Court that in many cases a person is first selected for a post with JET and only then recruited by a member, the sole purpose being to meet the requirements of Article 8.1, 8.4 and 8.5 of the Statutes in the absence of any recourse to the category of 'other personnel'.

- 61 Events such as a change of 'sponsoring member' or a transfer from employment by the UKAEA to employment by another member organization can

therefore have no effect on the retention by a staff member of the post he holds with JET.

62 Consequently, by rejecting the applicant's complaint on the independent ground indicated at paragraph 15 above, as elucidated in the defence and detailed further at the hearing, the Commission applied the relevant provisions of the Statutes and the Supplementary Rules incorrectly as a result of an error of interpretation, and thus infringed those provisions.

63 Since the decisions rejecting the applicant's request and complaint are not legally justified on that ground, it must be determined whether they may be legally justified on the other grounds on which they are based, namely the broad discretion of the appointing authority with regard to recruitment in the context of the budgetary difficulties at that time and the prospect that JET would come to an end in 1996.

64 Article 8.1 of the Statutes provides: 'The staff of the Project Team shall be recruited in accordance with the provisions of points 8.4 and 8.5 [...]'; under Article 8.5, '[...] staff made available by the Members of the Joint Undertaking other than the host organization as well as other personnel shall be recruited by the Commission for temporary posts [...] and assigned by the Commission to the Joint Undertaking'. Similarly, under Section 5.10 of the Supplementary Rules, once the final decision to select a member of the JET staff has been taken in accordance with Section 5.9, 'The Director shall [...] engage the selected candidate as a temporary agent of the European Communities [...]' in the exercise of the power delegated to him by the Commission under Section 5.11.

- 65 By their repeated use of the injunctive 'shall' ('shall be recruited', 'shall be [...] assigned', 'shall [...] engage'), those provisions indicate that, once the selection stage described in Section 5 of the Supplementary Rules has been completed, the Commission has practically no further discretion as regards recruitment to JET. The stage at which the broad discretion enjoyed by the institutions in that regard is to be exercised is that of the selection of the qualified staff made available by the members of the Joint Undertaking in accordance with the procedure laid down in Section 5 of the Supplementary Rules (see also Article 8.2 of the Statutes, which refers to the need to 'give the Director of the Project the widest possible authority in the matter of staff selection'), and the Commission's subsequent action in recruiting the persons thereby selected to the Community's temporary staff is thus in the nature of a mere administrative formality intended to give effect to the abovementioned provisions of Article 8.1 and 8.5 of the Statutes.
- 66 Thus, is so far as the applicant could show both that he was properly assigned to the Project by the Swedish member of JET and that he had a post on the JET staff, the Commission was obliged to recruit him to a post on the temporary staff of the Community, irrespective of its budgetary constraints or the imminent conclusion of the Project.
- 67 Consequently, by making Dr Stott's recruitment to the Community's temporary staff dependent on budgetary considerations without any further qualification and without examining whether the two conditions set out in paragraph 66 above were met, the Director of JET, and subsequently the Commission, exercised a discretion which they did not enjoy in the circumstances of the case and thereby misapplied Article 8.1 and 8.5 of the Statutes and Section 5.10 of the Supplementary Rules.

- 68 As a result, the Commission did not legally justify its contested decisions and infringed both Article 8.1 and 8.5 of the Statutes and Sections 5 and 9 of the Supplementary Rules. The applicant's fourth plea in law must therefore be upheld, without there being any need to examine the other pleas put forward by him in support of his claim for annulment.

The claim seeking the issue of directions

- 69 In accordance with settled case-law, the claim seeking the issue of directions must be dismissed as inadmissible. The Community judicature is not entitled, when exercising judicial review of legality, to issue directions to the institutions, it being for the institution concerned to take the steps necessary to implement a judgment given on an application for annulment (Case C-100/88 *Oyowe and Traore v Commission* [1989] ECR 4285, paragraph 19; see, most recently, Case T-109/94 *Windpark Groothusen v Commission* [1995] ECR II-3007).

The claim for compensation

- 70 The claim for compensation was already included in the applicant's complaint under Article 90(2) of the Staff Regulations against an act adversely affecting him, namely the express decision, communicated by letter of 13 June 1994 from the Director of JET, rejecting his request, submitted in the proper form on 16 May 1994, to be engaged as a member of the temporary staff of the Community. It must

therefore be regarded as having been made pursuant to Article 152 of the EAEC Treaty (Article 179 of the EC Treaty) and Articles 90 and 91 of the Staff Regulations, which have been complied with. In principle, therefore, that claim, which is confined to compensation for loss directly related to the said acts adversely affecting the applicant, is admissible.

71 As regards its substance, the claim seeks compensation for the damage which the applicant claims to have suffered as a result of the Commission's rejection of his request of 16 May 1994 to be recruited.

72 It has consistently been held (Joined Cases 256/80, 257/80, 265/80, 267/80 and 5/81 *Birra Wührer and Others v Council and Commission* [1982] ECR 85, paragraph 9, Case 51/81 *De Franceschi v Council and Commission* [1982] ECR 117, paragraph 9, and Case T-478/93 *Wafer Zoo v Commission* [1995] ECR II-1479, paragraph 49) that the damage for which compensation is sought must be actual and certain. In the present case, the damage which the applicant claims to have suffered can be established only if his right to recruitment by the Commission to the temporary staff of the Community following his request of 16 May 1994 is first recognized; however, that right cannot be recognized unless, on examination, the said request is shown to meet the general requirements laid down by the Conditions of Employment, and in particular by Article 12 thereof, and the requirements for staff to be made available to JET by a member other than the UKAEA under Article 8.5 and 8.8 of the Statutes. No such examination has yet taken place; it will have to be carried out in the context of the measures necessary to comply with this judgment, which must be taken by the Commission by virtue of Article 149 of the EAEC Treaty (Article 176 of the EC Treaty). Accordingly, whilst the illegality of the contested decisions and their consequent annulment are in principle sufficient to give rise to liability on the part of the Community, such liability cannot actually be incurred unless it is established that, in the absence of the grounds on which his

request was unlawfully rejected, the applicant would have been recruited to the Community's temporary staff because he met all the requirements for such recruitment in the context of JET.

- 73 In the light of the foregoing, the Court cannot rule at this stage on the applicant's claim for compensation, which must therefore be dismissed as premature.

Costs

- 74 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Under Article 87(3) of those rules, where each party succeeds on some and fails on other heads, or where the circumstances are exceptional, the Court may order that the costs be shared or that each party bear its own costs. Article 88 provides that institutions are to bear their own costs in proceedings brought by servants of the Communities.

- 75 Since the Commission has been unsuccessful in its principal arguments, the Court considers that the proper application of those principles requires that the Commission should be ordered to bear its own costs and to pay those of the applicant.

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber)

hereby:

1. **Annuls the Commission's decision not to recruit the applicant to a post on the temporary staff of the Community under Article 8.5 of the JET Statutes, communicated to him by letter of the Director of JET dated 13 June 1994, and the Commission's decision of 28 December 1994 rejecting the applicant's complaint against the decision first mentioned;**
2. **Dismisses the remainder of the application;**
3. **Orders the defendant to bear its own costs and to pay those of the applicant.**

Kirschner

Bellamy

Kalogeropoulos

Delivered in open court in Luxembourg on 12 December 1996.

H. Jung

Registrar

H. Kirschner

President

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