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

Joined Cases T-177/94 and T-377/94

Henk Altmann and Others
v
Commission of the European Communities

(JET Joint Undertaking – Persons claiming the status of members of the temporary staff)

Full text in all languages in ECR-II

Applications for: primarily, annulment of the Commission's decisions refusing to appoint the applicants as members of its temporary staff and for reparation of the damage suffered.

Decision: Annulment.

Abstract of the Judgment

Facts

Legislative background

The Joint European Torus (JET), Joint Undertaking ('JET' or 'the Joint Undertaking') was established for a duration of 12 years beginning on 1 June 1978 by Council Decision 78/471/Euratom of 30 May 1978 (OJ 1978 L 151, p. 10). Its aim is to construct a large torus facility of the Tokamak type ('the Project').

Under Article 1 of the JET Statutes ('the Statutes'), 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 undertakings equivalent to the UKAEA in other EAEC Member States and the Swiss Confederation.

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).

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 'shall 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).

The Ainsworth *judgment*

In 1983, a number of United Kingdom nationals employed by the UKAEA and made available by that body to JET applied to be employed as temporary staff of the Commission. When their requests were not granted, they brought an action before the Court of Justice. By judgment of 15 January 1987 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 Court of Justice held, *inter alia*, that in view of the special characteristics of the Joint Undertaking, the privileged role

attributed to the UKAEA as a result and the UKAEA's concern to prevent that situation from upsetting its own organization, the difference in treatment thus arising between the staff made available to JET by the UKAEA and the staff made available by the other members of the Joint Undertaking was objectively justified.

Subsequent developments

The duration of the JET Project, initially set at 12 years (1978 to 1990), has been extended on a number of occasions by the Council and has now been formally approved to continue until 31 December 1999.

In February 1990, considering that the circumstances had changed since the date of the *Ainsworth* judgment, 206 members of the UKAEA staff assigned to JET petitioned the Parliament to call upon the Commission and the Council to put an end to the discrimination which they claimed to have suffered. The petitioners maintained, *inter alia*, that since the *Ainsworth* judgment, and in defiance of it, JET and/or its members had adopted or applied a number of practices the purpose or effect of which was to prevent United Kingdom nationals from being recruited by members other than the UKAEA. They also claimed that, following a radical change in the factual circumstances since the *Ainsworth* judgment, the difference in treatment accepted in that judgment was no longer objectively justified.

In October 1991, the Committee on Petitions of the European Parliament found that 'the discrimination claimed by those presenting the petition does exist and ought to be brought to an end'.

The Commission had a study of the problem carried out by a panel of 'wise men', known as the 'Pandolfi Panel', and by an external consultant. The report of the Pandolfi Panel, dated 16 September 1992, made a number of recommendations, the first of which was that 'ways and means should be sought so that, on request, existing UKAEA staff working at JET can be offered temporary Euratom contracts until the end of their work for the JET Project' (Recommendation No 1).

In its report to the Parliament on the Pandolfi Panel's report, the Commission favoured the first recommendation, but stated that it would not implement it in view of the opposition of the JET Council.

The Parliament and the Commission appear to have reached a political compromise on 3 May 1994. The terms of the compromise are apparently set out in a 'Note of Understanding' providing, *inter alia*, that the so-called 'resign first' and 'six months leave from site' practices would be abolished and that recruitment of staff would take place on a non-discriminatory basis.

The pre-litigation procedure

Following the publication of the Pandolfi Panel's report, the applicants in the present cases, who are all United Kingdom nationals and UKAEA staff members made available to JET, wrote to the Director of JET requesting to be recruited as temporary staff of the Community. Those requests remained unanswered. The applicants submitted two joint complaints against the implied rejection of their requests. Those complaints were sent to, amongst others, the Secretary-General of the Commission. The Commission rejected the complaints on the ground that the engagement of the applicants as temporary staff of the Community would infringe Article 8.4 of the Statutes.

Admissibility

Scope and admissibility of certain of the applicants' claims

The Court of First Instance has jurisdiction to take cognizance of the present case, in which the applicants do not have the status of officials or servants of the Community but claim that status (paragraph 44).

The decisions rejecting the applicants' complaints are acts adversely affecting them within the meaning of Articles 90 and 91 of the Staff Regulations. Since the applicants have followed the procedures laid down by the relevant provisions, those claims for annulment are admissible (paragraph 45).

The head of claim in which the Court is formally requested to rule on the validity of the Statutes is no more than a procedural means of giving effect to the possibility, offered by Article 156 of the EAEC Treaty to any party in proceedings in which a regulation of the Council or of the Commission is in issue, of pleading the grounds specified in the first paragraph of Article 146 in order to invoke before the Community judicature the inapplicability of that regulation. Since it is put forward not as an independent head of claim but incidentally, in support of the main claims for annulment of the contested decisions, this claim must also be declared admissible (paragraph 46).

See: 33/80 *Albini* v *Council and Commission* [1981] ECR 2141; 87/77, 130/77, 22/83, 9/84 and 10/84 *Salerno and Others* v *Commission and Council* [1985] ECR 2523; 89/86 and 91/86 *Étoile Commerciale and CNTA* v *Commission* [1987] ECR 3005

However, the heads of claim seeking the issue of directions must be dismissed as inadmissible (paragraph 47).

See: C-100/88 *Oyowe and Traore* v *Commission* [1989] ECR 4285, para. 19; T-109/94 *Windpark Groothusen* v *Commission* [1995] ECR II-3007

The plea of res judicata

The authority of *res judicata* attaching to the judgment by which the Court of Justice dismissed as unfounded the actions brought by Mr Ainsworth and others can constitute a bar to the admissibility of the present action only if both actions are between the same parties, have the same subject-matter and are founded on the same cause (paragraph 50).

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

The present actions seek, principally, the annulment of decisions of the Commission that are quite separate from those challenged in the *Ainsworth* case and their subject-matter is thus different from that of the action brought at that time by Mr Ainsworth and others. The act whose annulment is sought is an essential element of the subject-matter of an action. In addition, although the arguments raised in support of the present applications may coincide to a certain extent with those put forward in *Ainsworth*, the present applicants rely also on other factual and legal submissions (paragraphs 51 and 52).

See: *Maindiaux*, cited above, para. 23

The Court of First Instance is bound by a judgment of the Court of Justice only in the circumstances set out in Article 55 of the EAEC Statute of the Court of Justice (Article 54 of the EC Statute of the Court), or where the principle of *res judicata* applies (paragraph 80).

The claims for annulment

Existence of the alleged difference in treatment

The JET Joint Undertaking is a Community project. All the members of the Project Team staff are in a comparable situation, irrespective of the member organization which made them available to the Joint Undertaking. They all work exclusively for the Project, within the same team and under the authority of the same director. They have been recruited in the same competitions and are promoted on the sole basis of their merits, no account being taken of their nominal employer (paragraph 81).

Nevertheless, staff made available to JET by the UKAEA remain in its employment on its terms and conditions, whereas staff made available by members of the Joint Undertaking other than the UKAEA are recruited to posts on the temporary staff of the Community (paragraph 82).

Prior to joining JET, many of the members of the Project Team had had no connection with the member organization which made them available (paragraph 83).

The staff made available to JET by the UKAEA receive appreciably lower salaries than do those recruited to the temporary staff of the Communities (paragraph 84).

Staff made available to the Joint Undertaking by the UKAEA do not have the same chance of obtaining permanent Community posts as do the staff made available by the other members and recruited by the Commission to posts on its temporary staff. The latter, as 'internal candidates', enjoy various advantages and priorities with regard to recruitment as Community officials (paragraph 85).

Even though the Commission has extended to 50 the age limit for outside candidatures for posts on ITER (an international thermonuclear experimental reactor project, intended as a successor to JET), that measure is not such as to establish truly equal treatment, as regards access to those posts, between the two categories of staff making up the JET Project Team (paragraph 88).

The proportion of JET staff who obtain a permanent post with the Commission on completion of their assignment with JET is considerably higher among the staff made available by members other than the UKAEA than among those made available by the UKAEA (paragraph 89).

Between 1988 and 1993 the Commission gave repeated assurances of future employment for temporary staff of the Community made available to JET, in particular by undertaking to give them priority treatment as candidates for other posts within the Commission when JET comes to an end (paragraph 90).

The differences in treatment established by the Court of Justice in the *Ainsworth* judgment are therefore still in existence, and have even become considerably more pronounced. Those differences no longer concern only conditions of employment but now affect security of employment and, above all, prospects of recruitment as Community officials (paragraph 91).

Changes in the factual circumstances since the Ainsworth *judgment*

The Court recapitulates the factors which led the Court of Justice to consider, in the *Ainsworth* judgment, that the difference in treatment was objectively justified (paragraphs 92 to 94).

In the present cases, the applicants ask the Court of First Instance to determine whether those factors may still be taken into consideration. It must therefore ascertain whether the difference in treatment established by Article 8.4 and 8.5 of the Statutes has ceased to be objectively justified in fact, in the terms defined by the Court of Justice in *Ainsworth*, by reason of a change in the circumstances since 1987 (paragraph 95).

There are a number of new or changed aspects in the present situation compared to that which came before the Court of Justice in 1987, specifically: (a) the considerable extension of the duration of JET; (b) the lesser role played by the UKAEA in the organization and functioning of the Joint Undertaking; (c) the UKAEA's withdrawal of its objections to staff which it makes available to JET leaving its employment for that of the Commission; (d) the disruption of the functioning of the Joint Undertaking as a result of the industrial relations conflict; and (e) the inability of the JET recruitment system to achieve the aims for which it was designed (paragraph 96).

First, the duration of the JET Joint Undertaking has been considerably extended. Whilst the Court of Justice had no reason to suppose that JET would not come to an end as planned in 1990, after 12 years of existence, it is now clear that it will last until at least 1999, making a total of 21 years. JET has acquired the nature of a permanent or very long-term undertaking (paragraphs 97 to 99).

Secondly, a large number of services previously supplied under an Agreement on Support from the Host Organization have since been provided on a commercial basis following competitive tendering procedures (paragraph 100).

Thirdly, the UKAEA no longer objects to its employees made available to JET joining the temporary staff of the Community, provided that they resign from its employment at the same time (paragraph 101).

Fourthly, the Joint Undertaking is faced with a permanent industrial relations conflict which has not only soured working relations at JET but has also jeopardized the prompt achievement of the objectives of the Community Fusion Programme (paragraph 103).

Fifthly, at the time when JET was set up, a specific system of staff recruitment and secondment was considered essential, given the temporary nature of the Joint Undertaking, in order to prevent social problems at the end of the Project without obliging the Commission to give staff made available to JET the status of established officials, whilst still providing for sufficiently centralized personnel management (paragraph 106).

It must, however, be acknowledged that that system, modified in several important respects, is no longer able to fulfil the purposes for which it was originally designed (paragraph 107).

First, UKAEA staff have no assurance of finding a suitable post on completion of their assignment with JET (paragraph 108).

Secondly, other than in exceptional cases, it is not possible in practice for United Kingdom nationals to obtain a 'return ticket' from a member of JET other than the UKAEA (paragraph 109).

See: T-99/95 *Stott* v *Commission* [1996] ECR II-1583

Thirdly, 'return tickets' are of limited practical value in terms of security of employment (paragraphs 110 to 112).

Fourthly, the Commission has taken into Community employment, well before the end of the Joint Undertaking, a significant proportion of the staff made available to the Project Team by its members and has also given various general undertakings with a view to facilitating redeployment of temporary Community staff with JET to other services on the conclusion of the Project (paragraph 114).

Fifthly, the present recruitment system leads in many cases to artificial links being established between a researcher and a member organization of JET with whom he or she had no contact before being selected for the project (paragraph 115).

In view of all those factors, it can only be concluded that all the factual circumstances referred to by the Court of Justice in support of its conclusion that there was objective justification for the difference in treatment established by the JET Statutes have lapsed (paragraph 117).

Legal consequences of the factual developments since the Ainsworth *judgment*

The question therefore arises whether, in the context of an objection of illegality under Article 156 of the EAEC Treaty (Article 184 of the EC Treaty), the Court of First Instance may have regard to changes in factual and legal circumstances in order to declare inapplicable a provision which the Court of Justice has already held to have been lawful at the time it was adopted (paragraph 118).

The system of legislative and judicial powers set up by the Treaty does not in itself preclude such factors from being taken into consideration. By giving any party the right, unlimited in time, to seek a declaration, in proceedings in which a regulation of the Council or of the Commission is in issue, that the regulation is unlawful *ab initio*, Article 156 of the EAEC Treaty (Article 184 of the EC Treaty) implies *a fortiori* that such a party is entitled to raise an objection pleading that the regulation is unlawful as from a subsequent point in time. In the present case, since the Statutes were adopted by a Council decision and not by a regulation as such, it must be added that, according to consistent case-law, Article 156 of the EAEC Treaty (Article 184 of the EC Treaty) gives expression to a general principle conferring upon any party to proceedings the right to challenge, for the purpose of obtaining the annulment of a decision of direct and individual concern to that party, the validity of previous acts of the institutions which form the legal basis of the decision which is being contested, if that party was not entitled under Article 146 of the

EAEC Treaty (Article 173 of the EC Treaty) to bring a direct action challenging those acts by which it was thus affected without having been in a position to seek their annulment. Since the legality of the individual measure contested must be assessed on the basis of the elements of fact and of law existing at the time when the measure was adopted, the legality of the legislative measure which forms its legal basis must also be assessed at that time rather than at the time of its own adoption (paragraph 119).

See: 15/76 and 16/76 *France* v *Commission* [1979] ECR 321; 92/78 *Simmenthal* v *Commission* [1979] ECR 777; 262/80 *Andersen and Others* v *Parliament* [1984] ECR 195

It is, furthermore, clear from the *Ainsworth* judgment that the Court of Justice found an objective justification for the difference in treatment at issue in certain legal and factual elements existing at the time. The Court of First Instance cannot assume that the reasoning of the Court of Justice would have remained the same if those elements had been different (paragraph 120).

The general principle of equal treatment, which is one of the fundamental principles of Community law, requires that similar situations should not be treated differently unless such differentiation is objectively justified. Since any difference in treatment is thus in the nature of an exception, derogating from a fundamental principle of Community law, it is self-evident that it can no longer be regarded as remaining valid, even if the rule establishing it does not explicitly limit its duration, once the circumstances constituting the objective justification for its existence have ceased to obtain (paragraph 121).

See: 36/83 *Mabanaft* v *Hauptzollamt Emmerich* [1984] ECR 2497, para. 34; *Ainsworth*, para. 33; T-571/93 *Lefebvre and Others* v *Commission* [1995] ECR II-2379, para. 78

That is all the more true where, as in the present case, the limited duration of a specific situation is one of the factors taken into consideration as part of the objective justification for unequal treatment (paragraph 122).

That does not conflict in any way with the principle of legality in the Community which, although it entails for individuals the right to challenge the validity of regulations by legal action, also requires all persons subject to Community law to acknowledge that regulations are fully effective so long as they have not been declared to be invalid by a competent court. Thus, in the present case, the principle of legality in the Community undoubtedly required the Commission to continue applying the JET Statutes even after they had, in the applicants' view, become illegal as a result of the objective justification having lapsed for the difference in treatment which they establish. The applicants, however, cannot be denied the right to bring a challenge before the Community judicature seeking a declaration that those Statutes are inapplicable, not *ab initio* but as from the date of a specific change in circumstances (paragraph 123).

See: 101/78 *Granaria* v *Hoofdproduktschap voor Akkerbouwprodukten* [1979] ECR 623

Even on the assumption that the principles of legality and legal certainty preclude the Court from having regard to a change in the factual and legal circumstances which, when the JET Joint Undertaking was set up, constituted an objective justification for the difference in treatment established by Article 8.4 and 8.5 of the Statutes, in order to declare those provisions inapplicable henceforth, they could do so in any event only in respect of the original 12-year period provided for in Article 1 of Decision 78/471 and Article 19 of the Statutes annexed thereto (paragraph 124).

Had it not been extended, the JET Joint Undertaking would have come to an end on 30 May 1990, but the Council has extended the duration of the Joint Undertaking by a number of decisions which have produced their own distinct legal effects (paragraph 125).

See: C-135/93 *Spain* v *Commission* [1995] ECR I-1681, paras 25 to 30

One of the distinct legal effects of those decisions has been that of maintaining the system of staff recruitment and secondment in force at JET. The system was maintained as a result of the Council's exercising afresh its power of assessment in fact and law (paragraph 126).

An action for annulment must be available under the conditions laid down in Article 146 of the EAEC Treaty (Article 173 of the EC Treaty) in the case of all measures adopted by the institutions, whatever their nature or form, which are intended to have legal effects. The validity of provisions of an institutional or general nature such as those in issue here – which may not be challenged in a direct action by natural or legal persons other than Community institutions and Member States and by which those persons are thus affected without having been in a position to seek their annulment – may be challenged by such persons under Article 156 of the EAEC Treaty (Article 184 of the EC Treaty) in order to secure the annulment of a decision which is of direct and individual concern to them and for which those provisions form the legal basis (paragraph 127).

See: 22/70 *Commission* v *Council* [1971] ECR 263, para. 42; *Simmenthal*, cited above; *Andersen*, cited above; *Spain* v *Commission*, cited above, para. 20

In support of their applications for the annulment of the contested decisions, the applicants are in any event entitled to challenge the validity of the successive decisions by which the Council extended the duration of JET. Such a challenge cannot be regarded as jeopardizing legal certainty (paragraph 128).

The provisions of Article 8.4 and 8.5 of the Statutes have given rise, at least since 19 December 1991, when the Council extended the recruitment system laid down in Article 8 of the Statutes, to a difference in treatment which has no objective justification and is therefore unlawful (paragraphs 130 and 131).

Legality of the contested decisions

Whilst nothing in the Statutes expressly and unequivocally precludes persons who have already been made available to the Project by the UKAEA from being recruited as 'other personnel' under Article 8.5 in principle, the fact remains that their general scheme and actual wording lead to the conclusion that such recruitment cannot be envisaged without seriously undermining the system of staff recruitment and management which they set up (paragraph 136).

It must, moreover, be stated that the JET Council and management have adopted ancillary or *ad hoc* rules to prevent any possibility of such recruitment (paragraph 140).

It must therefore be held that Article 8.4 and 8.5 of the Statutes, the supplementary provisions implementing them and the administrative rules intended to give effect to them are illegal in so far as they establish or help to maintain a difference in treatment that is without objective justification and is thus unlawful (paragraph 141).

The applicants' alternative plea of illegality must therefore be upheld and Article 8.4 and 8.5 of the Statutes must be declared inapplicable. The same applies to the Supplementary Rules and the 'resign first' rule in that they are tainted by the same illegality (paragraph 142).

Since those provisions cannot serve as a legal basis for the contested decisions, it remains to be determined whether there was any valid ground for the rejection of the applicants' requests (paragraph 143).

First, the JET Council's opposition to the implementation of Recommendation No 1 in the Pandolfi Panel's report is clearly not a ground on which the Commission could legitimately rely against the applicants' requests. It was on the contrary for the Commission to ensure strict compliance with the fundamental principles of Community law by the JET Council (paragraph 144).

The argument that to recruit the applicants as 'other personnel' would give rise to a new kind of discrimination, against the staff made available by members of JET other than the UKAEA, unless such recruitment were also extended to them, is irrelevant inasmuch as it refers, *ex hypothesi*, to a type of recruitment which the Court has already held was not available to the applicants (paragraph 145).

Since the contested decisions cannot be justified in law on any of the grounds on which they are based, they must therefore be annulled (paragraph 146).

The claims for compensation

The claims for compensation were already included in the applicants' complaints under Article 90(2) of the Staff Regulations against acts adversely affecting them. In principle, those claims are admissible (paragraph 147).

To the extent, however, that compensation is sought by the applicants in respect of damage arising out of conduct on the part of the Commission unrelated to the acts adversely affecting them, namely the rejection of the original requests, these claims must be dismissed as inadmissible because the applicants failed to comply with the two-stage pre-litigation procedure laid down in Articles 90 and 91 of the Staff Regulations (paragraph 148).

See: T-54/92 *Schneider* v *Commission* [1994] ECR-SC II-887; T-569/93 *Moat* v *Commission* [1995] ECR-SC II-305, para. 25

As to whether the applicants may also base their claims for compensation on the second paragraph of Article 188 of the EAEC Treaty and the second paragraph of Article 215 of the EC Treaty, it must be borne in mind that a dispute between an official and the institution which employs or employed him or her concerning compensation for damage is pursued, where it originates in the employment relationship between the person concerned and the institution, under Article 152 of the EAEC Treaty (Article 179 of the EC Treaty) and Articles 90 and 91 of the Staff Regulations and, as regards, in particular, the question of admissibility, lies outside the sphere of application of Articles 151 and 188 of the EAEC Treaty (Articles 178 and 215 of the EC Treaty) (paragraph 149).

See: 65/74 *Porrini and Others* v *EAEC* [1975] ECR 319; 9/75 *Meyer-Burckhardt* v *Commission* [1975] ECR 1171; 48/76 *Reinarz* v *Commission and Council* [1977] ECR 291, at p. 297; *Ainsworth*; Opinion of Mr Mischo in *Ainsworth*, at pp. 196-201

The argument that Decision 78/471 establishing JET and adopting its Statutes was taken by the Council and not the Commission cannot prevail against the applicants' right to bring their actions directly against the institution responsible for the act adversely affecting them. It is clear from Article 184 of the EAEC Treaty that only the Community has legal personality (see also Article 152 and the second paragraph of Article 188, which refer only to the Community and not to its institutions). Whilst it is true that under the Community legal system it is in the interests of the proper administration of justice that, where the liability of the Community is incurred by the act of one of its institutions, it is represented before the Court by the institution or institutions accused of the act giving rise to liability, that does not render a claim for compensation inadmissible, if it is closely linked to a claim for annulment which is itself admissible (paragraph 150).

See: 63/72 to 69/72 *Werhahn* v *Council* [1973] ECR 1229, para. 7; 353/88 *Briantex and Di Domenico* v *EEC and Commission* [1989] ECR 3623, para. 7

As regards the substance of the claim, it must first be determined whether the liability of the Community is incurred on account of the acts unlawfully adopted by the Council and implemented by the Commission (paragraph 151).

The JET Statutes form part of a legislative measure. The claims for compensation are based on the allegation that those Statutes are unlawful, but such illegality is not in itself sufficient for the Community to incur liability. In such cases, liability arises only where there is a sufficiently serious breach of a superior rule of law for the protection of the individual (paragraph 152).

See: 83/76, 94/76, 4/77, 15/77 and 40/77 *Bayerische HNL and Others* v *Council and Commission* [1978] ECR 1209, paras 4 to 6; 238/78 *Ireks-Arkady* v *Council and Commission* [1979] ECR 2955, para. 9; 143/77 *Koninklijke Scholten-Honig* v *Council and Commission* [1979] ECR 3583, para. 10

The fundamental principle of equal treatment is undoubtedly a superior rule of law for the protection of the individual (paragraph 153).

See: *Ireks-Arkady*, cited above, para. 11; 64/76, 113/76, 167/78, 239/78, 27/79, 28/79 and 45/79 *Dumortier Frères and Others* v *Council* [1979] ECR 3091; C-104/89 and C-37/90 *Mulder and Others* v *Council and Commission* [1992] ECR I-3061

In the present case, however, the breach of that principle by the Statutes is not sufficiently serious to render the Community liable. The difference in treatment of which the applicants complain was objectively justified in the original context of the establishment of the Joint Undertaking and its validity was confirmed by the Court of Justice in *Ainsworth* in 1987. In view of the authority attaching to judgments of the Court of Justice in the Community legal system and of the broad discretion conferred on the institutions with regard to the organization and operation of Joint Undertakings, the Council did not manifestly and gravely disregard the limits on the exercise of its legislative powers by illegally maintaining in force the recruitment system provided for in Article 8 of the Statutes (paragraph 154).

Nor, for the same reasons, is the conduct alleged against the Commission such as to cause the Community to incur liability inasmuch as it stems from the implementation of the Statutes for administrative purposes (paragraph 155).

Operative part:

Formal note is taken of the withdrawal from the proceedings of Mr D. Hurford, twenty-sixth applicant in Case T-177/94, and Case T-177/94 is removed from the register in so far as he is concerned.

The Commission's decisions, dated 14 January and 16 September 1994 respectively, not to recruit the other applicants to posts on the temporary staff of the Community are annulled.

The remainder of each of the applications is dismissed.

The defendant is ordered to bear its own costs and to pay those of the applicants, with the exception of those of Mr D. Hurford, and Mr D. Hurford and the intervener are ordered each to bear their own costs.