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

In Joined Cases T-177/94,

Henk Altmann, residing at Wantage, Oxfordshire, United Kingdom, and the 56 other applicants whose names appear in Annex 1 hereto, 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,

applicants,

v

Commission of the European Communities, represented by Hans Gerald Crossland, of its Legal Service, acting as Agent, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

supported by

Council of the European Union, represented by Diego Canga Fano and Jan-Peter Hix, of its Legal Service, and initially by Yves Crétien, Legal Adviser, acting as Agents, with an address for service in Luxembourg at the office of Bruno Eynard, Manager of the Legal Directorate of the European Investment Bank, 100 Boulevard Konrad Adenauer, Kirchberg,

intervener,

* Language of the case: English.

and T-337/94,

Margaret Casson, residing at Chilton, Oxfordshire, United Kingdom, and the 13 other applicants whose names appear in Annex 2 hereto, 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,

applicants,

v

Commission of the European Communities, represented by Hans Gerald Crossland 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 Service, Wagner Centre, Kirchberg,

defendant,

supported by

Council of the European Union, represented by Diego Canga Fano and Jan-Peter Hix, of its Legal Service, and initially by Yves Crétien, Legal Adviser, acting as Agents, with an address for service in Luxembourg at the office of Bruno Eynard, Manager of the Legal Directorate of the European Investment Bank, 100 Boulevard Konrad Adenauer, Kirchberg,

intervener,

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

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

Facts

Legislative background

1 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), adopted

under Articles 46, 47 and 49 of the Treaty establishing the European Atomic Energy Community ('the EAEC Treaty'). 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 The Project was conceived from the outset as a Community project, as is clear from the third recital in the preamble to Decision 78/471 and from Article 8.2 of the JET Statutes ('the Statutes'), annexed thereto. It currently forms the spearhead of joint European effort in the field of controlled thermonuclear fusion. According to Annex I to Council Decision 94/799/Euratom of 8 December 1994 adopting a specific programme of research and training in the field of controlled thermonuclear fusion (1994 to 1998) (OJ 1994 L 331, p. 22), the long-term objective of the Community Fusion Programme is the joint creation of safe, environmentally sound prototype reactors, resulting in the construction of economically viable power stations. Progress towards that objective has a time-scale measured in decades. It is clear from that annex, and from the Evaluation Study of the Management of JET annexed to the specific annual report of the Court of Auditors on the 1990 accounts of the Joint Undertaking (OJ 1992 C 41, p. 1), that the long-term strategy of the fusion programme involves three intermediate steps which extend into the middle of the next century to achieve the ultimate goal of a commercial prototype reactor:

(a) the Joint European Torus (JET) and other devices to demonstrate aspects of the scientific feasibility of fusion;

(b) a 'Next Step' device to complete the demonstration of the scientific and technological feasibility of fusion energy for peaceful purposes. That device will be in the form of either the 'Next European Torus' (NET) or an 'International

Thermonuclear Experimental Reactor' (ITER), in collaboration with the three other major fusion programmes in the world (Japan, Russia and the United States);

(c) a demonstration reactor (DEMO), capable of producing significant quantities of electricity.

In its observations on the study by the Court of Auditors (OJ 1992 C 41, p. 19), the Commission agreed that 'the transfer of technology and know-how from JET to the Next-Step activities is essential to the effectiveness of the Fusion Programme' and stated that it 'continues to explore ways to facilitate and expand this transfer, particularly in human terms'.

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

4 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).

5 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).

6 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.

7 Under Article 9.1 of the Statutes, the expenditure of JET, including expenditure in respect of the remuneration of the staff made available to it, is to be borne 80% by the EAEC, 10% by the UKAEA and the remaining 10% by all the members other than the EAEC.

The Ainsworth judgment

8 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 that:

— in view of the limited life accorded to the Project and the concern to ensure that all the members of the JET staff are guaranteed employment at the end of the Project, the JET management had met the requirements of good administration and had not contravened any provision of the Statutes by requiring every candidate to find a member organization to agree to make him available to JET, even though the provisions of Article 8.1 and 8.5 of the Statutes, providing that the Project Team is to be composed also of 'other personnel', had thus been of no practical consequence (paragraphs 19 to 24);

— by requiring candidates holding United Kingdom nationality to be made available to JET by the UKAEA exclusively and not by any other member organization, JET had discriminated on grounds of nationality, without objective justification and thus illegally, but its practice had not affected the applicants' position since none of them had established or even claimed that in order to comply with those requirements he or she had been induced to forgo a chance of being made available by a member of JET other than the UKAEA (paragraphs 25 to 29);

— the difference in treatment arising under Article 8.4 and 8.5 of the Statutes did not discriminate on grounds of nationality, even though the fundamental principle of equal treatment precludes comparable situations from being treated differently unless the difference in treatment is objectively justified (paragraphs 32 and 33);

— 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 (paragraphs 34 to 39).

Subsequent developments

9 The duration of the JET Project, initially set at 12 years (1978 to 1990), has been extended by the Council since the *Ainsworth* judgment: 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). In the proceedings before the Court of First Instance, it was common ground that the duration of JET would be extended beyond 1996 (see Decision 94/799 and the decision of the JET Council of 21 March 1995, officially requesting a further extension of JET by decision of the Council). That third extension, until 31 December 1999, was formally approved by Council Decision 96/305/Euratom of 7 May 1996 (OJ 1996 L 117, p. 9).

10 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.

11 The signatories of that petition complained, in particular, of

(a) discrimination as between their conditions of employment and those of nationals of other Member States, who always work for JET as temporary staff of the Commission. In that regard, they claimed that their remuneration as

employees of the UKAEA was approximately half that received by those employed by the Commission as temporary staff and that it was common for senior United Kingdom members of staff to be less well paid than the staff working under them;

(b) discrimination as regards their career prospects, in that JET personnel employed by the Commission as temporary staff have preferential access to other Community posts, particularly in the field of the EAEC.

12 The petitioners further maintained 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, namely:

(a) maintenance of the prior requirement of obtaining a 'return ticket' from a member of JET for any person wishing to work for JET;

(b) an agreement or concerted practice between the members of JET to refuse United Kingdom nationals 'return tickets' issued by members other than the UKAEA;

(c) the 'resign first rule', introduced in 1987 in the Supplementary Rules, under which a United Kingdom national employed by the UKAEA must resign his or her post with JET *before submitting an application* for any other post with JET on the temporary staff of the Community;

(d) the 'six months leave from site rule'. The proceedings before the Court have not made it possible to ascertain the precise import of this rule, and it will therefore not be examined in any further detail in this judgment.

13 The petitioners also claimed that the factual circumstances had changed radically since the *Ainsworth* judgment, in particular since

(a) the UKAEA no longer objected to United Kingdom nationals in its employment who worked for JET becoming members of the Community's temporary staff (see the statement of the chairman of the UKAEA of 17 October 1989, cited in Appendix 15 to the petition), so there was no danger that such a change would disturb peaceful industrial relations at Culham;

(b) neither the 'return ticket' system nor the fact of being employed by the UKAEA ensured any longer that employment would be guaranteed at the end of the Project (see Appendices 9 and 11 to the petition);

(c) many of the staff working at JET were not employed by either the UKAEA or another member before they were made available for the Project and thus had no real link with their 'sponsoring member'; in particular, 97 United Kingdom members of the JET staff had no link with the UKAEA before they were assigned to JET (see Appendix 10 to the petition);

(d) the JET Project could no longer be regarded as a temporary project, inasmuch as it was to last at least 18 years, and probably at least 21 years; many of the United Kingdom nationals in question would thus have spent more than half their working lives in its service.

14 The petitioners thus considered that the obligation imposed on United Kingdom nationals to obtain a 'return ticket' from another member of JET if they wished to be recruited as temporary staff of the Community was no longer justified. The fairest and most efficient system, they claimed, was that all the staff made available to JET should have the same employer. The petitioners also requested compensation for the discrimination which they claimed to have suffered.

15 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'. By Legislative Resolution of 10 December 1991 (OJ 1992 C 13, p. 50), the Parliament therefore made two amendments to the Commission proposal for a Council Decision relating to the extension of the JET Project until 1996, expressing its fears 'that the differing remuneration for researchers working for the Commission and national authorities not only will cause tension at the JET facility in Culham, as has already occurred, but will also hamper researcher mobility' and calling on the Commission, within six months, to 'have an independent consultancy draw up a proposal providing for remuneration that is based on performance rather than on inflexible statutes'.

16 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, in particular, the following recommendations:

— '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);

— failing which, 'ways must be found to enable applicants for permanent posts in the Community from UKAEA staff working at JET to be treated by the Commission as internal applicants, or at least to be treated preferentially compared with other external applicants' (Recommendation No 2); and

— an extension of the 'Retention of Experience Allowance' should be negotiated between the UKAEA and the staff unions to compensate to a certain extent for the difference between the remuneration of such staff made available to JET and that of the temporary staff of the Community (Recommendation No 3).

17 The JET Council held an extraordinary meeting on 26 February 1993 to consider the recommendations of the Pandolfi Panel's report. The conclusions of that meeting show that a '[clear] majority of the JET Council Members found [Recommendation No 1] to be generally unacceptable and advised the Commission not to proceed further with the recommendation'. With regard to Recommendation No 2, the JET Council noted that 'the Commission, within its statutory limitations, has already taken steps which have the effect of improving the opportunities also for UKAEA staff at JET to be recruited for posts elsewhere in the Fusion Programme' and urged the Commission to ensure that those steps were pursued. The JET Council confirmed its position at its meeting of 13 and 14 October 1993.

18 In its report to the Parliament on the Pandolfi Panel's report, dated 31 March 1993, the Commission considered that 'the implementation of Recommendation No 1 would have constituted the most suitable solution in order to conclude the Project in good order'. However, in view of the conclusions reached at the extraordinary meeting of the JET Council of 26 February 1993, the Commission concluded that, in all likelihood, the necessary majority for such implementation would not be attained within the JET Council. The Commission further stated that the implementation of that recommendation would require the granting of 'return tickets' by the UKAEA in order to avoid a new kind of discrimination, against the JET staff made available by members other than the UKAEA, and noted that the UKAEA was opposed to the issuing of such 'return tickets'. With regard to Recommendation No 2, the Commission stated that, although it was unable to subscribe to the recommendation because of the limits imposed on it by the Statutes, it had taken and would continue to take various steps to ease the future career development of JET staff, including those made available to the Project by the UKAEA. It mentioned a training programme under study, and steps taken to increase the age-limit from 35 to 50 years in respect of applications from such staff for posts in the ITER project.

19 On behalf of the JET management, the Director of JET stated that Recommendation No 1 in the Pandolfi Panel's report was the only one which would 'guarantee the restoration of social peace' (see point 11 of the Commission's abovementioned report to the Parliament). The JET Staff Representatives Committee (SRC),

together with the IPMS (Institution of Professionals, Managers and Specialists) and the CPSA (Civil and Public Services Association), the two trade unions representing UKAEA staff, considered, in a report dated 9 February 1993, that neither Recommendation No 2 nor Recommendation No 3 in isolation offered a satisfactory solution to the unlawful discriminatory treatment currently meted out to United Kingdom members of the JET Team staff. They considered that transfer to temporary employment by the Community was the only way for such staff to be treated on an equal footing with their colleagues during the remainder of JET's term and obtain reasonable prospects of a career after the Project ends.

20 In a communication dated September 1992, published in response to the Pandolfi Panel's report, and again in a letter from its Chairman dated 15 March 1994, the UKAEA indicated that it would not oppose Recommendation No 1, on condition that those of its staff who became temporary employees of the Community resigned from the UKAEA. It also expressed its support for Recommendation No 2.

21 After its Committee on Budgets had severely criticized the JET Council for having 'neglected its responsibilities in rejecting Recommendation No 1, without giving any reason for this decision and well knowing that all other parties are in favour of Recommendation No 1' (Working Document PE 204.729 of 20 April 1993, Annex 19 to the application in Case T-177/94), the Parliament decided, at its plenary session of 17 December 1993, to place in reserve ECU 59 million of the Community's contribution to JET (representing more than half of the Project's total annual budget), specifying that the amount 'will stay in the reserve until the Commission and the UKAEA agree on modification of their stated positions and regulations that have caused and are still causing discriminatory effects for those United Kingdom citizens wanting to enter the EC administration'. The Parliament also allocated a sum of ECU 2 million to compensate 'persons in the present service of JET who

met the Euratom recruitment requirements at the moment they entered JET', by granting them awards. The President of the Parliament gave the following explanation in an apparently undated letter to the Chairman of the JET Council (see Annex 22 to the application in Case T-377/94):

'The European Parliament has always fully supported the fusion programme and in particular, the JET Project as one of the most important joint scientific projects in Europe. The Parliament, nevertheless, cannot accept discriminatory procedures in a Community supported project, nor measures that go against our idea of the European researchers' role.

The reason for voting the funds in the reserve this year is therefore directly related to this unresolved problem within JET, as is the grant of 2 million ECU. Endeavours to release the reserve for the project should therefore be directed towards a settlement of the internal discrimination rather than towards reductions in the programme. Furthermore, the 2 million ECU should not be regarded as an undue increase of payments to individual employees, but as a Community contribution to JET for those who have been adversely affected by the discriminatory recruitment procedures in the past.'

22 The Parliament and the Commission appear subsequently to have reached a political compromise on 3 May 1994 enabling the sums placed in reserve to be released. The terms of the compromise are apparently set out in a 'Note of Understanding' (see Annex 4 to the reply in Case T-177/94) providing, *inter alia*, as follows:

'2. According to the agreement the so-called "resign first" and "six months leave from site" practices will be abolished. There has been a creation [of] 20 A, B or C grade posts for ITER in 1994; in 1995 and the following years the Commission will ask for [a] further 10 A, B or C posts each year. The age limit in selection procedures for fusion posts has been set at 50.

3. Recruitment of this staff shall take place on a non-discriminatory basis with due consideration of social realities (includ[ing] the problem of UKAEA staff at JET).

4. The UKAEA staff emp[l]oyed by JET on 24 February 1994 will be eligible for the award of 2 million ECU according to the time they have worked for JET.

...'

23 At the hearing, in reply to a question from the Court, the Commission explained that the sum of ECU 2 million was paid out to eligible staff in December 1995, subject to a deduction of 10.2% representing an amount in dispute between the UKAEA and the Department of Social Security. That sum was divided up amongst the UKAEA staff concerned on the basis of the duration of their secondment to JET, at a basic rate of £700 per year of service. The average individual payment was between £5 000 and £10 000. According to the applicants, that payment was a gesture of goodwill towards them on the part of the Parliament in recognition of the discriminatory situation pertaining within JET and in no way constitutes adequate compensation for that discrimination. The Commission too considers that it was a discretionary *ex gratia* payment granted by the Parliament in the light of the 'unpleasant' situation which it had found to exist.

24 It appears from the Commission's answers to other questions from the Court that at least 230 UKAEA staff were made available to JET between 1993 and 1996. The number of temporary staff of the Community seconded to JET, however, fell from 163 on 1 January 1993 to 117 on 1 January 1996. The Project Team also includes contract staff provided by outside companies, a number of employees made

available by the Directorate-General for Science, Research and Development (DG XII) and various other categories of staff seconded for short periods under various arrangements.

The pre-litigation procedure

25 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, by individual letters dated 18 to 29 January 1993 in the case of the applicants in Case T-177/94 and 28 September to 19 October 1993 in the case of the applicants in Case T-377/94, requesting to be recruited as temporary staff of the Community. Those requests remained unanswered.

26 The applicants in Case T-177/94 submitted two joint complaints, dated 12 and 17 August 1993, against the implied rejection of their requests. The applicants in Case T-377/94 likewise submitted two joint complaints, dated 14 April and 20 May 1994, against the implied rejection of their requests. Those complaints were all sent to the Secretary-General of the Commission, the Secretary-General of the Council, the Director of JET and the Chairman of the JET Council.

27 In their complaints, the applicants referred, inter alia, to the arguments put forward in their petition to the Parliament and requested the addressees:

'— to engage the Signatories as "Other Personnel" within the meaning of Article 8.5 of the Statutes of the JET Joint Undertaking and therefore as temporary servants of the Community;

— to ensure that the Signatories are engaged on the same terms as other temporary servants of the community engaged under Article 8.5 of the said Statutes and in particular so as to enjoy the benefit of the agreement made between the Commission and the Staff Association of those other employees in relation to preferential treatment as regards future employment to be accorded to them as temporary servants of the Community;

— by way of subsidiary and alternative claim, to abrogate the "rules", introduced at JET since the judgment of the Court of Justice of the European Communities in [*Ainsworth*], which have as their object and effect to perpetuate the wrongful discrimination that was condemned by the Court at paragraph 26 of the said judgment [...]; and

— in each case, to compensate the Signatories for the loss that they have suffered by reason of the matters complained of.'

28 Only the Commission took any action in response to those two sets of complaints, which it rejected by two decisions ('the decisions') drafted in almost identical terms: the first, dated 14 January 1994 ('the Altmann decision'), addressed to the applicants in Case T-177/94 and received by its addressees later the same month; the second, dated 16 September 1994 ('the Casson decision'), addressed to the applicants in Case T-377/94, sent with a letter from the JET administration and personnel service dated 27 October 1994 and received by its addressees in early November 1994.

29 In each decision, the Commission stated that it was replying to 'the personnel of the JET Joint Undertaking, Culham, who have submitted complaints under Article 90(2) of the Staff Regulations' against the implied decision rejecting their requests 'lodged with the appointing authority' to be engaged as temporary staff of the Community.

30 As regards the substance of the complaints, the Commission stated in the decisions, *inter alia*, that the engagement of the applicants as temporary staff of the Community would infringe Article 8.4 of the Statutes and that at its meeting on 26 February 1993, the JET Council had decided to ask the Commission not to act upon Recommendation No 1 of the Pandolfi Panel's report.

Procedure and forms of order sought

31 By application lodged at the Registry of the Court of First Instance on 22 April 1994, Altmann and Others brought an action, citing originally as defendants the Commission and the JET Council, in Case T-177/94.

32 By application lodged at the Court Registry on 24 November 1994, Casson and Others brought a similar action, also citing originally as defendants the Commission and the JET Council, in Case T-377/94.

33 By order of 16 December 1994, the Court (Third Chamber) dismissed the application in Case T-177/94 as manifestly inadmissible in so far as it was directed against the JET Council.

34 By letter of 15 February 1995 to the Registrar of the Court of First Instance, the applicants stated that they deferred to the said order of 16 December 1994 and agreed that the Commission should be deemed to be the sole defendant both in Case T-177/94 and in Case T-377/94.

35 By orders dated 13 January and 7 April 1995 respectively, the Council was granted leave to intervene in support of the Commission in Cases T-177/94 and T-377/94.

36 Cases T-177/94 and T-377/94 were joined by order of 7 April 1995.

37 By decision of the Court of First Instance of 19 September 1995, with effect from 1 October 1995, the Judge-Rapporteur in Joined Cases T-177/94 and T-377/94 was appointed to the Second Chamber, to which those cases were therefore assigned.

38 Upon hearing the report of the Judge-Rapporteur, the Court (Second Chamber) decided to open the oral procedure and, by letters dated 12 December 1995 and 8 March 1996, requested the parties to reply to certain questions in writing before the hearing, as a measure of organization of procedure under Article 64 of the Rules of Procedure. The applicants' answers were lodged on 22 January 1996 and the Commission's answers on 15 February and 21 March 1996.

39 By letter to the Registrar of 18 March 1996, counsel for the applicants informed the Court that Mr D. Hurford, 26th applicant in Case T-177/94, had resigned from JET and did not intend to pursue his case.

40 The parties presented oral argument and answered the questions put orally by the Court at the public hearing on 28 March 1996.

41 All the applicants claim, in identical terms, that the Court should:

(1) declare that the operation of the Statutes and the Supplementary Rules, in respect of the employment of the applicants at JET since the *Ainsworth* judgment, has been discriminatory and unjustified;

(2) require the Commission to take steps to enable the applicants to become temporary employees of the Community for the term of JET, whether as 'other personnel' or otherwise;

(3) require the Commission to take steps to eliminate any administrative practices that have the object or effect of:

(a) preventing or discouraging Members of the JET Council from granting 'return tickets' to the applicants for the purposes of obtaining the status of temporary employees of the Community; or

(b) preventing or impeding the applicants from applying for posts at JET on the basis that they would alter their status to temporary employees of the Community; or

(c) preventing or impeding the applicants from applying for such posts on equal terms with other members of the JET Team staff;

(4) to the extent that:

(a) any of the practices or matters complained of are held by the Court to be necessary consequences of the Statutes; and/or

(b) any of the remedies sought by the applicants are prevented or impeded by the terms of the Statutes;

declare that the Statutes are discriminatory and unjustified and therefore illegal in those respects;

(5) require the Commission to take all necessary steps to amend the Statutes in the light of any declaration made under (4) above;

(6) require the Commission to implement all the recommendations of the Pandolfi Panel's report;

(7) require the Commission to pay compensation to the applicants for their financial loss since the judgment of the Court of Justice in *Ainsworth* and for their loss of career prospects and, where appropriate, loss of seniority in grade and loss of accrued pension rights, caused by the unjustified discrimination practised against them;

(8) lay down guidelines to be followed by the Commission in assessing the loss and damage caused to the applicants and a timetable within which the Commission must make concrete proposals for compensating the applicants;

(9) order the costs of the application to be paid by the defendant; and

(10) take such further measures and grant such further relief, under the Statute of the Court of Justice and/or the Rules of Procedure of this Court, as may be necessary, just or equitable.

42 The Commission contends that the Court should:

— dismiss the applications as unfounded in their entirety; and

— make an appropriate order as to costs.

43 The Council, specifying that its intervention is confined to supporting the Commission in so far as it contends that the applications should be dismissed to the extent that they challenge the legality and validity of the Statutes of JET, contends that the Court should:

— dismiss the applications; and

— make an appropriate order as to costs.

Admissibility

A — *Scope and admissibility of certain of the applicants' claims*

44 First of all, this Court 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 (see paragraphs 33 to 36 of the order of 16 December 1994, cited above).

45 In view, in particular, of the express reference in the application to Article 73 of the Conditions of Employment of other Servants of the European Communities ('the Conditions of Employment') and Articles 90 and 91 of the Staff Regulations of Officials of the European Communities ('the Staff Regulations'), the procedure laid down in which has been followed by the applicants, their first head of claim, taken together in so far as appropriate with their tenth head of claim, must be interpreted as seeking principally the annulment of the Altmann decision or the Casson decision, as the case may be. Those two decisions, rejecting the applicants' complaints against the implied rejections of their requests to be appointed to the temporary staff of the Community, 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.

46 The fourth 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 (see, *a contrario*, Case 33/80 *Albini* v *Council and Commission* [1981] ECR 2141, Joined Cases 87/77, 130/77, 22/83, 9/84 and 10/84 *Salerno and Others* v *Commission and Council* [1985] ECR 2523 and Joined Cases 89/86 and 91/86 *Étoile Commerciale and CNTA* v *Commission* [1987] ECR 3005).

47 However, in accordance with consistent case-law, the second, third, fifth and sixth heads of claim, seeking the issue of directions to the Commission, 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 administration concerned to take the necessary measures to comply with the

judgment delivered in an action 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).

B — *The plea of* res judicata

Arguments of the parties

48 In its statement in intervention, which is confined to the issue of the legality of the JET Statutes, the Council submits that the *Ainsworth* judgment has the authority of *res judicata* for those applicants who were already parties to that case (see Case 14/64 *Gualco* v *High Authority* [1965] ECR 51). Since the Court of Justice has upheld the lawfulness of the recruitment system established by Article 8.4 and 8.5 of the Statutes, those applicants are barred from raising the same issue in a later action. Moreover, by order of 1 April 1987 in Joined Cases 159/84, 267/84, 12/85 and 264/85 *Ainsworth and Others* v *Commission* [1987] ECR 1579, the Court of Justice held that certain actions brought by Mr Ainsworth and others subsequent to its judgment of 15 January 1987 had 'the same purpose and [were] based on the same submissions as the actions which led to' that judgment and 'must therefore be dismissed as inadmissible'.

49 The applicants submit that they are entitled to rely on changes in circumstances which have occurred since the *Ainsworth* judgment.

Findings of the Court

50 It is clear from well-established case-law that 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 (Joined Cases 172/83 and 226/83 *Hoogovens Groep* v *Commission* [1985] ECR 2831, paragraph 9; Joined Cases 358/85 and 51/86 *France* v *Parliament* [1988] ECR 4821, paragraph 12; Case T-28/89 *Maindiaux and Others* v *ESC* [1990] ECR II-59, paragraph 23).

51 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. As this Court pointed out at paragraph 23 of its judgment in *Maindiaux*, cited above, the act whose annulment is sought is an essential element of the subject-matter of an action. The order of the Court of Justice of 1 April 1987 in *Ainsworth and Others* v *Commission*, cited above, to which the Council refers, is not relevant in any way because it was held specifically that the actions brought by Mr Ainsworth and others subsequent to the judgment of 15 January 1987 had 'the same purpose' as the actions which led to that judgment, namely the annulment of the same decision of the Director of the Joint Undertaking.

52 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, in particular the lapse of any objective justification for the difference in treatment established by Article 8.4 and 8.5 of the Statutes, on which the Court of Justice based its decision in that case.

53 The plea of *res judicata* raised by the Council must therefore be dismissed. Account must be taken, in the examination of the substance of the case, both of the *Ainsworth* judgment and of the new issues raised by the present applications.

The claims for annulment

Pleas in law and main arguments

54 In support of their claims for annulment, the applicants put forward, in substance, a single plea in law alleging breach of the basic principle of equal treatment and the prohibition of discrimination on grounds of nationality.

55 They claim, first, that the United Kingdom members of the JET Team staff receive less favourable treatment than the others in relation to security of employment after the end of the Project and, secondly, that their pay and conditions of employment are significantly inferior to those of the other members of the JET Team staff.

56 That difference in treatment, established by Article 8.4 and 8.5 of the Statutes, has become more serious since the *Ainsworth* judgment and, in contrast to what the Court of Justice found then, is no longer objectively justified as a result of changes in the factual situation. The applicants submit, essentially, that JET can no longer be regarded as a short-term project and that the UKAEA itself now acknowledges that appointment of its employees made available to JET to the Commission's temporary staff would not interfere with the proper functioning of its organization.

57 Furthermore, the remedies to that difference in treatment which were identified in the *Ainsworth* judgment, in particular the possibility for United Kingdom nationals to be made available to JET by members other than the UKAEA and thus to gain the status of temporary staff of the Community, have been rendered ineffective by various practices applied by the JET management and JET Council members since 1987.

58 The applicants, referring in particular to the cases of Dr H. Altmann and Dr A. Hubbard in 1987, Dr A. Gondhalekar in 1989 and Dr G. Fishpool and Mr R. Shaw in 1993, allege a concerted practice by the members of JET to prevent recruitment of United Kingdom nationals by a member other than the UKAEA for the purpose of making them available to the Project Team.

59 In addition, they claim, the management and members of JET make sure that once recruited and made available to the project by the UKAEA, the United Kingdom staff on the team are prevented, or at least dissuaded, from changing employer by the 'resign first' rule, introduced in 1987 specifically to replace the practices condemned by the Court of Justice. It is, moreover, clear from the decision adopted by the Commission on 28 December 1994 concerning Dr Peter Stott, the annulment of which is sought in Case T-99/95 *Stott* v *Commission*, that a version of that rule remained in force despite the terms of the Note of Understanding of 3 May 1994 (see paragraph 22 above).

60 Furthermore, contrary to the findings of the Court of Justice in 1987, the practice of requiring all candidates to find a member organization which agrees to make them available to JET and of refusing to recruit any candidates to the temporary staff of the Community as 'other personnel' no longer meets the requirements of good administration, because of the change in circumstances. The applicants claim, in substance, that neither employment by the UKAEA nor the 'return tickets' granted to non-United Kingdom staff on the JET project any longer provide security of employment at the end of the project and that the Commission has as a result offered its temporary staff assigned to JET certain assurances of employment, from which they are themselves excluded.

61 In those circumstances, the applicants maintain, the Commission's refusal in the Altmann and Casson decisions to recruit them as 'other personnel' — which would none the less be possible under Article 8.5 of the Statutes — is wrongful and discriminatory. In those decisions, the Commission also disregarded the import of Article 8.4 and 8.5 of the Statutes.

62 In the alternative, should the Court find that the Commission's refusal is the necessary consequence of the terms of the Statutes, preventing it from taking appropriate steps to end the discrimination which they claim to suffer, the applicants submit that the Statutes are illegal, any objective justification for the difference in treatment which they establish having lapsed.

63 The Commission denies that the factual circumstances have changed to such an extent as to call into question the reasoning of the Court of Justice in *Ainsworth* and maintains that, in any event, the objective justification for the difference in treatment established by Article 8.4 and 8.5 of the Statutes has in no way lapsed, and thus there is no reason to reach a different conclusion in the present cases from that reached by the Court of Justice in 1987.

64 The Commission submits that JET remains by definition a temporary undertaking in relation to which the UKAEA, as host organization, remains in a highly specific position. Whilst the UKAEA did not object to the first recommendation of the Pandolfi Panel's report, its insistence that members of its staff should resign on joining the temporary staff of the Community merely emphasizes the dichotomy recognized by the Court as justified.

65 The Commission specifies that the major argument in favour of the distinction between staff employed by the UKAEA and temporary staff of the Community is the avoidance of discrimination amongst the UKAEA staff working at Culham or by extension among the staff of the UKAEA as a whole. UKAEA staff members would thus be undertaking the same type of work in the same establishment, the same town or the same country as the UKAEA staff assigned to JET but under different conditions of service. Such a difference in treatment would not be justified.

66 The Commission denies both the existence of and any responsibility for the discriminatory practices alleged by the applicants.

67 It further submits that Article 8.4 of the Statutes expressly precludes the recruitment of staff made available by the UKAEA as temporary staff and therefore automatically means that the applicants' requests must be rejected. It concedes that Article 8.5 provides for 'other personnel' to be recruited but specifies that no such appointment has been made and maintains that the applicants have no right to such appointment, whether on the basis of the Statutes or of the *Ainsworth* judgment.

68 Furthermore, the appointment of the applicants as 'other personnel' under Article 8.5 of the Statutes would also have to be open to staff made available to JET by other members, failing which new discrimination lacking any objective justification would arise in relation to such staff.

69 Such an extension would in the Commission's view destroy the system of recruitment established by the Statutes and held to be lawful by the Court of Justice in *Ainsworth*.

70 Finally, as regards the 'resign first' rule, the Commission submits that it follows from, in particular, Article 8.4 of the Statutes and Section 9.1 of the Supplementary Rules that a member of the JET Team who changes employer automatically loses his or her post with JET and must thus submit anew to the recruitment procedure set out in Section 5 of the Supplementary Rules.

71 In its statement in intervention, which is confined to the issue of the legality of the JET Statutes, the Council submits that the recruitment system set out in Article 8 of the Statutes was and remains legal and valid and that there is no legal provision requiring it to amend the Statutes in that regard.

72 The Council argues that, since it follows from the *Ainsworth* judgment that the Statutes were valid at the date of their adoption and remained valid at least until the date of that judgment, the present applications imply that they have become invalid subsequent to the judgment due to a substantial change in circumstances. In its submission, any such claim is inaccurate in fact and erroneous in law.

73 First, the applicants have failed to demonstrate in any way that such a change in circumstances has taken place. The factual situation at the time of the adoption of the Statutes and in particular the limited duration of the JET Project and the particular position of the UKAEA in relation to the Joint Undertaking have remained basically unaltered.

74 Even if the alleged change in circumstances had in fact occurred, the Council adds, the Statutes would not have become invalid, because they are drafted in such a way as to allow a flexible application in the light of subsequent developments. The applicants themselves admit, according to the Council, that the Statutes do not prevent the Commission from taking appropriate measures in order to remedy the alleged discrimination against them. The manner in which the Statutes are applied consequently falls within the discretion of the competent institutions and can in no way result in their illegality.

75 The Council further maintains that, even if the Statutes did not allow such a flexible application, a mere change in the factual situation would not render them invalid. In accordance with the principle of legality (Case 101/78 *Granaria* v *Hoofdproduktschap voor Akkerbouwprodukten* [1979] ECR 623, paragraph 5), a measure lawfully adopted by the Community institutions remains lawful and valid

unless revoked by a subsequent act or declared invalid by a competent court. The principle of legality and, in particular, of legal certainty thus requires the maintenance and stability of a legal situation. If subsequent developments in the factual situation in which a specific legislative act was adopted were to have an impact on its validity, those to whom it is addressed would, in the Council's submission, be uncertain as to their rights and obligations.

76 Finally, the Council submits that any amendment of Article 8 of the Statutes is subject to the procedure laid down in Article 24 thereof, under which, if a member of the Joint Undertaking proposes an amendment to the Statutes to which the JET Council agrees, the Commission is to make a proposal to the Council for its approval in accordance with the rules laid down in Articles 50 and 47 of the EAEC Treaty.

77 In its statement in intervention, which was lodged before Decision 96/305, cited above, was adopted on 7 May 1996, the Council stated that if the Commission were to submit a proposal to amend the recruitment system, it would examine the proposed amendment taking into consideration the factual circumstances prevailing at the time. Should a proposal for a further extension of the JET Project be submitted, moreover, it would have the opportunity to decide whether that extension would justify a review of the recruitment system under Article 8 of the Statutes.

Findings of the Court

A — *Preliminary considerations*

78 Although the applicants' complaints are directed principally against the Commission's decisions not to recruit them as 'other personnel' under Article 8.1 and 8.5 of the Statutes, and only in the alternative call into question the validity of those

Statutes, the whole of their action is founded on the central argument that, as a result of a change in facts and circumstances, the various conclusions reached by the Court of Justice in *Ainsworth* should be re-examined and that there is no longer any objective justification for the difference in treatment or discrimination which they claim to suffer.

79 Since the general principle of equal treatment and the prohibition of discrimination based on nationality are fundamental principles of Community law, which the Community judicature must ensure is observed, the first questions to be examined, in the light of the parties' arguments, are those of the existence of a difference in treatment or discrimination within the JET Joint Undertaking and of the effects of any subsequent developments since the *Ainsworth* judgment on the legality of the decisions taken by the Commission on the basis of Article 8.4 and 8.5 of the Statutes.

80 Before those questions are examined, the Commission's argument that, because of the great similarity between the actions, the *Ainsworth* judgment has to be regarded as a 'binding precedent' on this Court in the present case must be rejected. It need merely be pointed out that this Court 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 (see paragraph 50 et seq. above).

B — *Existence of the alleged difference in treatment*

81 It is common ground that the JET Joint Undertaking is a Community project. It is also clear from the documents before the Court that 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.

82 Nevertheless, under Article 8.4 and 8.5 of the Statutes, staff made available to JET by the UKAEA, the host organization, 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.

83 The documents before the Court also show that, prior to joining JET, many of the members of the Project Team had had no connection with the member organization which made them available. 97 United Kingdom nationals — 45% of the United Kingdom staff of JET — were in that situation as regards the UKAEA at the time of the petition to the Parliament (see Appendix 10 to that petition) and, according to their answer to a written question from the Court, 30 of the 71 applicants were not engaged by the UKAEA until after they had been selected by JET. Likewise, according to the Commission's answer to another written question from the Court, at least 39 of the 117 members of the Community's temporary staff working with JET on 1 January 1996 had had no previous employment relationship with the member of JET which made them available.

84 It is common ground that the staff made available to JET by the UKAEA receive appreciably lower salaries than do those recruited to the temporary staff of the Communities.

85 The applicants claim, however, to be considerably more concerned by a second difference in treatment, relating to security of employment, which was not raised in the *Ainsworth* case. In that regard, it is clear from the documents before the

Court — and the Commission does not deny — that 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.

86 Those advantages and priorities derive in particular from:

— Article 29(1)(b) of the Staff Regulations, under which the appointing authority is not to open the procedure for an external competition in order to fill a vacant post before considering whether to hold competitions internal to the institution. In Case 16/64 *Rauch* v *Commission* [1965] ECR 135, the Court of Justice specified that the expression 'competition internal to the institution' concerns any person employed by the institution, in whatever capacity. Members of the temporary or auxiliary staff may therefore be admitted to take part in internal competitions;

— Article 1(1)(g) of Annex III to the Staff Regulations, which provides that where an age limit is specified in a notice of competition it may be extended in the case of servants of the Communities who have completed not less than one year's service.

87 Pursuant to Article 101 of the EAEC Treaty, the European Atomic Energy Community entered into an agreement on 21 July 1992 with the Government of Japan, the Government of the Russian Federation and the Government of the United States of America on cooperation in the engineering design activities for the international thermonuclear experimental reactor ('the ITER-EDA Agreement', OJ 1992 L 244, p. 14). It is common ground that the staff which the European Atomic Energy Community undertook to make available to that project under secondment agreements, in accordance with Article 8 of the said Agreement, are recruited to Community posts, which has involved the gradual creation of several dozen

Community posts since 1994, forming a natural employment opportunity, given their scientific and technical knowledge, for staff currently working on the JET Project (see, in this regard, point 3 of the Note of Understanding between the Commission and the Parliament).

88 Even though the Commission has extended the age limit for outside candidatures for ITER posts to 50, 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, as is shown, *inter alia*, by the cases of Dr Harbour (in 1992) and Dr Gondhalekar (in 1994), set out in Annexes 12 and 15 to the application in Case T-177/94.

89 It appears, moreover, from the Commission's answer to a written question from the Court that the proportion of JET staff who obtain a permanent post with the Commission, in particular in the context of the ITER project, 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. The Commission has provided the following yearly figures for the period 1992 to 1995:

	1992	1993	1994	1995
(a) Total non-UKAEA staff leaving JET	18	25	17	10
(b) Non-UKAEA staff obtaining a post with the Commission	15	21	13	8
(c) Non-UKAEA staff using a 'return ticket'	3	1	2	0
(d) Total UKAEA staff leaving JET	23	8	16	21
(e) UKAEA staff obtaining a post with the Commission (by external competition)	0	2	2	1
(f) UKAEA staff returning to UKAEA	1	2	5	4

90 Thirdly, it appears from the documents before the Court that 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. The applicants have referred to a number of such undertakings given by the Commission on 15 December 1988, 14 November 1989, 30 November 1990 and 22 December 1992, and to a meeting on 1 July 1993 at which the Director of JET stated: '[the] Commission has given an undertaking that they will treat JET Euratom staff as priority candidates for posts elsewhere with the Commission at the end of JET. It has shown good faith in the way it transferred most of those whose assignments were terminated at the end of 1992. ...' (see Annex 10 to the application in Case T-177/94). Those in the applicants' situation have been excluded from those guarantees by reason of their status as UKAEA employees.

91 This Court therefore finds that the differences in treatment established by the Court of Justice in the *Ainsworth* judgment are still in existence, and have even become considerably more pronounced, within the JET Project Team, depending on whether the staff members in question were made available to the Joint Undertaking by the UKAEA or by another member. Those differences no longer concern only conditions of employment but now affect security of employment and, above all, prospects of recruitment as Community officials, in particular in the context of the ITER and ITER-EDA projects.

C — *Changes in the factual circumstances since the* Ainsworth *judgment*

92 Having regard to the very special nature of the JET Joint Undertaking and the specific constraints which had to be taken into account in its rules of organization, the Court of Justice considered, at paragraphs 34 to 38 of the *Ainsworth* judgment, that the difference in treatment established by Article 8.4 and 8.5 of the Statutes was objectively justified.

93 In its reasoning, the Court of Justice placed particular emphasis on the consideration that a joint undertaking devoted entirely to research and of limited duration in time can work to good effect only in close association with a national organization that is already in existence, which is thus required to assume responsibilities of its own in the organization and functioning of the Joint Undertaking (paragraphs 35 and 36 of the judgment).

94 At paragraph 37 of its judgment, the Court of Justice noted in addition that the UKAEA was thus in the very special position of having to manage staff with the same qualifications, employed on the same site on the same kind of work but assigned to two legally distinct organizations. The UKAEA was anxious to prevent that situation from upsetting the functioning of its own organization and, supported on this matter by the United Kingdom Government, requested in the negotiations which preceded the adoption of Decision 78/471, cited above, that the staff which it would make available to the JET Joint Undertaking should remain subject to its own conditions of service. By reason of the privileged role attributed to the UKAEA as a result of the special characteristics of the Joint Undertaking, the Court of Justice considered that that requirement could not be overlooked in the Joint Undertaking's Statutes.

95 In support of their claims for annulment in the present cases, the applicants none the less ask this Court to determine whether the factors accepted by the Court of Justice in the *Ainsworth* judgment may still be taken into consideration. This Court must therefore ascertain whether, as the applicants submit, 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.

96 This Court finds that 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.

1. The extension of the duration of JET and the continuation of the Fusion Programme

97 This Court notes, first, that 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. Furthermore, in view of what has repeatedly occurred so far, it cannot be ruled out that 'new substantial scientific and technical arguments ... in particular with a view to a Next Step' (see the second recital in the preamble to Decision 96/305, cited above) will plead in favour of continuing the operation of JET after 1999, as has already been the case in 1988, 1991 and 1996.

98 Whilst JET remains a specialized research undertaking the duration of which is in theory limited, it has through its successive extensions acquired the nature of a permanent or very long-term undertaking. That development has meant in particular that the staff made available to JET by its members pursue a proper career there and only exceptionally return to their original employers (see the table in paragraph 89 above), whereas returning to the member concerned had originally been conceived as a fundamental feature of the Project (see paragraph 106 below). The applicants have specified, in response to a written question from the Court, that by February 1996 the duration of their periods of service with JET ranged from 5 to 17 years, with an average of 12 years.

99 Moreover, as has already been noted (see paragraphs 2 and 87 above), the JET Project is merely the first intermediate step in a programme of research and development extending until the middle of the 21st century, the continuation of which offers natural career prospects for scientists assigned to JET.

2. The modified role played by the UKAEA in the organization and functioning of the Joint Undertaking

100 Secondly, whilst under Article 15 of the Statutes and the Annex thereto the UKAEA provided considerable support to JET during the initial years of its existence, further to a clarification of the Agreement on Support from the Host Organization negotiated in 1987 and endorsed by the JET Council in 1988, a large number of services previously supplied under that agreement have since been provided on a commercial basis following competitive tendering procedures (see point 1.3 of the petition to the Parliament and point 4.3 of the study annexed to the report of the Court of Auditors).

3. The change in the UKAEA's attitude

101 Thirdly, it is clear from a statement made by the chairman of the UKAEA on 17 October 1989 (Appendix 15 to the petition to the Parliament), from the UKAEA's response to the Pandolfi Panel's report (see paragraph 20 above), from the minutes of the meeting of the Joint Working Party on the Future Career Prospects of JET Team Members on 30 September 1993 (summary by Mr O'Hara, see Annex 8 to the application in Case T-177/94, p. A8.16) and finally from a letter from the chairman of the UKAEA of 15 March 1994 (Annex 18 to the application in Case T-177/94) that 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. The Director of JET has considered Recommendation No 1 of the Pandolfi Panel to be the only one which would 'guarantee the restoration of social peace'. The trade unions representing UKAEA staff have also expressed unreserved support for Recommendation No 1, in their report of 9 February 1993 (see paragraph 19 above).

102 In view of those changes, it is no longer possible to find on the evidence now before the Court, as the Court of Justice did at paragraph 37 of its judgment in *Ainsworth*, that the difference in treatment established by Article 8.4 and 8.5 of the Statutes is still objectively justified by the concern to avoid upsetting the functioning of the UKAEA, whose sole concern now is not to give guarantees of future employment to the staff which it makes available to JET.

4. The industrial relations conflict within JET

103 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, since the Parliament, having intervened in the conflict and being concerned to bring an end to what it saw as unacceptable discrimination against the applicants, for several months withheld nearly half of the yearly budget appropriations allocated to JET.

104 It must also be borne in mind that, according to the Director of JET, Recommendation No 1 of the Pandolfi Panel is the only one which would 'guarantee the restoration of social peace' and that the Commission itself considered that it 'would have constituted the most suitable solution in order to conclude the project in good order' (see the Report of the Commission to the Parliament in Annex 17 to the application in Case T-177/94).

5. The change in the recruitment system originally envisaged

105 Fifthly, the difference in treatment established by Article 8.4 and 8.5 of the Statutes is linked to the specific system of staff recruitment and secondment decided upon when the Joint Undertaking was set up. The essential characteristics of that system are that qualified staff are made available by the members of JET (Article 8.1 and 8.3 of the Statutes), being recruited as temporary staff by the Commission (Article 8.5) with an undertaking of re-employment from the member concerned (Article 8.8). However, given the disruption which that system was likely to cause within it in view of its special position as host organization, the UKAEA obtained a derogation whereby the staff which it made available would remain in its employment on its terms and conditions (Article 8.4).

106 At the time when JET was set up, that system 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 (see the Report for the Hearing, and the Opinion of Advocate General VerLoren van Themaat, in the *Ainsworth* case, at ECR p. 178 and ECR p. 190 respectively; see also, on the question as a whole, the report of the Pandolfi Panel).

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

— Lack of security of employment for UKAEA staff

108 First, it is clear from the documents before the Court that UKAEA staff have no assurance of finding a suitable post on completion of their assignment with JET. The statistics produced by the Commission at the request of the Court show that

very few of them return to a post with the UKAEA after their secondment (12 out of 68 for the years 1992 to 1995: see paragraph 89 above). The applicants have described the cases of several staff members whose contracts have not been renewed on the expiry of their secondment or who have been obliged to accept early retirement (see the UKAEA's letters of December 1992 in Annex 8 to the application in Case T-177/94, compared with those dating from the 1980s). They have also cited, without being contradicted by the Commission, the statements made by Mr Bretherton, Secretary of the UKAEA, at a meeting of JET staff on 17 September 1993, that the majority of the United Kingdom members of the JET Team staff would be made 'redundant' at the end of JET, and by Mr Dawson, Director of Personnel for the UKAEA, at a meeting of the Joint Working Party on the Future Career Prospects of JET Team Members on 30 September 1993, that 'the deployment of over two hundred staff at the end of 1996 would present the [UK]AEA with great difficulty and ... the probability had to be faced that a significant proportion would be surplus' (see Annex 8 to the application in Case T-177/94). Finally, the UKAEA has significantly reduced the job security of its employees, introducing fixed-term contracts of three years or less as the norm (see the documents produced in Appendix 11 to the petition to the European Parliament and in Annex 7 to the application in Case T-177/94).

— Near impossibility for United Kingdom staff to obtain a 'return ticket' from a member of JET

109 Secondly, it is clear from the documents before the Court that, other than in exceptional cases (see Case T-99/95 *Stott* v *Commission*), it is not possible in practice for United Kingdom nationals to obtain a 'return ticket' from a member of JET other than the UKAEA (see, in Annex 14 to the application in Case T-177/94, the contents of which have not been contested by the Commission, the cases of Drs Altmann, Hubbard, Gondhalekar and Fishpool and Mr Shaw between 1987 and 1993, involving the German, Netherlands and Italian members of JET). As a result, the possibility that United Kingdom nationals could be made available to JET by any one of its members, to which the Court of Justice referred in paragraphs 25 and 26 of its judgment in *Ainsworth*, has remained purely theoretical. In

contrast to the situation found at paragraph 27 of the *Ainsworth* judgment, moreover, the five examples mentioned above, like the circumstances of Case T-99/95 *Stott* v *Commission*, show that, in order to comply with the requirements of the Statutes and the Supplementary Rules as interpreted by the Commission, the applicants have had to abandon the possibility of being made available to JET by a member organization other than the UKAEA and, consequently, that of being recruited to the temporary staff of the Communities under Article 8.5 of the Statutes.

— Limited practical value of 'return tickets'

110 Thirdly, the documents before the Court show that very few of the staff made available to JET by members other than the UKAEA make use of their 'return tickets'. The figures produced by the Commission at the request of the Court show that only six of them have done so, out of a total of 70 staff members who left JET between 1992 and 1995 (see paragraph 89 above).

111 The practical value of those 'return tickets' is further called into question by various statements of the JET management and the Commission (see, in particular, paragraph 21 of the Annual Report on Personnel Matters 1986/1987 presented by the Director of JET to the JET Executive Committee Meeting No 62 held on 14 and 15 May 1987, and the letter sent on 16 July 1991 to the heads of all fusion research units by Mr Kind, an official in DG XII — Annex 9 to the application in Case T-177/94). Following two surveys concerning the validity of the 'return tickets' carried out in 1992 by DG XII among the members and Euratom staff of JET, the *ad hoc* JET monitoring group in DG XII concluded at its meeting on 2 June 1992 that 'a great majority of the return tickets in their current form do not provide any real guarantees' (see the minutes of that meeting in Annex 9 to the application in Case T-177/94).

112 It is clear from the figures provided by the Commission in response to questions from the Court that a considerable number of 'return tickets' are for a limited

period and thus do not offer any substantial advantages in terms of security of employment. The terms of the 'return tickets' held by Community temporary staff made available to JET by members other than the UKAEA on 1 January 1993 and 1 January 1996 were as follows:

Duration of re-employment	Number	
	1.1.93	1.1.96
3 months	8	5
6 months	39	31
12 months	14	11
18 months	1	1
Unlimited	101	69
TOTAL	163	117

113 Furthermore, the fall in the number of 'return tickets' of unlimited duration from 101 on 1 January 1993 to 69 on 1 January 1996, a difference of 32, does not mean that those 'return tickets' were used; in fact, 42 of the 52 temporary Community staff who left JET during that period secured permanent posts with the Commission, and only three of them made use of their 'return tickets'. By contrast, of the 45 UKAEA employees who left JET during the same period, only five obtained permanent posts with the Commission, after taking external competitions (see paragraph 89 above).

— Recruitment of temporary staff made available to JET by the EAEC to permanent posts with the Commission and undertakings given in that regard

114 Fourthly, in order to make up for those deficiencies, 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

(see paragraph 89 above) 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 (see paragraph 90 above). That policy runs directly counter to the reasons advanced in 1978 to justify the system whereby staff are made available by members.

— Establishment of artificial links with member organizations

115 Fifthly, the present recruitment system leads in many cases (30 of the 70 applicants are in this position) 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. The link with the member concerned becomes purely formal — without there being any need to rule as to whether such a practice complies with Article 8.1, 8.4, 8.5 and 8.8 of the Statutes — when the 'return tickets' are issued by outside firms or organizations and merely 'underwritten' by the member of JET concerned. According to the Commission's answer to a written question from the Court, 39 of its 117 temporary staff made available to the Project in February 1996 were in such a position.

116 It follows from all of the foregoing that the policy of giving precedence to the system whereby staff are made available by the members of the Joint Undertaking, with every candidate having to find a member organization willing to make him or her available to JET, no longer meets the concern identified by the Court of Justice at paragraph 23 of the *Ainsworth* judgment of ensuring that all members of the JET staff are guaranteed employment at the end of the Project.

117 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. The Court of Justice did not, moreover, have to rule on the difference in treatment related to career prospects and security of employment, which were not in issue in *Ainsworth*.

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

118 This Court has found that, in the light of factual developments, the difference in treatment established by Article 8.4 and 8.5 of the Statutes is no longer objectively justified by the factors relied upon by the Court of Justice in *Ainsworth* (see paragraphs 81 to 117 above). 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), this Court 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. This aspect of the case has been stressed above all by the Council, whose arguments are based on the principles of legality and legal certainty.

119 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 (Case 92/78 *Simmenthal* v *Commission* [1979] ECR 777 and Case 262/80 *Andersen and Others* v *Parliament* [1984] ECR 195). 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 (Joined Cases 15/76 and 16/76 *France* v *Commission* [1979] ECR 321), 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.

120 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. This Court cannot assume that the reasoning of the Court of Justice would have remained the same if those elements had been different.

121 It must also be borne in mind that 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 (*Ainsworth*, paragraph 33; see, most recently, Case T-571/93 *Lefebvre and Others* v *Commission* [1995] ECR II-2379, paragraph 78). 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 (see, for an application of those principles, Case 36/83 *Mabanaft* v *Hauptzollamt Emmerich* [1984] ECR 2497, especially at paragraph 34).

122 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. It is necessary in such a case to ensure with particular care that the situation in question does not extend unduly beyond the duration reasonably envisaged at the outset. Should this occur, it is for the author of the rule to reassess its initial appraisal.

123 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 (*Granaria* v *Hoofdproduktschap voor Akkerbouwprodukten*, cited above). 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.

124 Even on the assumption that, as the Council submits, the principles of legality and legal certainty preclude this 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/Euratom and Article 19 of the Statutes annexed thereto.

125 Had it not been extended, the JET Joint Undertaking would have come to an end on 30 May 1990, in accordance with Article 1 of Decision 78/471 and Article 19 of the Statutes. Decision 88/447, by which the Council extended by 31 months the duration of the Joint Undertaking and the concomitant application of the rules of organization and operation contained in its Statutes, therefore produced its own distinct legal effects (see Case C-135/93 *Spain* v *Commission* [1995] ECR I-1681, paragraphs 25 to 30). The same is true of Decisions 91/677 and 96/305, providing for subsequent extensions to the duration of JET.

126 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. Far from being a necessary consequence of the decision to extend the duration of JET, the system was maintained as a result of the Council's exercising afresh its power of assessment in fact and law, as it explicitly acknowledged at point 19 of its statement in intervention, stating that 'should a proposal on a further prolongation of the JET project be submitted, [it] will have the opportunity to decide whether or not such prolongation would justify a review of the recruitment system under Article 8 of the Statutes'.

127 The Court of Justice has consistently held that 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 (Case 22/70 *Commission* v *Council* [1971] ECR 263, paragraph 42, and *Spain* v *Commission*, cited above, paragraph 20). 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 (judgments in *Simmenthal* and *Andersen*, both cited above).

128 In support of their applications for the annulment of the contested decisions, therefore, the applicants are in any event entitled to challenge the validity of the successive decisions by which the Council extended the duration of JET and, more particularly, one of the legal effects of those decisions, namely that of maintaining the system of staff selection, posting and management in place at JET, including the difference in treatment established by Article 8.4 and 8.5 of the Statutes. Such a challenge cannot be regarded as jeopardizing legal certainty where it relates only to the specific legal effects of the extending decision without in any way reopening, in the light of a fresh legal assessment, the question of the legality and effects of the previous situation.

129 In the present case, even if the difference in treatment established by Article 8.4 and 8.5 of the Statutes could still be justified when the duration of JET was extended for a further 31 months by Decision 88/447, that had already ceased to be the case when, on 19 December 1991 (before the commencement of the pre-litigation procedures and the bringing of the present actions), the Council again extended the duration of JET for four years, until 31 December 1996, by Decision 91/677.

130 In that regard, the Court notes that: the Agreement on Support from the Host Organization was amended in 1988; the UKAEA, in the person of its chairman, stated on 17 October 1989 that it did not object to its staff assigned to JET being recruited by the Commission; the Commission has given guarantees of future employment to temporary Community staff with JET since late 1988; it was already obvious in 1990 that the 'return ticket' system was not working, as is shown by the appendices to the petition submitted to the Parliament in February 1990; and on 10 December 1991 the Parliament sent the Council a Legislative Resolution calling into question the recruitment system in place at JET (see paragraph 15 above). The conclusions of the Pandolfi Panel's report, published on 16 September 1992, clearly show that neither the provisions of Article 8.4 and 8.5 of the Statutes nor the 'return ticket' system any longer appeared reasonable to the four independent experts on the panel, who considered that they should be amended by appropriate legislative means. That point of view has been approved in substance by the staff and management of JET, the staff and management of the UKAEA, the Commission and the Parliament. Only the JET Council has refused to accept the implications of the report, but without giving any reasons whatever for its stance. In view of the factors which the Pandolfi Panel was able to take into account, this Court considers that its findings and conclusions were already inescapable by 19 December 1991, when the Council extended the recruitment system laid down in Article 8 of the Statutes.

131 It follows that the provisions of Article 8.4 and 8.5 of the Statutes, as maintained in force by Decision 91/677, and subsequently by Decision 96/305, have given rise, at least since 19 December 1991, to a difference in treatment, which has no objective justification and is therefore unlawful, as between two categories of JET staff, depending on the member organization making the staff concerned available to the

Joint Undertaking, in particular as regards prospects of recruitment to the service of the Communities.

132 The applicants submit, however, that the Statutes as they now stand allow the Commission to recruit them to temporary posts as 'other personnel' under Article 8.5 which, they claim, would suffice to remedy the unequal treatment found above. Such recruitment was, moreover, the purpose of their initial approach to the appointing authority (see point 3 of, and Annex 2 to, their complaint under Article 73 of the Conditions of Employment and Article 90 of the Staff Regulations) and also forms the main object of their claims for annulment of the decisions rejecting their requests. The Council, too, which drew up the Statutes of JET, has asserted in its statement in intervention, and repeated at the hearing in answer to a question from the Court, that it does not consider there to be any legal obstacle in the Statutes to recruitment on the terms referred to by the applicants.

133 It is therefore necessary to determine whether the Statutes do in fact allow persons who, like the applicants, have already been made available to the Project by the UKAEA to be recruited as 'other personnel' under Article 8.5. If that were so, the Statutes would contain a mechanism enabling the difference in treatment which they establish to be remedied, at least in part. The Court considers that this circumstance, if established, might be sufficient to avoid a finding of illegality, for the reasons given above.

E — *Legality of the contested decisions*

134 At point 10 of each of the contested decisions, the Commission considered that the engagement of the applicants as temporary staff would infringe Article 8.4 of the Statutes, which provides that staff made available by the host organization is to remain in the employment of that organization. At point 11 of each decision, it

added that, under Article 8.4 and 8.5 of the Statutes, if the applicants wished to be engaged as temporary staff they must terminate their employment with the UKAEA and be taken on and assigned to JET by another member organization. Otherwise, it referred (at point 12) to the JET Council's refusal to have Recommendation No 1 in the Pandolfi Panel's report implemented and (in points 13 and 14) to the UKAEA's repeated undertakings with regard to its staff made available to JET. In its written pleadings, the Commission added that to recruit the applicants as 'other personnel' would give rise to a new kind of discrimination, against the staff made available to JET by members other than the UKAEA, and that such an extension would destroy the recruitment system set up by the Statutes.

135 The applicants argue, essentially, that there is nothing in the Statutes formally preventing their recruitment as 'other personnel' — on the contrary, they are entitled to be recruited as such, since that is the only way in which the discrimination they suffer could be brought to an end.

136 The Court considers that, whilst nothing in the Statutes expressly and unequivocally precludes persons who, like the applicants, 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.

137 The concept of 'other personnel' in Article 8.5 of the Statutes must be interpreted by reference to Article 8.1, which provides that the Project Team is to be composed of staff coming from the members of JET as provided for in Article 8.3, and

of 'other personnel'. No provision is made in the Statutes for a member of the Project Team made available by the UKAEA to resign from such employment for the sole purpose of being recruited by the Commission as 'other personnel'.

138 Furthermore, as the Commission has rightly argued, the applicants' proposed interpretation of the Statutes runs counter in any event to the very principle underlying the system of staff recruitment and management currently in place at JET, namely the establishment and maintenance of two separate categories of staff, depending on the member making them available.

139 Article 8.4 and 8.5 of the Statutes, as they now stand, therefore cannot be interpreted as allowing the applicants to be recruited as 'other personnel' within the meaning of those provisions.

140 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 (see this Court's analysis of Section 9.1 of the Supplementary Rules and the 'resign first' rule in its judgment given today in Case T-99/95 *Stott* v *Commission*, a parallel case). The difference in treatment established by Article 8.4 and 8.5 of the Statutes is thus reinforced by the operation of mechanisms which complement one another and are designed to ensure that it cannot in any way be remedied.

141 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, as between

two categories of JET staff, depending on the member organization making the staff concerned available to the Joint Undertaking, in particular as regards prospects of recruitment to the service of the Communities.

142 The applicants' alternative plea of illegality raised under Article 156 of the EAEC Treaty must therefore be upheld and Article 8.4 and 8.5 of the Statutes must be declared inapplicable in the present case to the extent indicated at paragraphs 131 and 141 above. The same applies to the Supplementary Rules and the 'resign first' rule in that they are tainted by the same illegality.

143 Since those provisions cannot serve as a legal basis for the contested decisions, it remains to be determined whether any of the other reasons listed in paragraph 134 above could constitute a valid ground for the rejection of the applicants' requests.

144 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, since the JET Council is not in a position to exempt anyone from the application of Community law. It was on the contrary for the Commission to ensure strict compliance with the fundamental principles of Community law by the JET Council, since the Joint Undertaking receives more than 80% of its funding from Community sources and the European Atomic Energy Community is one of its members. In *Ainsworth*, moreover, the Court of Justice held the Commission legally responsible for the conduct of the JET management (see paragraphs 19 to 27 of the judgment).

145 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 this Court has already held was not available to the applicants. In any event, it is for

the institutions concerned to prevent the appearance of any new form of unequal treatment which is not objectively justified when taking the necessary measures to comply with this judgment in accordance with Article 149 of the EAEC Treaty.

146 Consequently, the contested decisions cannot be justified in law on any of the grounds on which they are based and must therefore be annulled.

The claims for compensation

147 The claims for compensation (seventh and eighth heads of claim) were already included in the applicants' complaints under Article 90(2) of the Staff Regulations against acts adversely affecting them, namely the implied decisions rejecting their requests to be engaged as temporary staff of the Community. These claims 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, the claims are admissible.

148 It must, however, be pointed out that the admissibility of a claim for compensation is limited to making good damage directly related to the relevant act adversely affecting an applicant, namely, in this case, the implied decisions rejecting the applicants' original requests to be engaged as temporary Community staff, which were submitted in January 1993 by the applicants in Case T-177/94 and in September and October 1993 by the applicants in Case T-377/94. 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 those 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 (see, most recently, Case T-54/92 *Schneider* v *Commission* [1994] ECR-SC II-887 and the order in Case T-569/93 *Moat* v *Commission* [1995] ECR-SC II-305, paragraph 25).

149 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) (Case 9/75 *Meyer-Burckhardt* v *Commission* [1975] ECR 1171 and Case 48/76 *Reinarz* v *Commission and Council* [1977] ECR 291, at p. 297). Since the jurisdiction of the Community judicature with regard to persons claiming the status of officials or of servants other than local staff derives from Article 152 of the EAEC Treaty (Article 179 of the EC Treaty) (see Case 65/74 *Porrini and Others* v *EAEC* [1975] ECR 319, and the *Ainsworth* judgment), it is also subject, as stipulated in that article, to the limits and conditions laid down in the Staff Regulations or the Conditions of Employment (see the Opinion of Advocate General Mischo in the *Ainsworth* case, at ECR pp. 196-201). Furthermore, by submitting requests and complaints the applicants have themselves followed the procedure outlined in Articles 90 and 91 of the Staff Regulations and the admissibility of their actions must therefore be considered in the light of those provisions (*Meyer-Burckhardt*, cited above, paragraph 8).

150 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 (Joined Cases 63/72 to 69/72 *Werhahn* v *Council* [1973] ECR 1229, paragraph 7, and Case 353/88 *Briantex and Di Domenico* v *European Economic Community and Commission* [1989] ECR 3623, paragraph 7), that does not render a claim for compensation inadmissible, if it is closely linked to a claim for annulment which is itself admissible.

151 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.

152 As the Commission has rightly pointed out, the JET Statutes form part of a legislative measure, namely Decision 78/471, as amended by Decisions 88/447, 91/677 and 96/305. The claims for compensation are based on the allegation that those Statutes are unlawful, and the Court of Justice has consistently held that 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 (Joined Cases 83/76, 94/76, 4/77, 15/77 and 40/77 *Bayerische HNL and Others* v *Council and Commission* [1978] ECR 1209, paragraphs 4 to 6, Case 238/78 *Ireks-Arkady* v *Council and Commission* [1979] ECR 2955, paragraph 9, and Case 143/77 *Koninklijke Scholten-Honig* v *Council and Commission* [1979] ECR 3583, paragraph 10). The principles enshrined in those rulings should be applied by analogy in the present case, a Community staff dispute, having regard in particular to the broad discretion enjoyed by the institu-

tions to adopt general provisions laying down rules for the establishment and operation of Joint Undertakings set up in accordance with Chapter 5 of Title II of the EAEC Treaty. In the present case, therefore, there can be no liability on the part of the Community unless the institution concerned has manifestly and gravely disregarded the limits on the exercise of its powers.

153 The fundamental principle of equal treatment is undoubtedly a superior rule of law for the protection of the individual (see *Ireks-Arkady*, cited above, paragraph 11, Joined Cases 64/76, 113/76, 167/78, 239/78, 27/79, 28/79 and 45/79 *Dumortier Frères and Others* v *Council* [1979] ECR 3091 and Joined Cases C-104/89 and C-37/90 *Mulder and Others* v *Council and Commission* [1992] ECR I-3061).

154 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. It is true that by December 1991, as stated in paragraph 130 above, the Council was in a position to observe the changes in circumstances which it should have taken into account when it adopted Decision 91/677, since they removed the basis for the reasoning of the Court of Justice in *Ainsworth*. However, 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, this Court considers that 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. In the exceptional circumstances of the present case, in which the institutions relied in part on the authority of the *Ainsworth* judgment, in a complex factual context, constantly in a state of flux, this Court considers at the very least that their conduct was not such as to cause the Community to incur liability before the date on which this judgment, finding that any objective justification for the difference in treatment noted by the Court of Justice in *Ainsworth* has lapsed, is delivered.

155 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. The Commission was, moreover, right to consider that the Statutes, as they now stand, do not in themselves allow the applicants to be recruited as 'other personnel' under Article 8.5.

156 The claims for compensation must therefore be dismissed as unfounded.

Costs

157 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.

158 Since the Commission has been unsuccessful on the essential heads of claim, and in view of the exceptional circumstances as a result of which the claims for compensation have been dismissed, 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 applicants. However, pursuant to Article 87(5) of the Rules of Procedure and since the parties have not sought any specific order on that point, Mr D. Hurford, the twenty-sixth applicant in Case T-177/94, must be ordered to bear his own costs.

159 In accordance with Article 87(4) of the Rules of Procedure, the intervener must bear its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber)

hereby:

1. Takes formal note of the withdrawal from the proceedings of Mr D. Hurford, twenty-sixth applicant in Case T-177/94, and removes Case T-177/94 from the register in so far as he is concerned;

2. Annuls 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;

3. Dismisses the remainder of the applications;

4. Orders the defendant 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 each to bear their own costs.

Kirschner Bellamy Kalogeropoulos

Delivered in open court in Luxembourg on 12 December 1996.

H. Jung H. Kirschner

Registrar President

Summary