JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber)
30 June 1993 *

In Case T-46/90,

Antonio Devillez, Henk Bunnik, Jerry Cadogan and Emile Kill, officials of the European Parliament, 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,

applicants,

v

European Parliament, represented by Jorge Campinos, Jurisconsult, assisted by Manfred Peter and Jannis Pantalis, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the Secretariat of the European Parliament, Kirchberg,

defendant,

APPLICATION for the annulment of the decision of the European Parliament refusing the applicants the flat-rate allowance provided for in Article 1 of Council Regulation (ECSC, EEC, Euratom) No 300/76 of 9 February 1976 determining the categories of officials entitled to allowances for shiftwork, and the rates and conditions thereof,

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

composed of: C. W. Bellamy, President, A. Saggio and C. P. Briët, Judges,

Registrar: J. Palacio González, Administrator,

* Language of the case: French

having regard to the written procedure and further to the hearing on 31 March 1993,

gives the following

Judgment

The facts and legal background of the application

1 Mr Devillez, Mr Bunnik, Mr Cadogan and Mr Kill are assigned to the print shop of the European Parliament (hereinafter the 'Parliament'). As appears from the documents before the Court, two-shift operation was introduced as from 8 September 1989 as regards those four officials, for the purpose of reducing the effects on their health of the high noise levels linked to the operation of the rotary press and of restricting overtime. As was confirmed by the parties in reply to a written question from the Court of First Instance, that work was performed by two teams, one working from 7 a. m. to 1.30 p. m. and the other from 1 p. m. to 7.30 p. m. on a weekly basis, excluding Saturdays, Sundays and official holidays. As appears from the observations of the Parliament, which were not denied by the officials in question, it ended on 15 September 1990 at the request of the applicants.

2 Operation on a shiftwork basis may confer entitlement, under certain conditions, to an allowance under Article 56a of the Staff Regulations of Officials of the European Communities. The relevant legal provisions for the granting of such an allowance are as follows:

A — Under Article 56a of the Staff Regulations, as amended by Regulation (Euratom, ECSC, EEC) No 1009/75 of the Council of 14 April 1975 amending Regulation (EEC, Euratom, ECSC) No 259/68 laying down the Staff Regulations of officials and the conditions of employment of other servants of the European Communities (OJ 1975 L 98, p. 1):

'An official who is expected to work regularly at night, on Saturdays, Sundays or public holidays shall be entitled to special allowances when doing shiftwork which is required by the institution because of the exigencies of the service or safety rules and which is regarded by it as a regular and permanent feature.

Acting on a proposal from the Commission submitted after consulting the Staff Regulations Committee, the Council shall determine the categories of officials entitled to such allowances, and the rates and conditions thereof.

...'

B — Pursuant to the second paragraph of Article 56a of the Staff Regulations, the Council adopted Regulation (ECSC, EEC, Euratom) No 300/76 of 9 February 1976 determining the categories of officials entitled to allowances for shiftwork, and the rates and conditions thereof (OJ 1979 L 38, p. 1). Article 1(1) of that regulation, as amended by Council Regulations (ECSC, EEC, Euratom) No 2764/79 of 6 December 1979 (OJ 1979 L 315, p. 1) and No 1307/87 of 11 May 1987 (OJ 1987 L 124, p. 6) is worded as follows:

'1. An official paid from research and investment appropriations and employed in an establishment of the Joint Research Centre or in indirect action, or paid from operating appropriations and employed in a computer centre, a security department or a telex service or involved in the dispatch of the *Official Journal of the European Communities*, who is engaged in shiftwork within the meaning of Article 56a of the Staff Regulations, shall be entitled to an allowance of:

— BFR 10 329 — where the department operates on a two-shift basis, excluding Saturdays, Sundays and public holidays;

— BFR 15 589 — where the department operates on a two-shift basis, one of them at night, including Saturdays, Sundays and public holidays;

— BFR 17 014, where the department operates on a round-the-clock basis, excluding Saturdays, Sundays and public holidays;

— BFR 22 238 — where the department operates on a continuous basis.

...'

3 In this case, by memorandum of 17 November 1989, Mrs Gomez de Enterria, Director General of translation and general services, of which the print shop forms part, informed Mr Van den Berge, Director General of Staff, Budget and Finance, that she had just learned that an 'experiment' involving two-shift working by the four officials mentioned above had commenced on 8 September 1989 and that the results appeared to be satisfactory. Accordingly, she requested that the flat-rate allowance under Article 56a of the Staff Regulations be paid to the officials in question as from 8 September 1989. A copy of the said memorandum was sent by Mrs Gomez de Enterria to the persons concerned, according to their observations, which were not disputed by the Parliament.

4 By memorandum of 19 December 1989, Mr Van den Berge replied to Mrs Gomez stating that no flat-rate allowance could be granted to the four officials in question on the basis of the said article, on the grounds that that article provided for the grant of an allowance only to officials who were required to carry out regular and permanent work for service reasons at night, on Saturdays, Sundays or public holidays. As is apparent from their observations, which have not been denied by the defendant, the persons concerned were informed of the contents of that memorandum by the person to whom it was addressed, Mrs Gomez de Enterria, following its receipt on 22 December 1989.

5 On 21 March 1990 they lodged a complaint against the decision of the administration refusing to grant them the flat-rate allowance provided for under Article 1 of Regulation No 300/76 in the context of two-shift working, as appeared from the said memorandum of 19 December 1989. By letters from the Secretary General of 18 July 1990, the Parliament rejected the four complaints on the ground that Regulation No 300/76 could not be applied to officials employed in the institutions' print shops.

Procedure

6 In those circumstances, by application lodged at the Registry of the Court of First Instance on 18 October 1990, the four officials in question requested the annulment of the Parliament's decision of 19 December 1989 refusing them the flat-rate allowance based on the two-shift operation provided for in Article 1 of Regulation No 300/76. The proceedings were suspended from 7 March 1991 to 15 May 1992 by a series of orders of 7 March, 30 May and 12 July 1991 and 9 January and 26 March 1992, first of all pending an expert's report on the noise level in the print shops, subsequently in order to enable specific measures to be considered and effected for the purpose of reducing the noise level and, when that work had been completed, in order to give the parties enough time to consider the terms of an amicable settlement of the dispute.

7 During the suspension of the proceedings sound-proofing work was put in hand following an expert's report carried out by the AIB-Vinçotte Association on 18 June 1991, on the Parliament's initiative. According to measurements taken on 9 December 1991 by the same expert appointed by the Parliament, that work resulted in an improvement of approximately four 'A' decibels (measuring noise level in terms of its impact on the human ear, hereinafter 'decibels'). In the expert's report put before the Court of First Instance on 6 February 1992, it was concluded that the permissible level of 85 decibels was exceeded only as regards the rotary press. The Parliament ordered a new expert's report to be drawn up by the AIB-Vinçotte Association concerning the noise to which operators of the rotary press were exposed. That expert's report was sent to the Parliament on 9 December 1992 and forwarded to the Court of First Instance on 25 January 1993. In their written observations on that expert's report, submitted on 11 March 1993, the applicants dispute the report's conclusions.

8 In the absence of an amicable settlement between the parties by 15 May 1992, the time-limit for lodging the defence was automatically set and the written procedure followed the normal course. It ended on 23 November 1992. Upon hearing the report of the Judge-Rapporteur, the Court of First Instance decided to open the oral procedure without any preparatory inquiry. In reply to the written questions of the Court of First Instance, the parties stated, prior to the hearing, their understanding of the concept of 'work at night' within the meaning of Article 56a of the Staff Regulations and confirmed certain facts. The oral procedure took place on 31 March 1993.

Forms of order sought by the parties

9 The applicants claim that the Court should:

— declare their application admissible and well founded;

— consequently, annul the decision of the administration refusing to grant the applicants the flat-rate allowance provided for in Article 1 of Regulation No 300/76 in connection with the continuous two-shift basis on which they are obliged to work;

— in so far as is necessary, annul the express decision of 18 July 1990 rejecting the complaint submitted by the applicants through official channels on 21 March 1990 under Article 90(2) of the Staff Regulations;

— order the defendant to pay the costs of the proceedings pursuant to the second subparagraph of Article 87(3) of the Rules of Procedure, together with the expenses necessarily incurred for the purpose of the proceedings.

In his reply, Mr Devillez claims in addition that the Court should:

— order the defendant to pay him, having regard to the new fact constituted by the defendant's refusal to carry out in sufficient time the work necessary for

reducing the noise level, an amount corresponding to the flat-rate allowance for shiftwork for the period between the termination of the aforementioned shiftwork and the completion of the said sound-proofing work.

The defendant contends that the Court of First Instance should:

— declare the application inadmissible;

— in so far as is necessary, dismiss the substance of the application;

— make an order as to costs in accordance with the applicable provisions.

In the rejoinder, the defendant further contends that the Court of First Instance should:

— declare the new application for compensation inadmissible;

— make an order as to costs in accordance with the second subparagraph of Article 87(3) of the Rules of Procedure.

The admissibility of the application for annulment

Arguments of the parties

10 The defendant contends that the application for annulment of the decisions of 19 December 1989 and 18 July 1990 rejecting the complaint is inadmissible. It contends, first, that the decision of 19 December 1989 was not taken by the appointing authority and cannot, therefore, be the subject of a legal action under Article 91 of

the Staff Regulations. It argues, secondly, that the applicants no longer have any legal interest in requesting the retroactive annulment of the decision of 18 July 1990, inasmuch as the two-shift working ended on 15 September 1990.

11 The applicants for their part consider that the application is admissible. They contend that, notwithstanding the works which have partially remedied the harmful noise levels found, they still have a personal interest in bringing the action in so far as it seeks to annul the decision refusing them the flat-rate allowance for the operations on a shiftwork basis which were in force from 8 September 1989 to 15 September 1990 with the dual objective of restricting recourse to overtime and minimizing harmful noise levels.

Findings of the Court

12 In the context of the first plea alleging lack of competence of the Director General of Personnel, Budget and Finance to take the contested decision, it should be ascertained whether the aforesaid memorandum of 19 December 1989 was capable of adversely affecting the applicants. That presupposes not only that that measure was adopted by the competent authority, but also that it contained a definitive position as to the applicability of Article 56a of the Staff Regulations in respect of the applicants. That question of public policy, which is closely linked to the plea relied upon by the defendant, must be considered by the Court of First Instance of its own motion (see in particular the judgment of the Court of Justice of the European Coal and Steel Community in Joined Cases 7/54 and 9/54 *Groupement des Industries Sidérurgiques Luxembourgeoises* v *High Authority* [1954 to 1956] ECR 175 at pp. 191 and 192 and the judgment of the Court of First Instance in Case T-130/89 *B* v *Commission* [1990] ECR II-761, summary publication).

13 The documents before the Court clearly indicate that the author of the contested memorandum acted with the agreement of the appointing authority. The Parliament confirmed the contents of the memorandum at issue, as is shown by the dismissal of the complaint against the said memorandum by the Secretary General of the Parliament on 18 July 1990. Moreover, since the applicants were informed of the clear, precise and reasoned refusal by the Director General for Personnel, Budget and Finance of the request which had been sent to him by their immediate

superior seeking payment to them of the allowance in question, they were legitimately entitled, in view of the status of that authority, to regard his refusal to grant them the allowance in question as a decision of the competent authority (see the judgments of the Court of Justice in Joined Cases 161/80 and 162/80 *Carbognani and Coda Zabetta* v *Commission* [1981] ECR 543, paragraph 14, and in Case 65/83 *Erdini* v *Council* [1984] ECR 211, paragraph 7).

14 In those circumstances the contested memorandum must in any case be regarded as a decision capable of adversely affecting them; the applicants were informed of it orally by their immediate superior. That view accords with the case-law of the Court of Justice, which accepts that oral decisions may adversely affect the officials in question (see the judgment of the Court of Justice in Joined Cases 316/82 and 40/83 *Kohler* v *Court of Auditors* [1984] ECR 641, paragraphs 8 to 13).

15 Moreover, in so far as the officials in question had been associated with the request put forward by their superior in her memorandum of 17 November 1989 to the Director General for Personnel, Budget and Finance, the said memorandum should be interpreted as a request within the meaning of Article 90(1) of the Staff Regulations. The association of the officials in question with that request stems in particular from the fact that a copy had been communicated to them by their superior who also informed them subsequently of the administration's refusal. The wording of the said memorandum was completely unambiguous. It clearly and precisely requested payment to the applicants of the allowance provided for by Article 56a of the Staff Regulations. The contents of that request seeking a decision in favour of the applicants were therefore clearly identifiable. That confirms that the refusal of the Director General to whom the request was made cannot in any case be regarded as a purely internal act forming part of an exchange of correspondence within the administration, or as a mere piece of information. It clearly has the nature of a decision.

16 As regards the second plea of inadmissibility alleging lack of legal interest in bringing proceedings, the Court of First Instance notes that the applicants have a financial interest in requesting the annulment of the contested decisions refusing to grant them the allowance to which they consider they are entitled for working on a two-shift basis from 8 September 1989 to 15 September 1990.

17 It follows that the application for annulment must be declared admissible.

Substance of the application for annulment

18 The applicants rely on two pleas in law in support of the application for annulment, alleging, first, infringement of Regulation No 300/76, interpreted in the light of the general principle of equal treatment of officials and, secondly, failure to take account of the duty to have regard for the interests of officials and of the health and safety rules.

The first plea alleging infringement of Regulation No 300/76 interpreted in relation to the general principle of equal treatment of officials

Arguments of the parties

19 The applicants contend, first, that Regulation No 300/76 in no way makes the granting of the flat-rate allowance subject to the regular performance of work at night or on Saturdays, Sundays or public holidays. Where there are two provisions of the same kind, the said regulation, as a new and specific provision, overrides Article 56a of the Staff Regulations providing for the grant of an allowance only for an official 'who is expected to work regularly at night, on Saturdays, Sundays and public holidays'. Furthermore, the applicants pointed out in their written reply to the question of the Court of First Instance concerning the meaning of work at night that that concept was defined neither in Article 56a of the Staff Regulations nor in Regulation No 300/76. They argued that Article 1(1) of the regulation nevertheless does give some guidance inasmuch as it concerns, amongst those entitled to the allowance, officials assigned to the telex and/or telephone service who operate on a two-shift basis from 7 a. m. to 1 p. m. or from 1 a. m. to 7 p. m. They infer that the intention of the legislature behind Regulation No 300/76 is that working hours starting at 7 a. m. and/or finishing at 7 p. m. are to be treated in the same way as night-time working hours giving rise to entitlement to an allowance.

20 In those circumstances, the applicants consider that by refusing them the allowance under Article 1 of that regulation, the defendant has restrictively interpreted the

regulation contrary to the general principle of equal treatment of officials. At the hearing, they alleged, in particular, that their working conditions were similar to those of officials assigned to the telex service, which has mainly become a telephone and facsimile service and is therefore much less noisy.

21 The defendant considers that the first plea is unfounded. It contends, first of all, that the print shop, to which the applicants are assigned, does not appear amongst the departments receiving the allowance in question, referred to in Article 1 of Regulation No 300/76. That situation does not give rise to any discrimination to the detriment of those concerned. The defendant pleads in that regard that Article 56a of the Staff Regulations provides for the adoption of an implementing regulation only as regards continuous services or shiftwork regarded by the institution as 'regular and permanent'. That is not the case in this instance. The two-shift working in force from 8 September 1989 to 15 September 1990 on an experimental basis was merely transitional. In those circumstances the applicants' situation is not comparable to that of employees assigned to a computer centre, a security department or a telex service within the meaning of Article 1 of Regulation No 300/76.

22 Furthermore, the defendant points out that pursuant to Regulation No 300/76, shiftwork must be carried out 'within the meaning of Article 56a of the Staff Regulations' in order to confer entitlement to an allowance. However, the applicants have not fulfilled the requirement concerning work at night set out in that article. In that regard, the defendant considered, in its written reply to a question of the Court of First Instance concerning night time, that that concept related to work carried out between 10 p. m. and 7 a. m. It mainly relied on Regulation (Euratom) No 1371/72 of the Council of 27 June 1972 determining the rates and conditions of the special allowances which may be granted to officials or servants who are paid from appropriations in the research and investment budget and employed in an establishment of the Joint Research Centre or in indirect action, for certain services of a special nature (OJ, English Special Edition 1972 (II), p. 609) and on the Report from the Commission to the Council (COM (85) 372 final) of 15 July 1985 on the special allowance granted for certain services of a special nature in 1981, 1982, 1983 and 1984.

Findings of the Court

23 The Court must determine whether during their two-shift working the applicants met all the requirements concerning the grant of the allowance in question as set out in Article 1 of Regulation No 300/76 interpreted in conjunction with Article 56a of the Staff Regulations and the general principle of equal treatment of officials.

24 Article 1 of Regulation No 300/76 expressly sets out six categories of persons entitled to the allowance. They include officials paid from appropriations in the research and investment budget and employed in an establishment of the Joint Research Centre or in indirect action, or paid from appropriations in the operational budget and employed in a computer centre, or a security department or a telex service or who are involved in the dispatch of the *Official Journal of the European Communities.*

25 In this case it should be found at the outset that the applicants, being assigned to a printing service, are not covered by any of the categories of recipient expressly referred to by the regulation. The question therefore arises whether the regulation, regard being had to Article 56a of the Staff Regulations which it implements and from which it cannot derogate to the detriment of the officials concerned (see the judgment of the Court of Justice in Case 38/70 *Tradax* [1971] ECR 145, paragraph 10), may be broadly interpreted in favour of the applicants.

26 The Court considers that entitlement to an allowance pursuant to Regulation No 300/76 cannot be extended, on the basis of an interpretation by analogy of its provisions, to categories of officials other than those expressly defined therein for the following reasons. First, such an extension by way of analogy would adversely affect the legislature's discretion — which must be exercised in accordance with the principle of good administration — in defining the categories of persons entitled to the allowance in dispute. Article 56a, which empowers the Council to determine the categories of officials entitled to that allowance, does not grant any subjective right to an allowance to officials providing a service either continuously or by shift-work. It merely provides, when the persons concerned are subject to certain

specific constraints, for the possibility of granting such an allowance to certain categories of recipients to be determined and under conditions to be subsequently defined by an implementing regulation.

27 *A fortiori,* where there is operation on a two-shift basis during the day, within the meaning of the first indent of Article 1 of Regulation No 300/76, the provisions of the regulation in conjunction with Article 56a of the Staff Regulations clearly prevent the application, by way of analogy, of that first indent to officials not covered by categories of recipients expressly defined, by reason of the specific nature of the indent.

A comparison between the relevant provisions of Article 56a of the Staff Regulations and of Regulation No 300/76 shows that the first indent of Article 1 of the regulation makes an extensive application of Article 56a in so far as it does not make the grant of an allowance conditional on the performance of shiftwork at night, or on Saturdays, Sundays and public holidays, while Article 56a of the Staff Regulations expressly refers to the situation in which the official is 'expected to work regularly at night, on Saturdays, Sundays or public holidays'. Under the first indent of Article 1 of Regulation No 300/76 the official is entitled to an allowance of 'BFR 10 329 — where the department operates on a two-shift basis, excluding Saturdays, Sundays and public holidays'. It is clear that under that provision the grant of an allowance is not conditional upon work at night, as is shown by the fact that that requirement is expressly set out in the second indent of the same article, which provides for the payment of an allowance of 'BFR 15 589 where the [official] operates on a two-shift basis, one of them at night, including Saturdays, Sundays and public holidays'.

28 Such a provision, the scope of which goes beyond what is envisaged in Article 56a, can only be applied, on account of its exceptional nature in relation to the conditions set out in the said article, to officials covered by the categories of recipients expressly mentioned. It should furthermore be noted that Article 56a itself is a derogating provision and therefore applies by way of exception from the the general rules on remuneration. That is all the more reason why Article 1 of Regulation No

300/76, implementing Article 56a, cannot be applied to a situation which not only fails to meet the conditions set out under Article 56a but, furthermore, is not expressly covered by the regulation. In such a situation, the fundamental premises for applicability by way of analogy are lacking.

29 The abovementioned principles must next be applied to this case. The Court notes that the applicants operated on a two-shift basis from 7 a. m. to 1.30 p. m. and from 1 p. m. to 7.30 p. m. In the scheme of Article 1 of Regulation No 300/76 such work clearly comes under the concept of operation on a two-shift basis during the day, referred to under the first indent of that article. It cannot be categorized as work at night within the meaning, in particular, of the second indent of the article. As appears from the Parliament's written reply to the question of the Court of First Instance concerning work at night, such a view is confirmed by the practice of the institutions, which consists in taking into consideration, for the granting of an allowance for work at night within the meaning of Regulation No 300/76, work carried out between 10 p. m. and 7 a. m. That practice is in line with the provisions of Regulation No 1371/72, which was repealed by Regulation No 300/76 in so far as it set out the conditions for granting, and the rates of allowances under, Article 56a. That regulation expressly referred to night work performed between 10 p. m. and 7 a. m. In those circumstances, the applicants, who already fall outside the categories of recipients referred to above, cannot, *a fortiori,* invoke the applicability by way of analogy of Article 1 of Regulation No 300/76 for shiftwork performed, as in this case, during the day.

30 Finally it is also necessary to consider whether the interpretation of Regulation No 300/76 in relation to the general principle of equal treatment of officials may lead to recognition of the applicants' right to the allowance. That principle requires that comparable situations should not be treated differently unless such differentiation is objectively justified, as was held by the Court of Justice in Case 147/79 *Hochstrass* v *Court of Justice* [1980] ECR 3005, paragraph 7.

In this case it should be pointed out that Regulation No 300/76 cannot be applied by way of analogy, as has already been noted, inasmuch as it applies to specific

categories of recipients established on the basis of the interest of the service and the particular constraints placed upon the officials falling within the said categories. Moreover, in any event, it should be added that, in this case, the applicants are in a different situation from that of the officials or servants falling within the categories of recipients expressly covered by Article 1 of Regulation No 300/76, regard being had to the nature of the department to which they are assigned, namely a print shop, and to the type of duties carried out, which prevents any application of that provision by way of analogy.

31 It is apparent from all the foregoing that the first plea must be rejected as unfounded.

The second plea alleging a failure to take account of the duty to have regard for the interests of officials and of the health and safety rules

Arguments of the parties

32 The second plea is in two parts. In the first part the applicants suggest that, inasmuch as the introduction of operation on a two-shift basis was precisely intended to remedy the failure of the administration to take action in relation to the health and safety rules, it was the responsibility of the administration, pursuant to its duty to have regard for the interests of officials, to grant them an allowance under Article 56a of the Staff Regulations.

33 In order to establish the administration's failure to act, the applicants allege that, as an employer, the Parliament is bound not only to observe Council Directive 86/188/EEC of 12 May 1986 on the protection of workers from the risks related to exposure to noise at work (OJ 1986 L 137, p. 28), but also the rules for the protection of workers in force in the place of employment, in this case the general regulations in force in Luxembourg on safety at work. However, as early as 27 July 1989, Dr De Wilde sent Mrs Gomez de Enterria the results of the measurements of the noise levels in the print shop. The applicants point out that Dr De Wilde found

in his report that the noise level in the print shop reached 90.1 decibels; he stated that for a rotary press, a noise level of 85 decibels must be regarded as cause for concern and a noise level of 90 decibels as the danger level for the onset of occupational deafness; he stated that the frequencies recorded were 'on the border-line of the danger zone for the human ear'; finally he proposed several measures for reducing the noise level of the rotary press and a compulsory audiogram during the annual medical check-up. However, no action was taken on those proposals.

34 The defendant rejects the applicants' line of argument. It contends that the main reason for introducing operation on a shiftwork basis was the desire to improve the applicants' working conditions whilst awaiting measures to be adopted by the administration for the purpose of reducing harmful noise levels. In that regard, it considers that the work effected following the first expert's report, carried out at its request on 18 June 1991, led to satisfactory improvements as shown by the results of subsequent expert's reports.

35 In connection with the second part of that plea, the applicants point out that they had been informed by their Director General, Mrs Gomez de Enterria, as early as 8 September 1989 of their entitlement to a flat-rate allowance for shiftwork. They state that they had received a copy of her memorandum of 17 November 1989 to Mr Van den Berge requesting that the flat-rate allowance for shiftwork provided for by Article 56a of the Staff Regulations be paid to them as from 8 September 1990. They consider that they were therefore legitimately entitled to expect that the allowance in question would be granted to them. In those circumstances, they contend that by not immediately informing them of the possible mistake made by their Director General, the administration failed in its duty to have regard for the interests of officials. In fact, it was not until more than two months after the applicants had received a copy of Mrs Gomez de Enterria's said memorandum of 17 November 1989 that Mr Van den Berge sent to Mrs Gomez de Enterria, on 19 December 1989, the memorandum refusing to grant that flat-rate allowance to the applicants, which is the subject of this dispute.

36 The defendant contends that a misinterpretation of a Community rule cannot render the administration liable and that promises which are contrary to the provisions of the Staff Regulations cannot create a legitimate expectation.

Findings of the Court

37 As regards the first part of that plea, the Court points out, first of all, that although shiftwork is decided upon by the administration, whatever the reason for it, the payment of an allowance under Article 56a of the Staff Regulations is governed by the conditions set out in Regulation No 300/76. Since those conditions are not met in this case, as has already been determined, the applicants cannot hope to obtain the grant of an allowance under Article 56a by invoking the duty to have regard for the interests of officials, which operates in the framework of the applicable provisions, which are binding on the institution.

In those circumstances, the first part of the second plea must be rejected without any need to check the substance of the allegations concerning the administration's failure to act in relation to the observance of the health and safety rules.

38 As regards the second part of that plea, it must also be recalled that information or promises which do not take account of the provisions of the Staff Regulations cannot create a legitimate expectation. Even assuming that the administration had failed in its duty to have regard for the interests of officials by not immediately informing them that the information to the effect that they were entitled to the allowance in question, which was given them by their immediate superior on 8 September 1989, was incorrect, that fact cannot lead to the applicants being granted an allowance in breach of the applicable provisions.

39 It follows from all the foregoing considerations that the application for annulment must be rejected as unfounded.

The admissibility of the application for damages

Arguments of the parties

40 The defendant raises an objection of inadmissibility against the claim submitted by Mr Devillez in his reply, for compensation for the damage allegedly suffered from 16 September 1990 until the date when the work in question was carried out, on account of the defendant's refusal to effect the sound-proofing work at the proper time. It argues that such a claim goes beyond the scope of this dispute.

41 Mr Devillez considers that the persistence of excessively high noise levels following the sound-proofing work undertaken after this application was lodged, as shown by the measurements of the noise levels carried out by the AIB-Vinçotte Association, constitutes a new matter which allows him to submit a claim for damages in the course of the proceedings. During the oral procedure he invoked the concept of procedural economy in support of the admissibility of that claim.

Findings of the Court

42 It should first be pointed out that the abovementioned claim for damages has no link whatever with the claim for annulment of the decision refusing to grant an allowance under Article 56a of the Staff Regulations, set out in the originating application. Its admissibility must, therefore, be considered separately from the admissibility of that application; the Court of First Instance may at any time of its own motion consider whether there exists any absolute bar to proceeding with the action (see, in particular, the judgment of the Court of First Instance in Case T-8/92 *Di Rocco* v *ESC* [1992] ECR II-2653, paragraph 34, and the order of the Court of First Instance in Case T-53/92 *De Stachelski* v *Commission* [1992] ECR II-35, paragraphs 14 and 17).

43 The Court finds that the emergence of new facts, as alleged by the applicant, cannot in any case relieve the official in question of the duty to follow the procedure provided for by the Staff Regulations. At all events, if the person concerned wished to obtain compensation for damage allegedly suffered because of the persistence of

an excessive noise level in the print shop, he was bound to submit to the appointing authority a prior request within the meaning of Article 90(1) of the Staff Regulations to take a decision with regard to any compensation for the alleged damage. Only such a request would have made it possible to initiate the administrative procedure in accordance with the Staff Regulations (see, in particular, the order of the Court of First Instance in Case T-29/91 *Castelletti and Others* v *Commission* [1992] ECR II-77, paragraphs 28 to 30).

44 It follows that, owing to the failure to follow the proper administrative procedure, Mr Devillez's claim for damages must be declared inadmissible.

Costs

45 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs, if they have been applied for in the successful party's pleadings. However, under Article 88 of those rules, in proceedings between the Communities and their servants the institutions are to bear their own costs.

46 Furthermore, according to the second subparagraph of Article 87(3) of those rules, the Court 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.

47 In this case the Court notes that it was only after this application was brought on 18 October 1990 that the Parliament's officers ordered an expert's report and then took measures to reduce the noise levels in the print shop. However, according to the applicants' statements, which were not denied by the defendant, an expert's report drawn up by Dr De Wilde showing that the noise level in the print shop reached 90 decibels had been sent to the Parliament on 27 July 1989. Dr De Wilde proposed several measures to reduce the noise level and a compulsory audiogram during the annual medical check-up. It is apparent from the applicants' allegations,

which were not contested by the defendant, that no action was taken on those proposals and that it was only on the basis of an expert's report drawn up at the Parliament's request on 18 June 1991 that the administration undertook work in order to reduce harmful noise levels. Following that work, the results of a first expert's report drawn up on 9 December 1991 on the Parliament's initiative showed the need to order a second expert's report concerning in particular the noise level to which the operator of the rotary press was exposed. The results of that second expert's report were not sent to the Parliament until 9 December 1992.

48 By its conduct the defendant has accordingly led the applicants to initiate proceedings and persist with their claims at the end of the period of suspension of the proceedings from 7 March 1991 to 15 May 1992. In those circumstances, it is fair to order the Parliament to bear the applicants' costs in addition to its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber)

hereby:

1. Dismisses the action;

2. Orders the Parliament to pay the costs.

Bellamy Saggio Briët

Delivered in open court in Luxembourg on 30 June 1993.

H. Jung C. W. Bellamy

Registrar President