JUDGMENT OF THE COURT OF FIRST INSTANCE (First Chamber)

5 October 2004 *

In Case T-144/02,

Richard J. Eagle, residing in Oxfordshire (United Kingdom), and the 12 applicants whose names appear in the annex, represented by D. Beard, Barrister,

applicants,

v

Commission of the European Communities, represented by J. Currall and L. Escobar Guerrero, acting as Agents, with an address for service in Luxembourg,

defendant,

supported by

Council of the European Union, represented by J.-P. Hix and A. Pilette, acting as Agents,

intervener,

* Language of the case: English.

APPLICATION for damages for the material loss sustained as a result of the failure to recruit the applicants as temporary servants of the Communities during the time they worked at the Joint European Torus (JET) Joint Undertaking,

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

composed of: B. Vesterdorf, President, M. Jaeger and H. Legal, Judges,

Registrar: J. Plingers, Administrator,

having regard to the written procedure and further to the hearings on 8 May and 23 September 2003,

gives the following

Judgment

Legal background

1 The second paragraph of Article 1 of the EAEC Treaty provides:

'It shall be the task of the Community to contribute to the raising of the standard of living in the Member States and to the development of relations with the other countries by creating the conditions necessary for the speedy establishment and growth of nuclear industries.'

2 Article 2 EA provides inter alia that, in order to perform its task, the European Atomic Energy Community (EAEC) is to promote research and ensure the dissemination of technical information.

3 Article 49 EA provides:

'Joint Undertakings shall be established by Council decision.

Each Joint Undertaking shall have legal personality.

In each of the Member States, it shall enjoy the most extensive legal capacity accorded to legal persons under their respective national laws; it may, in particular acquire or dispose of movable and immovable property and may be a party to legal proceedings.

Save as otherwise provided in this Treaty or in its own statutes, each Joint Undertaking shall be governed by the rules applying to industrial or commercial undertakings; its statutes may make subsidiary reference to the national laws of the Member States.

Save where jurisdiction is conferred upon the Court of Justice by this Treaty, disputes in which Joint Undertakings are concerned shall be determined by the appropriate national courts or tribunals.'

4 Under Article 51 EA:

'The Commission shall be responsible for carrying out all decisions of the Council relating to the establishment of Joint Undertakings until the bodies responsible for the operation of such undertakings have been set up.'

5 Article 152 EA provides:

'The Court of Justice shall have jurisdiction in any dispute between the Community and its servants within the limits and under the conditions laid down in the Staff Regulations or the Conditions of Employment.'

6 Under Article 151 EA:

'The Court of Justice shall have jurisdiction in disputes relating to the compensation for damage provided for in the second paragraph of Article 188 [EA].'

7 Under the second paragraph of Article 188 EA:

'In the case of non-contractual liability, the Community shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties.'

8 The Joint European Torus (JET) Joint Undertaking, for which the applicants worked, was established by Council Decision 78/471/Euratom of 30 May 1978 (OJ 1978 L 151, p. 10) to conduct the European Atomic Energy Community ('EAEC') Fusion programme which provided for the construction, operation and exploitation of a large torus facility of the Tokamak type and its auxiliary facilities. Originally set up for a period of 12 years, the JET project was extended on three occasions: by Council Decision 88/447/Euratom of 25 July 1988 (OJ 1988 L 222, p. 4) until 31 December 1992, by Council Decision 91/677/Euratom of 19 December 1991 (OJ 1991 L 375, p. 9) until 31 December 1996, and finally by Council Decision 96/305/Euratom (OJ 1996 L 117, p. 9) until 31 December 1999. The programme is being continued within the framework of the European Fusion Development Agreement.

9 The Statutes of the Joint Undertaking ('the Statutes'), annexed to Decision 78/471, state that the seat is at Culham, Oxfordshire, in the United Kingdom, and that the members, besides the EAEC, are the Member States or their atomic energy authorities, in particular the host organisation, the United Kingdom Atomic Energy Authority ('UKAEA'), and, following Decision 91/677, the Swiss Confederation.

10 The Statutes provide that the organs of JET are the JET Council and the Director of the project. The JET Council is assisted by an executive committee and may request the opinion of a scientific council.

11 Under Article 4.2.2 of the Statutes:

'in particular the JET Council shall:

...

(d) nominate the Director and the senior staff of the project with a view to their appointment by the Commission or the host organisation as appropriate and determine their period of assignment, approve the main structure of the project team and decide the procedures for the assignment and management of staff;

...

(f) in accordance with Article 10 approve the annual budget including establishment of staff as well as the project development plan and the project cost estimates.'

12 According to Article 7 of the Statutes, the Director of the project, which is the executive body of the Joint Undertaking and its legal representative, shall in particular:

'(a) organise, direct and supervise the project team;

(b) submit to the JET Council proposals on the main structure of the project team, and propose to the JET Council the nomination of senior staff'.

13 Article 8 of the Statutes, concerning the project team, provides, in its original wording applicable until 21 October 1998 (see paragraphs 25 and 26 below):

'8.1. The project team shall assist the Director of the project in the performance of his duties. Its staff shall be fixed in the staff establishment as defined in the annual budget. It shall be composed of staff coming from the members of the Joint Undertaking as provided for in point 8.3 and of other personnel. The staff of the project team shall be recruited in accordance with the provisions of [Articles] 8.4 and 8.5 below.

8.2. The composition of the project team shall strike a reasonable balance between the need to guarantee the Community nature of the project, especially in the case of posts for which qualifications of a certain level are required (physicists, engineers, administrative staff at an equivalent level) and the need to give the Director of the project the widest possible authority in the matter of staff selection in the interests of efficient management. In applying this principle account shall also be taken of the interests of the non-Community members of the Joint Undertaking.

8.3. The members of the Joint Undertaking shall make available to the Joint Undertaking qualified scientific, technical and administrative staff.

8.4. Staff made available by the host organisation shall remain in the employment of the host organisation on the terms and conditions of service of that organisation and be assigned by the latter to the Joint Undertaking.

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 organisation 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.

8.6. All staff forming part of the project team shall come under the sole management authority of the Director of the project.

8.7. All staff expenditure, including expenditure related to staff assigned to the Joint Undertaking by the Commission and the host organisation shall be borne by the Joint Undertaking.

8.8. Each member having a contract of association with Euratom 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.

8.9. The JET Council shall establish the detailed procedures for assignment and management of staff.'

14 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 applicants, British nationals recruited by the UKAEA and in that capacity made available to the Joint Undertaking to be part of the project team, contested the decision of the Director of the project of the JET Joint Undertaking, taken on behalf of the Commission, refusing to appoint them as temporary servants of the Commission at the EAEC. They raised, inter alia, a preliminary plea of illegality, challenging the legality of the Joint Undertaking Statutes on account of the difference of treatment established by Articles 8.4 and 8.5.

15 The Court held that 'the real purpose of the provisions at issue is to establish a difference of treatment according to the member organisation which makes the

employee in question available to the Joint Undertaking' (paragraph 32). However, the Court observed that 'the JET Joint Undertaking is devoted entirely to research and its duration is limited in time, (paragraph 35) and noted the particular position of the UKAEA, which, as the host organisation, has its own responsibilities (paragraphs 36 and 37). In those circumstances, the Court held that 'the very particular position of the UKAEA, the host organisation, in relation to [JET], which is not comparable to the position of any other member organisation [of JET], constitutes an objective justification for the difference in treatment established by Articles 8.4 and 8.5 of the Statutes' (paragraph 38).

16 The European Parliament adopted a legislative resolution, on 10 December 1991 embodying its opinion on the Commission proposal for a Council decision approving amendments to the Statutes of the JET Joint Undertaking, which expresses its concern that the differences in pay as between researchers employed by the Commission and those employed by the national authorities would lead to tensions within JET (OJ 1992 C 13, p. 50).

17 In Joined Cases T-177/94 and T-377/94 *Altmann and Others* v *Commission* [1996] ECR II-2041, the applicants, British nationals, who were members of the UKAEA staff made available to JET, contested the Commission decisions rejecting their claims to be employed as temporary servants of the Community. They relied, in particular, on the change of circumstances which had occurred since the judgment in *Ainsworth*, cited above.

18 The Court of First Instance found, first, that 'all the members of the project team staff are in a comparable situation, irrespective of the member organisation which made them available to the Joint Undertaking. They all work exclusively for the project, within the same team and under the authority of the same director. They have been recruited in the same competitions and are promoted on the sole basis of

their merits, no account being taken of their nominal employer' (paragraph 81). It also found that the difference of treatment within the project team in terms of remuneration and career prospects, resulting from Articles 8.4 and 8.5 of the Statutes of the Joint Undertaking, persisted (paragraphs 82, 84 and 85).

19 Next, the Court of First Instance observed '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 organisation and functioning of the Joint Undertaking; (c) the UKAEA's withdrawal of its objections to staff which it makes available to JET leaving its employment for that of the Commission; (d) the disruption of the functioning of the Joint Undertaking as a result of the industrial relations conflict; and (e) the inability of the JET recruitment system to achieve the aims for which it was designed' (paragraph 96).

20 The Court also held:

'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*' (paragraph 117).

21 As regards the reference to 'other personnel' in Article 8 of the Statutes, the Court of First Instance held 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' (paragraph 136).

22 The Court of First Instance added:

'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"' (paragraph 137).

23 The Court of First Instance considered that 'Article[s] 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' (paragraph 139), and held that 'Article[s] 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 of treatment that is without objective justification and is thus unlawful, as between two categories of JET staff, depending on the member organisation making the staff concerned available to the Joint Undertaking, in particular as regards prospects of recruitment to the service of the Communities' (paragraph 141).

24 As regards the applicants' claims for compensation for financial loss arising from the alleged discrimination, the Court of First Instance held that the breach of the principle of equality of treatment by the Statutes was not sufficiently serious to render the Community liable on account of the acts unlawfully adopted by the Council and implemented by the Commission (paragraph 154).

25 Following *Altmann*, Council Decision 98/585/Euratom of 13 October 1998 (OJ 1998 L 282 p. 65), which entered into force on 21 October 1998, amended the Statutes of the Joint Undertaking and removed, inter alia, the references to 'other personnel'.

26 Under point 4 of the annex to Decision 95/585, Articles 8.1, 8.3, 8.4, 8.5 and 8.7 were replaced by the following:

'8.1. The project team shall assist the Director of the project in the performance of his duties. Its staff shall be fixed in the staff establishment as defined in the annual budget. It shall be composed of staff coming from the members of the Joint Undertaking as provided for in Article 8.3.'

'8.3. The members of the Joint Undertaking having association contracts with Euratom, or limited duration contracts in the framework of the Euratom Fusion programme in Member States where there is no association (hereafter referred to as the Parent Organisation) shall make available to the Joint Undertaking qualified scientific, technical and administrative staff.'

'8.4. Staff made available by Parent Organisations shall be seconded to the Joint Undertaking and shall:

(a) remain throughout the period of secondment in the employment of their Parent Organisations on the terms and conditions of service of those Organisations;

(b) be entitled, throughout the period of their secondment, to an allowance as specified in the "Rules applicable to Secondment of Personnel from Parent Organisations to the Joint Undertaking", adopted by the JET Council under Article 8.5.'

'8.5. The JET Council shall adopt the detailed procedures for the management of staff (including "Rules applicable to Secondment of Personnel from Parent Organisations to the Joint Undertaking"). It shall adopt the transitional provisions and shall take the necessary measures with regard to the project team assigned to the Joint Undertaking by the Commission and by the host organisation before 21 October 1998.'

'8.7. All staff expenditure, including reimbursement of staff expenditure incurred by the seconding Parent Organisations and expenditure related to staff assigned to the Joint Undertaking by the Commission and the host organisation prior to the entry into force of the above provisions, shall be borne by the Joint Undertaking.'

Background to the dispute and procedure

27 The 13 applicants, who are British nationals, worked for the JET project, eight of them for a period of 10 years or more, generally occupying posts as engineers, technicians or draughtsmen. The applicants, who were all engaged under an initial one-year contract before the amendment of the Statutes in October 1998, had no contractual relationship with the UKAEA or the Commission but were employed and paid by outside companies, which were in a contractual relationship with the JET Joint Undertaking. Their employment, the purpose of which was to make them available to the JET Joint Undertaking, was in any event terminated when the project came to an end on 31 December 1999.

28 The JET Joint Undertaking concluded contracts with companies supplying manpower for the provision of the services of a person or group of persons who possessed specific technical qualifications or skills. The group contracts allowed 'pools' of workers to be made available to the JET Joint Undertaking, such as those made available to the MAC (main assembly contract), to the MEC (main electrical contract), to the Drawing Office or the Data Processing Department, and staff working in the post room, switchboard operators or workshop technicians. The JET Joint Undertaking also concluded contracts with other companies for services such as maintenance and cleaning.

29 Most of the contracts concluded by the JET Joint Undertaking with the companies supplying manpower were the result of invitations to tender by the Joint Undertaking, usually published every three years. The JET management interviewed the candidates put forward by the companies submitting tenders before giving or refusing its approval of the selection made by the company awarded the contract of

the persons to be recruited by that company to work for the Joint Undertaking. All the contracts for the provision of staff were concluded by the JET Joint Undertaking for a year and could be renewed on an annual basis. They could, however, be terminated at any time.

30 Each of the applicants sent a letter to the Commission primarily on the basis of Article 90 of the Staff Regulations of Officials of the European Communities (the 'Staff Regulations'), between 14 November 2000 and 5 May 2001. The applicants cited Article 188 EA as the alternative basis for their action. They requested the Commission to take a decision concerning their claim for compensation for the failure by the JET Joint Undertaking, in disregard of its Statutes, to recruit them as temporary servants of the Communities.

31 Since they had not received a response to that request within the legal time-limit of four months, each of the applicants brought a formal complaint against the Commission, sent between 4 and 27 September 2001, under Article 90(2) of the Staff Regulations against the implied rejection of their claim.

32 The Commission rejected the complaints of the applicants by decision of 22 January 2002.

33 The applicants brought the present action by application lodged at the Court Registry on 7 May 2002.

34 By order of the President of the Court of First Instance of 10 September 2002, the Council was granted leave to intervene in the present proceedings in support of the Commission.

35 The parties presented oral argument and their replies to the Court's questions at the hearing on 8 May 2003.

36 By order of 21 July 2003, the President of the First Chamber of the Court of First Instance reopened the oral procedure in order to allow the parties to clarify their positions regarding the legal framework applicable to the present dispute and the implications thereof. The parties expressed their views on that point at a further hearing, held on 23 September 2003.

Forms of order sought

37 The applicants claim that the Court should:

— declare that the failure by the Commission to appoint the applicants to Community posts was unlawful being contrary to the terms of Articles 8.1 and 8.5 of the JET Statutes;

— declare that the failure by the Commission to appoint the applicants to Community posts was unlawful being discriminatory and without any objective justification;

— declare, in so far as it is necessary, that any amendments to the JET Statutes which purported to render lawful treatment which was unlawful were themselves unlawful;

— annul the Commission's decision dated 22 January 2002;

— order the Commission to compensate the applicants for their loss of earnings and other benefits caused by the aforesaid breaches of Community law;

— order such further or other measures as the Court may consider just and equitable;

— order the Commission to pay the costs.

38 The Commission, supported by the Council, contends that the Court of First Instance should:

— dismiss the action;

— make an appropriate order as to costs.

The nature of the dispute

39 The applicants essentially seek compensation for the material damage they claim to have suffered as a result of the fact that they were not recruited by the Commission under contracts as temporary servants. The effect of their claims, as set out in paragraph 37 above, for annulment of the decision of 22 January 2002 rejecting the complaint which each of them submitted to the Commission following the implied rejection of their claim for compensation under the procedure described in

paragraphs 30 and 31 above, is to bring before the Court the act adversely affecting the official in respect of which the complaint was submitted (Case 346/87 *Bossi* v *Commission* [1989] ECR 303, paragraph 10), in other words, in this case, the implied rejection of their claim for compensation. Those heads of claim must be considered to be inseparable from the claim, which is in fact a single claim seeking only damages, which is the subject of the action and which is based on the unlawful act the Commission is alleged to have committed in not engaging the persons concerned under such contracts, in breach of the provisions of the JET Statutes. In the absence of any contractual relationship between the applicants and the Commission, the action raises the non-contractual liability of the Community.

40 In the particular circumstances of the case, given that a question of public policy is involved, the Court must determine of its own motion whether the dispute must be classified as general litigation on non-contractual liability under Article 151 EA and Article 188(2) EA, or as litigation concerning relations between the Community and its servants under Article 152 EA. The Court of First Instance heard the submissions of the parties on this question at the hearing organised for that purpose on 23 September 2003.

41 The application must be considered to fall within the category of disputes between the Community and its servants for three reasons.

42 First, the assessment of the merits of the action turns on the interpretation of the JET Statutes, which, the applicants claim, gave them the right to be recruited as temporary servants. Moreover, the compensation claimed by each applicant is equivalent to the difference between the amount he would have received if he had worked for the Joint Undertaking as a temporary servant and what he was paid by the employer who made him available to JET. In circumstances such as those in the present case, in which the rights in question are those recognised by the Staff Regulations, the legal problems to be solved are comparable to those arising in cases

where applicants claim the status of official or servant and where the Court of Justice and the Court of First Instance examine the disputes under the terms of litigation in staff cases (Case 65/74 *Porrini and Others* v *EAEC* [1975] ECR 319, paragraphs 3 to 13, and Case T-184/94 *O'Casey* v *Commission* [1998] ECR-SC I-A-183 and II-565, paragraphs 56 to 62).

43 Second, the notion of dispute between the Community and its servants has been given a wide definition by the case-law, with the result that disputes concerning persons who have the status neither of officials nor of employees but claim that status are also examined within that framework (Case 116/78 *Bellintani and Others* v *Commission* [1979] ECR 1585, paragraph 6; Joined Cases 87/77, 130/77, 22/83, 9/84 and 10/84 *Salerno and Others* v *CommissionandCouncil* [1985] ECR 2523, paragraphs 24 and 25; and Case 286/83 *Alexis and Others* v *Commission* [1989] ECR 2445, paragraph 9). This is true, in particular, of candidates in competitions (Case 23/64 *Vandevyvere* v *Parliament* [1965] ECR 157, 165). The Commission makes the very pertinent observation that too narrow a view of the disputes between the Community and its servants would make for legal uncertainty by making potential applicants uncertain as to the legal channel to follow or giving them an artificial choice.

44 Moreover, *Ainsworth*, cited above, paragraphs 10 to 13, and *Altmann*, cited above, paragraphs 44 and 45, which concerned JET staff who had the status neither of officials nor of servants of the Communities, were dealt with within the framework of the Staff Regulations.

45 It is true that, in this case, the applicants are claiming only after the event the benefit of the financial advantages derived from the provisions of the Staff Regulations which, they argue, should have been applied to them in the past and are no longer in force. Furthermore, although the applicants argue that part of the damage they suffered is made up of financial loss resulting from the absence of any prospect of subsequent employment as a temporary servant on expiry of the JET project, those claims are not accompanied by an application for immediate or future employment as a temporary servant of the Community.

46 However, it must be said that this dispute would have no subject-matter and no litigation would have arisen without reference to the rules applicable to the temporary staff recruited by the Communities, within whose remit the staff of the project team made available by the members of the Joint Undertaking were brought. It would thus be artificial to take the view that the question whether the term project team used in the Statutes should have applied to the applicants when they worked for the JET Joint Undertaking did not fall under the heading of litigation in staff cases.

47 Third, and finally, the applicants placed themselves within the framework of litigation under the Staff Regulations, even though the alternative of dealing with the case in terms of non-contractual liability was also canvassed when the applicants submitted their claim for compensation, as mentioned in paragraph 30 above. At the hearing of 23 September 2003, the applicants stated that they had been advised to place themselves within that framework by the Commission at the stage of their claim for compensation. They confirmed that, in their view, the dispute fell within the remit of Article 152 EA. The Commission and the Council pointed out that the dispute and the alleged unlawful act had their basis in the provisions of the Staff Regulations.

48 The reasons set out above justify the view that the action falls within the remit of disputes between the Community and its servants. That conclusion is not affected by the facts of the case which, as the parties agree, are unprecedented in several respects.

49 First, the applicants are not UKAEA staff made available by the Joint Undertaking and therefore covered by Article 8 of the JET Statutes as those in *Ainsworth* and *Altmann* were.

50 Second, they do not claim and have never claimed the status of temporary servant. In contrast to *Ainsworth* and *Altmann* or Case T-177/97 *Simon* v *Commission* [2000] ECR-SC I-A-75 and II-319, upheld on appeal by the judgment of the Court of Justice of 27 June 2002 in Case C-274/00 P *Simon* v *Commission* [2002] ECR I-5999 and cited by the defence, the applicants never asked the Commission or the JET management to recruit them as temporary servants during the time they worked for the Joint Undertaking.

51 Third, the subject of this action is a claim for compensation only, as stated in paragraph 39, which was submitted when the JET project was coming to an end or shortly after its expiry.

52 Those specific circumstances notwithstanding, the dispute should be dealt with under the heading of litigation in disputes between the Community and its servants, referred to in Article 152 EA, and, accordingly, in the light of the provisions governing such disputes, inter alia, as regards procedure and time-limits.

Admissibility

Arguments of the parties

53 Without formally raising an objection of inadmissibility, the Commission, supported by the Council, submits that the admissibility of the claim for compensation is open to question because of the applicants' delay in commencing the proceedings. First, the applicants could, from the beginning of the JET Joint Undertaking in 1978, have raised the question of the conditions of recruitment they now complain about, and

they acted of their own accord in knowledge of the circumstances when they signed the contract with their employer. Second, since the Court of First Instance held in *Altmann* that a change of circumstances had occurred as the JET project progressed, the applicants should have acted within a reasonable time from the date of the delivery of that judgment. The Commission submits that in the particular circumstances of the present case, and in so far as Article 90 of the Staff Regulations does not set a time-limit for bringing an action, a reasonable time should not exceed two years.

54 The applicants argue that, as Article 90 of the Staff Regulations does not lay down any time-limit for the submission of a request, no limitation period based on the time they submitted their claim for compensation to the Commission can be relied on against them. They submit that imposing a requirement, which is not laid down in the applicable regulations, that a claim be brought within a reasonable time breaches the principles of legal certainty and non-retroactivity, and that to impose such a time-limit after proceedings have been instituted constitutes a breach of the right to a fair trial enshrined in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Findings of the Court

55 Since this dispute falls within the terms of Article 152 EA, as stated in paragraph 52 above, the rules of admissibility for this action are laid down by Articles 90 and 91 of the Staff Regulations alone and are outside the scope of either Articles 151 EA and 188 EA (Articles 235 EC and 288 EC) or Article 43 (now Article 46) of the Statute of the Court of Justice (Case 9/75 *Meyer-Burckhardt* v *Commission* [1975] ECR 1171, paragraphs 7, 10 and 11).

56 It is common ground that the applicants followed the procedure laid down in the Staff Regulations set out above. Article 90(1) of the Staff Regulations lays down no time-limit for the submission of a request (Case 29/80 *Reinarz* v *Commission* [1981] ECR 1311, paragraph 12), as the defendant accepts.

Obligation to act within a reasonable time

57 There is an obligation to act within a reasonable time in all cases where, in the absence of any statutory rule, the principles of legal certainty or protection of legitimate expectation preclude Community institutions and natural persons from acting without any time-limits, thereby threatening, inter alia, to undermine the stability of legal positions already acquired. In actions for damages liable to result in a financial burden on the Community, the obligation to submit a claim for compensation within a reasonable time derives also from a need to safeguard the public coffers which is specifically given expression, as regards actions for non-contractual liability, in the five-year limitation period laid down by Article 46 of the Statute of the Court.

58 For the Community institutions, the duty to act within a reasonable time is an aspect of good administration (Case C-282/95 P *Guérin automobiles* v *Commission* [1997] ECR I-1503) and derives from the fundamental need for legal certainty (Case 52/69 *Geigy* v *Commission* [1972] ECR 787, paragraphs 20 and 21).

59 As regards natural or legal persons, the Court has held, in an action for damages, that the injured party must show reasonable diligence in limiting the extent of his loss or risk having to bear the damage himself (Joined Cases C-104/89 and C37/90 *Mulder and Others* v *Council and Commission* [1992] ECR I-3061, paragraph 33).

60 An official or servant is obliged to submit a claim to a Community institution within a reasonable time after the moment when he becomes aware of an act or a substantive new fact (see, as regards a retrospective challenge to conditions of

recruitment, Case 190/82 *Blomefield* v *Commission* [1983] ECR 3981, paragraphs 10 and 11, and orders of the Court of First Instance in Case T-202/97 *Koopman* v *Commission* [1998] ECR-SC I-A-163 and II-511, paragraph 24, and in Case T-68/98 *Jung* v *Commission* [2002] ECR-SC I-A-55 and II-251, paragraph 41).

61 That requirement should also be applied by analogy to a request for a decision by persons who are neither officials nor servants but who approach the institution and ask it to give its view on an issue.

62 The duty incumbent on individuals to act within a reasonable time when submitting a claim for compensation for loss caused by the Community in the course of its relations with its servants serves, in this context, the purpose, prompted by the need for legal certainty, of preventing the imposition on the Community budget of costs arising from an operative event which occurred too long ago.

63 In any event, that is so where, as here, the action brought concerns an exclusively financial claim and cannot result in a change in the legal relationship between the Community institution concerned and the applicants or between that institution and its servants.

64 Moreover, contrary to the submissions of the applicants, the requirement that a claim be brought within a reasonable time, far from undermining the principle of legal certainty, is liable to safeguard the certainty of legal relationships. Nor does it affect the principle of non-retroactivity, as retroactivity is acceptable outside the criminal sphere (Case C-331/88 *Fedesa and Others* [1990] ECR I-4023, paragraph

45). Moreover, the right of persons subject to the law to a fair trial, enshrined in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, does not preclude the court hearing a case from drawing inferences, even in the absence of express rules as to limitation periods, from the fact that an action was brought after a clearly excessive length of time.

65 It follows from the foregoing arguments that the duty to act within a reasonable time, which derives from the general principles of Community law, in particular the principle of legal certainty, applied, in the present case, to the applicants' claim for compensation from the Commission for loss alleged to be attributable to the Commission.

Definition of a reasonable period

66 The period within which the persons concerned should have submitted their financial claims to the Community institution in order for them to be considered to have been submitted within a reasonable time after the point in time when they became aware of the situation they complain of must be assessed in the light of the applicable law and the facts of the situation. The reasonableness of a period is to be appraised in the light of the circumstances specific to each case and, in particular, the importance of the case for the person concerned, its complexity and the conduct of the parties (Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others* v *Commission* [2002] ECR I-8375, paragraph 187).

67 It must be held that the facts of the present dispute are not comparable to any of the many situations in which the case-law requires action to be taken within a reasonable time and none can serve as a basis for reasoning by analogy as regards the length of a reasonable period.

68 However, a point of reference may be derived from the limitation period of five years laid down in Article 46 of the Statute of the Court of Justice for actions in non-contractual liability, referred to in paragraph 57 above, although that period is not applicable in disputes between the Community and its servants (*Meyer-Burckardt*, cited above, paragraphs 7, 10 and 11). That provision allows the imposition on any person seeking reparation for damage from the Community of an obligation to act within a period which will guarantee legal certainty and is clearly defined in the interests of all concerned. At one and the same time, it allows the persons concerned sufficient time, from the occurrence of the actionable event, to make known their claims to the Community institution and allows the Community to safeguard its finances from claims made by persons who have shown too little diligence in pursuing them.

69 That comparison is pertinent in the present case because, should the dispute result in a finding, in favour of the applicants, of liability for the Commission and an order that it pay compensation to them, the judgment would have an impact chiefly, or even exclusively, on the Community's finances.

70 The applicants have never had any direct legal relationship with the JET Joint Undertaking and the Commission, and the Joint Undertaking, in any event, ceased to exist on 31 December 1999. The time it took the applicants to bring their action, which makes purely financial claims, can, for example, neither prejudice legal rights acquired by third parties nor call into question the stability of the legal conditions under which the Community institutions act. The legal certainty which it is the purpose of the requirement of action within a reasonable time to safeguard is thus essentially for the benefit of the Community's finances.

71 Accordingly, and in the light of the point of reference provided by the limitation period of five years laid down for actions in non-contractual liability by Article 46 of the Statute of the Court of Justice and of the lack of any other comparison or of any other cogent reason for rejecting that point of reference, it must be held, by analogy, that if the persons concerned considered that they had suffered unlawful

discrimination, they should have made a request to the Community institution that it take steps to remedy that situation and bring it to an end within a reasonable time which cannot exceed five years from the time they became aware of the situation they complain of.

Point of departure for the definition of a reasonable period

72 In the absence of any instrument, whether unilateral or contractual, governing relations between the Community institution and each of the applicants, it is necessary to establish what event brought to light the alleged discrimination against each of them as compared with other groups of staff working for the JET project. That event could then be described as the substantive new fact within a reasonable time of awareness of which the persons concerned were obliged to submit their claims to the Commission.

73 According to the Court case-file and the account in paragraphs 28 and 29 above of the conditions of employment with JET for contract staff such as the applicants, renewable annual contracts were concluded between the JET management and the outside firms supplying the workforce for the provision of one or more workers. It is true that the applicants were not party to the individual or collective contracts thus concluded, as they stipulated that their employer was the firm contracting with JET (Articles 3 and 4 of the individual standard contract and Articles 5 and 8 of the collective standard contract). However, each worker signed an annex to the contract which set out his obligations and responsibilities arising from his being made available to JET and, in particular, confirmed his acceptance of the contractual terms binding his employer and JET and his acceptance that he was subject to them.

74 Thus, those individual or collective contracts defined precisely and unambiguously the position of the applicants vis-à-vis JET as staff paid by outside contractors with JET, made available to the Joint Undertaking by their employers, that is to say under terms of employment distinct from those of the staff made available to the Joint Undertaking by UKAEA or by the other members of the Joint Undertaking with whom they had to work.

75 It appears from the individual or collective standard contracts concluded between JET and the outside firms and placed on the Court case-file, that they were concluded for a maximum period of one year and were renewable but could be terminated at any time at one month's notice (Article 2 of the individual standard contract and Articles 4 and 5.7 of the collective standard contract). The Commission has explained that this limited term was a result of the fact that JET operated under an annual budget, adding that 'if the services of the people concerned were required for more than one year, the contracts with the companies would be renewed for a further year at a time'. Moreover, under the terms of the standard contracts, the contracts could only be renewed at the initiative of the Joint Undertaking and not of the outside companies, still less of their employees. Article 2 of the individual standard contract and Article 4 of the collective standard contract each provide, in the same terms: 'The Joint Undertaking, at its option, reserves the right to extend the contract for a further period of 12 months.' There was no provision for tacit renewal of the contracts.

76 The applicants, who were paid by the hour, have pointed out that their conditions of employment were not secure. The Commission explained that, at the end of each week, the worker concerned and the 'responsible officer' of JET had to sign a time sheet which was then sent to the undertaking providing the services for the calculation of their pay.

77 According to the extracts from the JET activity reports placed on the Court case-file the employment of contract staff such as the applicants, on a basis which was reviewed annually, was a feature of the staff management policy adopted and implemented by the Joint Undertaking.

78 The Commission contends that the status of the applicants was not as precarious as they allege and that they felt confident of continuing to be employed by JET until the end of the programme, as demonstrated by the petition they sent to the JET Council on 10 March 1997 in order to obtain special bonuses at the end of the project.

79 However, the fact that the annual contracts concluded by the management of the Joint Undertaking were generally renewed and that 62 of the 119 signatories of the petition had between 10 and 20 years of service with JET has no legal effect on the precarious nature of their employment relationship, continuation of which was at the discretion of JET, as it had to be reviewed every year and expressly extended.

80 Thus, the precarious nature of the conditions of engagement and employment of the applicants resulting from the annual nature of the contracts which could be terminated at any time and whose renewal was uncertain and subject to the express decision of the Joint Undertaking does not suggest that the persons concerned would have had and would have continued to have confidence in their position from the time they were first made available to JET for a nominal period of one year.

81 The specific nature of the applicants' position, differing as it does from that contemplated by the Court of First Instance in *Altmann*, precludes taking the date of delivery of that judgment as an event from the time of which those concerned could be considered to be sufficiently informed of that position, as the Commission suggests.

82 In the circumstances of the case, it is the conclusion of each initial annual contract, or each renewal thereof, which marks the point at which an applicant became aware of the situation complained of and represents a substantive new fact from the occurrence of which the applicants were aware of the position in which they had potentially unlawfully been placed because the Commission had failed to offer them a temporary contract.

83 It follows from the foregoing that the claims for compensation submitted under Article 90 of the Staff Regulations, sent between 14 November 2000 and 5 May 2001, as stated in paragraph 30 above, were made within a reasonable time in respect of contracts which were concluded or renewed at most five years before that claim, or, as the case may be, after a date between 14 November 1995 and 5 May 1996.

84 The application, lodged in accordance with the procedure laid down by Articles 90 and 91 of the Staff Regulations, is thus only admissible in so far as the claims for compensation it comprises relate to a period beginning on the date of the conclusion or renewal of the earliest contract for the employment of the person concerned which was concluded or renewed at most five years before the submission by each of the applicants of his claim for compensation.

Liability

The alleged unlawful act

Arguments of the parties

85 As their main plea, the applicants argue that the failure to recruit them to posts as temporary servants of the Commission was unlawful for two reasons. First, that situation was contrary to the JET Statutes in so far as the applicants were 'other personnel' as referred to in Articles 8.1 and 8.5 of the JET Statutes and should have been offered contracts as temporary servants, as provided by Article 8.5 of those Statutes. Second, the applicants suffered discrimination as compared with the treatment given to those employed by the Commission to perform comparable tasks to theirs on the project team.

86 From a factual point of view, the applicants argue that they were part of the project team, given that their respective tasks, their capacities, skills and qualifications were similar to those of the members of the project team. The applicants carried out their work under identical conditions to those under which the members of the project team worked, under the supervision of Commission employees and the JET Director. They occupied posts, the titles, responsibilities and duties of which were identical to those relating to jobs falling within the structure of the project team. The applicants take the view that the particular terms of their selection and recruitment, which were part of the unlawful discrimination to which they were subject, cannot be pleaded against them when there was no practical possibility of their being recruited to Euratom posts.

87 In legal terms, the applicants take the view that, even if they had no legal relationship with the JET Joint Undertaking since they were merely made available to it by outside companies, they were part of the project team and should have been recruited as 'other personnel' within the meaning of the JET Statutes. They point out that the Court of First Instance held in *Altmann* that 'the project team also includes contract staff provided by outside companies' (paragraph 24).

88 According to the applicants, it would be contrary to the basic principles of good faith and legal certainty and the doctrine of 'estoppel' to allow the Commission to rely upon the status of the applicants (that of outside contract staff) which it itself instigated. Nor can it plead the facts of Case C-274/00 P *Simon* v *Commission*, cited above, because they are not claiming that the Commission was their actual employer and are not seeking recognition of their status as temporary servants a posteriori.

89 In the alternative, the applicants plead the illegality of the amendment of the JET Statutes, adopted by Decision 98/585, in so far as it was intended to remove the possibility of appointing 'other personnel' as temporary servants of the Commission.

90 The Commission contends that since the applicants, who had no legal relationship with the JET Joint Undertaking, were not employed by either the UKAEA or the Commission, they cannot argue a posteriori that they were entitled to be treated as if they were employed by an institution and cannot legally claim appointment as a Euratom temporary agent ex post facto (Case T-177/97 *Simon* v *Commission*, cited above, confirmed on appeal by Case C-274/00 P *Simon* v *Commission*, cited above). The Commission states that that major legal difference is a bar to their claims. It submits that the term 'other personnel' who are members of the project team in Article 8 of the original Statutes does not cover the applicants. 'Other personnel' within the meaning of Articles 8.1 and 8.5 of the Statutes is distinct from the other categories of staff who are not part of the project team and who include, inter alia, staff under contract such as the applicants.

91 The Commission contends that the applicants were members of the contract staff which the JET Joint Undertaking, like any large and complex undertaking, always used, particularly because its Statutes did not allow it to recruit its own staff. The Commission adds that it is a normal and usual procedure in such an undertaking. The silence of the JET Statutes on that point did not, in its view, preclude the Joint Undertaking from using such recruitment methods. Moreover the Court of Justice had recognised the authority of the Community institutions to conclude such contracts (Case C-249/87 *Mulfinger and Others* v *Commission* [1989] ECR 4127). Thus, the applicants, whether they were members of 'pools' or recruited individually, were in every case the employees of outside companies providing services to the JET Joint Undertaking or of contractors providing services to those companies. They were thus, according to the Commission, subject to the law of England and Wales.

92 The Commission submits that the applicants have never been part of the project team or considered as such. The fact that certain of them may have held qualifications which would have enabled them to be a member of the project team has no bearing on their legal position. It adds that the applicants, six of whom worked in the Drawing Office, have adduced no evidence that they performed

functions comparable to those of the members of the project team. The information and references in the various documents produced by the JET Joint Undertaking have no bearing on the legal position of the applicants since being a 'responsible officer' in the JET Joint Undertaking does not confer the status of project team member.

93 The Commission points out, further, that the applicants never applied for posts or went through the selection procedure to become members of the project team, nor did they apply when posts in the project team were declared vacant. It emphasises, in that connection, that the JET management never prevented such professional development and on the contrary was pleased when contract staff passed the selection procedures and joined the project team.

94 The Commission adds that, in *Altmann*, the Court of First Instance also made a distinction between 'other personnel' within the meaning of the Statutes and other categories of staff working at the site of the JET Joint Undertaking. The removal of the reference to 'other personnel' in Article 8 of the Statutes, following *Altmann*, was intended to correct the inequality of treatment in the project team that was criticised by the Court of First Instance. The contract staff who remained outside that team were consequently not affected by that amendment. The Commission explains that the option of recruiting 'other personnel' had never been used. It adds that the applicants never raised the question of their alleged entitlement to be considered as members of the project team in the form of 'other personnel'.

95 The Commission contends that it committed no wrongful act which would give rise to its liability and the applicants have not been subject to any discrimination either in law or in fact as they were not legally members of the project team, and have not shown that they were in a position comparable to the members of the team.

96 The Council states that it doubts whether Decision 98/585, by which it amended the Statutes of the Joint Undertaking and which is alleged to be unlawful, is applicable in this case. It contends that the amendments to the Statutes were lawful and valid and in any case had no connection with the facts in the present case, given that all the applicants began working on the JET project before the entry into force of Decision 98/585.

97 The Council contends that it is within the Council's broad discretion to decide how the personnel of the JET project team should be recruited, and that it had no statutory obligation to retain the notion of 'other personnel'. There was no obligation for it to provide that persons other than those coming from the parent organisations should be recruited as 'other personnel' nor to specifically address the recruitment of staff who were engaged at JET under service contracts.

98 The Council stresses that the applicants, who were not made available to the JET Joint Undertaking either by the UKAEA or by other members of the Joint Undertaking, but who worked on the site on the basis of contracts of employment concluded with outside companies, do not fall within the category of staff who, according to *Altmann*, were subject to discrimination. It adds that the removal of that reference did not cause any discrimination and there was no recruitment following the amendment of the Statutes.

Findings of the Court

99 As regards the non-contractual liability of the Community and, in particular, in disputes like this one concerning relations between the Community and its servants, there is liability for damages under Community law only if three conditions are satisfied as regards the illegality of the allegedly wrongful act committed by the

institutions, the actual harm suffered and the existence of a causal link between the act and the damage alleged to have been suffered (Case C-259/96 P *Council* v *de Nil and Impens* [1998] ECR I-2915, paragraph 23).

100 Assessment of the merits of the applicants' action for damages entails, first, a definition of the term 'project team' within the meaning of the JET Statutes as originally drafted, that is to say it must be established what were the specific tasks, functions and responsibilities given to its members. Second, it must be considered whether the applicants carried out tasks, functions and responsibilities comparable to those of the members of the project team and fell de facto, as they submit, within the category of 'other personnel' whose members, under Article 8.5 of those Statutes, had to be recruited by the Commission for temporary posts, in accordance with the Conditions of Employment of Other Servants of the European Communities ('the Conditions of Employment').

101 It is common ground that 'other personnel' had to be employed under contracts as temporary servants as expressly provided by the Statutes. The parties disagree as to whether the applicants actually fell within that particular category and should, therefore, have been offered such contracts by the Commission.

The terms 'project team' and 'other personnel'

102 As regards the term 'project team', the JET Statutes, in particular Article 8 of the original Statutes, cited in paragraph 13, do not give a proper definition of the tasks allocated to the members of the project team. Article 8.2, concerning the composition of the project team, states that it must guarantee the Community nature of the project, and mentions, in that connection, posts for which qualifications of a certain level are required such as physicists, engineers, and

administrative staff at an equivalent level. Article 8.3 stipulates that the members of the Joint Undertaking are to make available to the Joint Undertaking such qualified staff. Article 8.2 also gives the Director of the project the widest possible authority in the matter of staff selection.

103 The Commission has given no definition of the alleged features, in terms of skills, qualifications, functions and responsibilities, of the posts which, in its view, fell within the project team and which were distinct from those of the applicants, but was mainly concerned to emphasise that they were not part of the project team. The defendant merely stated that the JET Council had originally decided that the project team would not include industrial personnel.

104 Thus, that exception apart, it does not seem that the project team was conceived as a level of the hierarchy or as requiring clearly defined professional skills.

105 First, Article 8.2, concerning the composition of the project team, which recommends, as regards posts of physicists, engineers and administrative staff 'at an equivalent level', that the Community nature of the project should be guaranteed, conversely implies that the project team comprised other posts, at different levels. Moreover, the Commission accepted that the project team comprised administrative staff without limiting them to managerial staff.

106 Second, although the JET annual reports, extracts from which were produced to the Court, make a distinction, in the chapter on 'Personnel', between staff belonging to the project team ('team posts'), made up of temporary servants recruited under the remit of the EAEC (staff made available to the Joint Undertaking by its members other than the UKAEA, according to Article 8.5 of the Statutes), UKAEA staff and

Commission staff (belonging to the Directorate-General for Science, Research and Development of the Commission), and staff not forming part of the team ('non-team posts') recruited by contract ('contract posts'), it does not appear that this arrangement, which served budgetary purposes, reflects a functional separation between two distinct types of responsibilities. It also appears from those reports that contract staff were recruited, inter alia, for posts as engineers, expressly mentioned in Article 8.2 amongst the posts falling within the project team, and that posts such as those for draughtsmen or computer operators, for example, could be filled by staff belonging to the project team or not.

107 Moreover, having regard to the scientific and technological complexity of the programme, as emphasised in the preamble to Decision 78/471 mentioned in paragraph 8 above, the project team, which assists the Director of the project in the performance of his duties (Article 8.1) concerning, inter alia, the implementation of the project's development plan (Article 7.2), appears to be the major component of the Joint Undertaking and comprises all the human resources necessary to carry out the programme.

108 It thus does not appear that the project team constituted a rigid and predetermined category, from which the posts and qualifications of the applicants were obviously excluded, nor that there was within the Joint Undertaking a strict and permanent delimitation based on the nature of the tasks distinguishing those falling to the project team which could only be performed by its members in the name of the project team and other tasks external to it. On the contrary, it must be found that it comprised scientific, technical and administrative staff with diverse qualifications and occupying various positions in the hierarchy.

109 The term 'project team' must therefore be understood, within the meaning of Decision 78/471, as all the functions needed to carry out the EAEC Fusion programme.

110 As regards the term 'other staff', the JET Statutes, as originally drafted, mention two categories of staff making up the project team: those made available by the members of the Joint Undertaking and 'other personnel' (Article 8.1). They also provide (Article 8.5) that, apart from UKAEA staff who retained their status and whose position was held in *Altmann* to be discriminatory as of 19 December 1991, the staff of the project team made available to the Joint Undertaking by its members and those falling within the category of 'other personnel' mentioned in that article were recruited for temporary posts under the Conditions of Employment.

111 The category 'other personnel' is not defined other than in terms of the method of recruitment laid down by the JET Statutes. Furthermore, as was stated in paragraph 100 above, it is not the obligation under those Statutes to recruit 'other personnel' on contracts for temporary servants which is at issue but whether the applicants, because they were de facto part of the project team, should have been taken on under the terms laid down for the recruitment of that particular category.

112 The Commission and the Council contend that the possibility of recruiting 'other personnel' under contracts for temporary servants, provided for by the JET Statutes, has never been used and that the Community institutions, which can always enter contracts for the purchase of goods and services, were free to decide the arrangements for recruiting the project team. They were under no legal obligation to recruit 'other personnel' under contracts for temporary servants.

113 It must be recognised that the institutions have a wide discretion in their choice of the most appropriate means for meeting their personnel requirements (Joined Cases 341/85, 251/86, 258/86, 259/86, 262/86 and 266/86, 222/87 and 232/87 *Van der StijlandOthers* v *Commission* [1989] ECR 511, paragraph 11), particularly as regards

the recruitment of members of the temporary staff (Case T-217/96 *Fabert-Goossens* v *Commission* [1998] ECR-SC I-A-607 and II-1841, paragraph 29). That is particularly true with regard to the organisation and operation of joint undertakings (*Altmann*, paragraph 154).

114 The fact that the JET Statutes provided that 'other personnel' of the project team were recruited under contracts for temporary servants did not oblige the Commission to recruit in that way if the project team did not need it to. The management of the Joint Undertaking thus had scope to assess the part to be made up, in the composition of the project team, by each of the two categories of staff mentioned in Article 8.1 of the Statutes (staff coming from the members of the Joint Undertaking and other personnel), its decision being put into effect by entry in the staff establishment appearing in the annual budget. It could equally well have recourse to companies supplying manpower or services to perform the various tasks involved in the operation of the Joint Undertaking but not constituting one of the functions which the Treaties assign to it (*Mulfinger*, cited above, paragraph 14), functions which the project team was responsible for carrying out under the authority of the Director of the project.

115 However, the JET management could not have concluded such contracts with companies supplying manpower or services with a view to avoiding the application of the provisions of the Staff Regulations (Case 123/84 *Klein* v *Commission* [1985] ECR 1907, paragraph 24, and *Mulfinger*, paragraph 11). The functions which the Treaties assign to the Community institutions cannot be entrusted to outside companies but must be performed by staff covered by the provisions of the Staff Regulations (*Mulfinger*, paragraphs 13 and 14).

116 According to Decision 78/471, referred to in paragraphs 8, 107 and 109 above, the JET project constitutes an important stage in the aim of the Fusion programme, which, because of the scientific and technological complexity of the project, its

importance for the security of the long-term energy supply of the Community and the financial and personnel resources necessary for its implementation, justified the creation of a joint undertaking. That project, which was to be carried out by the JET project team set up by the Statutes, was, as stated in paragraph 107, one of the tasks, described in paragraphs 1 and 2 above, assigned to the Community by the EAEC Treaty.

117 Accordingly, in so far as, in the JET Joint Undertaking, the tasks assigned by the Treaties to the Community institutions within the meaning of the decision in *Mulfinger* were at issue, such tasks, where not carried out by staff made available by members of the Joint Undertaking, could be performed only by 'other personnel' recruited under the provisions applicable to temporary servants in accordance with the Conditions of Employment, as required by the original JET Statutes.

118 It must therefore be determined whether, the legal and budgetary status accorded to the applicants notwithstanding, they should be regarded, in the light of the tasks entrusted to them, as forming part of the project team referred to by Article 8 of the Statutes.

119 In that regard, the argument of the Commission, supported by the Council, that the applicants had no legal relationship with the JET Joint Undertaking and had never been considered to be part of the project team, for which no other personnel had been recruited, is not relevant, because the question to be decided here is precisely whether or not it was legal not to make the applicants part of the project team with all the implications in terms of the Staff Regulations that entailed.

The tasks performed by the applicants at JET

120 The parties disagree on the nature of the tasks carried out by the applicants for the JET Joint Undertaking. The persons concerned argue that, in terms of their qualifications, functions and responsibilities, they were in practice members of the project team. The Commission, on the other hand, takes the view that the persons concerned were a heterogeneous group, made up of employees undifferentiated as to type of worker, whose tasks have been overestimated by those concerned and in most cases have no direct equivalent in the project team.

121 According to the Court case-file and, in particular, the evidence concerning the posts and qualifications of the applicants which is not actually contradicted by the Commission, whose criticisms concerned the level of responsibility they held, the persons concerned comprised six draughtsmen, three engineers, two physicists, a maintenance worker and a technician. The posts and qualifications of the applicants, as listed by the Commission, appear comparable, in terms of their nature and level, to those of the actual members of the project team. Moreover, the Commission admitted at the hearing of 8 May 2003 that there was no fundamental difference between the members as such of the project team and the applicants, the qualifications and professional experience of both being similar, but that the method of recruitment of staff such as the applicants to 'fill the gaps' was dictated by administrative considerations.

122 That similarity of functions is confirmed by the JET establishment plan. The *JET Function Book* for 1997, produced as an example, shows that, in almost all the departments of JET, contract staff are represented, with no distinction being made between them and their colleagues who were members as such of the project team and contract staff occupied posts the title of which was sometimes exactly the same as that of posts occupied by such colleagues. It also appears from that establishment

plan that in four instances, namely in the 'Finance Service', the 'Quality Assurance Group', the 'Remote Handling Group' and the 'Magnet Systems Group', the person in charge of the team or department was part of the contract staff.

123 It is, moreover, common ground that some of the applicants assumed responsibilities within the project team. The naming of some of them in the JET establishment plan or in other documents of the Joint Undertaking is additional evidence that the persons concerned were actually part of that team. Similarly, the Commission accepted, in some of the annual reports on the progress of JET, that some of the applicants had made scientific contributions.

124 The particular case of certain applicants who held technical clerical posts cannot affect the above findings, since the project team does not appear to have been a predefined, permanent and clearly delineated group, as noted above, and the posts held by the applicants had an equivalent within it at any given time during the operation of the JET programme.

125 The clauses of the individual or group contracts concluded between the JET Joint Undertaking and outside companies also show that the working conditions of the applicants were decided by the JET management, that they were under its authority and bound to respect the rules applicable to the Joint Undertaking (Article 3 of the individual standard contract and Article 5 of the collective standard contract). The applicants submit, without being contradicted, that their working conditions as regards physical organisation and content and method were determined by the management of the JET Joint Undertaking.

126 The JET activity reports provide evidence of the close collaboration of the contract staff in the project team and confirm that the tasks of the project team could be entrusted without distinction either to members as such of that team or to contract

staff. The report for 1981, after mentioning an increase in the number of members of the project team states (on page 14): that

'recruitment of certain staff, particularly engineers and technicians, has continued to be difficult although some improvement occurred in the second half of the year in the recruitment of UK staff for a number of engineer and technician posts. Nevertheless it has continued to be necessary to employ a considerable number of contract staff'.

127 It appears from the case-file that contract staff met the human resources needs of the JET project in large numbers and on a permanent basis throughout the duration of the Joint Undertaking.

The personnel needs of the Joint Undertaking

128 It appears that the JET Council, which had originally decided to use contract staff to fill skilled posts for industrial and technical staff, as stated in paragraph 103 above, subsequently expanded the arrangement to include, inter alia, groups under contract. Thus, the Commission made clear in its defence that the Joint Undertaking did also have to conclude contracts for the provision of contract staff on occasions when there were difficulties in obtaining the required scientific technical and administrative staff by way of secondment to the project team by the JET members under the Statutes. The Court of First Instance, for its part, held in paragraph 100 of *Altmann*, 'further to a clarification of the Agreement on Support from the Host Organisation 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'.

129 Contract staff were recruited either under individual contracts or under group contracts (for bodies of workers), in accordance with the arrangements described in paragraphs 28 and 29 above. The budgetary posts for staff recruited in that way were recorded in the staff numbers and identified as not forming part of the project team.

130 The extracts from the JET annual reports for the years 1981, 1986, 1989, 1990 and 1998 placed on the Court case-file and the Court of Auditors' report on JET drawn up in 1987 show the size in numbers of the contract staff, employed by outside companies party to contracts with JET supplying labour made available to the Joint Undertaking throughout the duration of the existence of the Joint Undertaking.

131 According to the chapter on 'Personnel' in those reports, the staff not forming part of the project team, recruited under contract, who were distinguished from the staff belonging to the project team, represented a substantial proportion of the total staff working on the project, that is to say 37% in 1986 and 48% in 1998.

132 The report for 1986 notes 'the necessity for increased use of contract staff to meet the manpower requirement' and goes on to state that, '[w]hereas the approved composition of team posts remained at 165 Euratom posts, 260 and 19 posts seconded, respectively, from the UKAEA and [the ...] Fusion programme [of the Directorate-General for Science, Research and Development of the Commission] the JET Council approved a new ceiling of 210 contract posts, i.e. an overall increase of 44 posts from the previous year'. The report added:

'Contract posts are filled by personnel employed by companies and other organisations and supplied under contracts placed with those companies by JET.'

133 The Court of Auditors' 1987 report recorded, as authorised staff, 449 posts for the project team and 231 contract posts and, as filled posts, 372 posts for the project team and 259 contract posts. The same report indicated that contract staff had no direct relationship with the JET Joint Undertaking but were employees of companies which had entered into contracts with the Joint Undertaking following an invitation to tender. At the request of the Court of Auditors, the management of the Joint Undertaking subsequently entered the appropriations relating to the employment of contract staff under expenditure on personnel.

134 The statistics appearing in the extracts from the JET reports placed on the Court case-file show, as regards posts, under the budget and actually filled, in the project team and outside it, in other words contract posts, for the three years 1986, 1989 and 1998, the significant proportion of the total made up by the latter.

Year	1986		1989		1998	
Predicted/actual	budget	filled	budget	filled	budget	filled
Team posts	444	384	470	383	n/a	242,5
Contract posts	210	229	210	242	n/a	255

135 It thus appears that the massive use made by the JET management of contract staff such as the applicants to meet staffing needs which the members of the Joint Undertaking were unable to meet by secondment, as mentioned in paragraph 128 above, was indeed for the purpose of performing the tasks of the project team. The JET annual reports highlight the recurrent difficulties of the Joint Undertaking in

that regard; the 1981 report mentioned in paragraph 126, for example, cites, in particular, the case of engineers and technicians. Those reports show how, throughout the duration of the JET programme, massive and repeated recruitment of contract staff made it possible to resolve those difficulties. The table in paragraph 134, moreover, shows that the posts available under the budget for the project team could not always be filled and contract staff stepped in to do the work.

136 Furthermore, some of the applicants took part in the JET project for a long period. Of the 13 applicants, 11 worked for more than 5 years for the Joint Undertaking, and of those 8 worked for it for more than 10 years and 5 for more than 15 years. The other two applicants worked at JET for four years. As stated above, the annual contracts of the persons concerned were renewable and renewed. The applicants state, without being contradicted, that the JET management often requested the recruitment and then the renewal of the contract of one or the other of them. Such long-term participation by staff with specific qualifications also tends to confirm that they were meeting a permanent need and that their work was important for the JET project.

137 It follows from the foregoing that the applicants carried out equivalent tasks to those which could be carried out by the members as such of the project team and that the purpose of their recruitment was to make good a shortage of personnel made available by the members of the Joint Undertaking which persisted throughout the duration of the JET programme.

138 Moreover, the Commission accepted at the hearing of 8 May 2003 that the applicants carried out essential work for the JET project which was an important research project under the EAEC Treaty. However, the defendant contends that, in order to apply here, the case-law derived from *Mulfinger* meant that the functions concerned would have to be integral to the Community civil service, they would have to be typical tasks which could be carried out only by servants of the Community. That interpretation by the Commission does not abide by the criteria

established by the Court. Thus, in the present case and as decided in *Mulfinger*, the functions performed by the members of the project team who participated directly and not in an ancillary manner in the operation of a programme in the Community interest for the purposes of which a joint undertaking had been set up pursuant to the EAEC Treaty are deemed to be functions falling within the research mission entrusted to the EAEC and, therefore, to be carried out within the framework provided by the Staff Regulations as, moreover, provided by Article 8 of the JET Statutes.

139 Finally, it can reasonably be considered, given the tasks performed by the contract staff and the high proportion of posts involved throughout the duration of the Joint Undertaking, that the JET project could not have been carried out without the contract staff. The distinction between staff belonging to the project team and staff not belonging to it thus does not reflect a proven functional difference between two categories of post. It must therefore be held that this distinction was made in breach of the JET Statutes, with the purpose and effect of not employing the persons concerned under contracts for temporary servants, pursuant to the Conditions of Employment, as provided by those Statutes.

Culpable illegality

140 It follows from the foregoing that the applicants performed tasks essential to the mission of the JET Joint Undertaking equivalent to those of the other members of the project team amongst whom they worked without differentiation. They were thus de facto part of the project team. The applicants could therefore have been recruited as 'other personnel' of the project team in accordance with the JET Statutes, as stated in paragraph 100 above. Their recruitment to contractual posts through the intermediary of outside undertakings thus represents a misuse of procedure. It also reveals long-term discrimination against those concerned for which the Commission and Council have offered no justification consistent with the applicable rules.

141 By failing to offer the applicants contracts as temporary servants in breach of the JET Statutes, the Commission disregarded, in carrying out its administrative responsibilities, the right which the persons concerned derived from those Statutes. That conduct, which had the effect of keeping the staff concerned in a legal position in which they suffered discrimination as compared with the other members as such of the project team throughout the duration of the JET Joint Undertaking, constitutes serious misconduct on the part of the Community institution concerned. The culpable illegality thus established is therefore such as to give rise to the liability of the Community.

The amendment of the JET Statutes in 1998

142 The amendment of the Statutes which took place in October 1998, deleting, in Article 8, any mention of 'other personnel' (see paragraph 26 above) does not affect the above assessment. It could not affect the position of the persons concerned, who were all recruited for the first time before that, as pointed out in paragraph 27 above. Moreover, many of the applicants continued to work for the JET Joint Undertaking until the project ended, without it ever having sought to terminate their employment.

143 Without it being necessary to rule on the applicants' plea of illegality set out in paragraph 89 above, suffice it to observe that it is always open to the Community institutions, within the constraints of the budget, to recruit temporary servants under the Conditions of Employment and to renew existing contracts. Provided that the functions at issue are tasks essential to the JET project, falling within the mission of the Joint Undertaking and appearing in the staff establishment, as stated above, it was not possible legally to have recourse to the services of outside companies (*Mulfinger*, paragraphs 11 and 14).

144 Thus, although the amended JET Statutes, cited in paragraph 26 above, which entered into force on 21 October 1998, no longer expressly mentioned, as the original Statutes did, the category 'other personnel' and the method of recruiting them to temporary posts, the fact remains that the performance of the tasks essential to the project should, as before, where they could not be carried out by staff made available by the members of the Joint Undertaking mentioned in Article 8.3 of the amended Statutes, have been brought within the regulatory framework of the Conditions of Employment to which the amended Statutes referred in connection with staff made available.

145 The amendments made to the JET Statutes thus did not preclude contracts from being concluded with the applicants as temporary servants in accordance with the Conditions of Employment, as they should have been, in the light of their duties. As such contracts were not concluded under the amended Statutes, it must be concluded that the culpable illegality committed with regard to the applicants, recorded in paragraph 141 above, persisted until the end of the JET project.

The causal link

Arguments of the parties

146 The Commission contends that, if the applicants had had to be recruited as 'other personnel', there would have been no guarantee of the applicants being engaged as they would have had to meet the relevant conditions for recruitment and the chances of succeeding in such selection procedures are about 25%. The defendant adds that the persons concerned, who were not subject to the selection procedures applied to the members of the project team, never applied when those posts were declared vacant within the project team, which suggests that they did not have the necessary qualifications. The Commission concludes that there is no causal link between the illegality and the alleged loss.

147 The applicants argue in that connection that their position was de facto identical to that of the members of the project team. They point out that they carried out the same tasks as the members of the project team, had comparable qualifications, that they had worked at JET for very long periods and, in the case of many of them, held responsibilities within the project team.

Findings of the Court

148 In order for it to be accepted that there is a causal link, evidence must be adduced that there is a direct causal nexus between the fault committed by the institution concerned and the injury pleaded (Case T-140/97 *Hautem* v *EIB* [1999] ECR-SC I-A-171 and II-897, paragraph 85).

149 However, in litigation under the Staff Regulations, the degree of certainty of the causal link required by the case-law is less where the unlawful act committed by a Community institution has definitely deprived a person, not necessarily of recruitment, to which the person concerned could never prove he had a right, but of a genuine chance of being recruited as an official or servant, resulting in material damage for the person concerned in the form of loss of income. Where it seems eminently probable, in the circumstances of the case, that, if it had abided by the law, the Community institution concerned would have recruited the servant, the theoretical uncertainty as regards the outcome of a properly conducted recruitment procedure cannot preclude reparation for the material damage sustained by the person concerned in being deprived of the right to apply for a post covered by the Staff Regulations which he would have had every chance of securing.

150 In the present case, the existence of such a right to reparation can be established, if the applicants provide evidence that they have, in any event, lost a genuine chance of working for the JET project within the framework of the Staff Regulations as provided for, with consequent material damage for the persons concerned (*Council* v *de Nil and Impens*, cited above, paragraphs 28 and 29).

151 Where there was no recruitment under the Staff Regulations and where, on the contrary, a parallel system was set up so as not to employ staff as temporary servants, the causal link between the unlawful act committed and the material damage sustained is established in so far as it appears that the persons concerned have lost a genuine chance of being recruited.

152 This is the approach in litigation in staff cases, in particular, where an assessment is to be made of the effects of an erroneous reclassification on the subsequent development of the career of the agent concerned (*Council* v *de Nil and Impens*, paragraphs 28 and 29).

153 It must therefore be assessed whether, given their qualifications, the tasks they performed for JET and the renewal of their contracts, the applicants would have had a genuine chance of being recruited as temporary servants if the procedures required by the Staff Regulations had been followed.

154 It has already been found that the functions of the applicants, their qualifications and their conditions of recruitment and work were comparable to those of the members of the project team recognised as such by the JET management, that the project team could not have completed the project without the assistance of the contract staff who represented a significant proportion of the staff assigned to the

project throughout its duration, and that, as a result of the almost automatic renewal of the annual contracts of the persons concerned, most of them ultimately worked for the Joint Undertaking for very long periods all told.

155 These facts show that the contract staff were necessary for the completion of the JET project, that the applicants had the qualifications required for the tasks for which they were employed and that their work was to the satisfaction of the JET management, which requested and approved the renewal of their employment annually. Moreover, the Commission has not established that, if the staffing needs of JET had been met by using contracts for temporary servants as the JET Statutes provided, the applicants would not have been recruited (*Council* v *de Nil and Impens*, paragraphs 28 and 29). Accordingly, the applicants have established to the requisite legal standard that the misconduct towards them caused them to lose that opportunity of recruitment as a temporary servant.

156 Although the Commission contends that the applicants never took any steps to apply for vacant posts within the project team, it has not established, inter alia by the production of vacancy notices, that such vacancies were open to outside staff, nor does it give any indication of their frequency. The defendant confines itself to proffering an isolated piece of information to the effect that 13 persons under contract were recruited onto the project team in 1989. Clearly there were never offers of contracts as temporary servants in respect of the posts occupied by the applicants. Rather, it appears that the posts entitled 'project team' were 'reserved' for the staff of the members of the Joint Undertaking recruited as temporary servants under the auspices of the EAEC, for Commission staff and for UKAEA staff, and that it was only to a very limited extent that certain contract staff succeeded in being incorporated in it.

157 The causal link between the unlawful act committed and the damage sustained is thus sufficiently established in law to justify reparation of the damage sustained by

the applicants as a result of the loss of a genuine chance of being offered a contract as a temporary servant of the European Communities.

Damage

Arguments of the parties

158 The applicants claim that they have sustained financial losses made up of three elements, that is to say the net loss of earnings for the period during which each applicant was engaged on the JET project, financial loss in terms of related benefits, including pension contributions, and loss of earnings resulting from the fact that they were not guaranteed another post at the Commission for a period of five years from the end of the project on 31 December 1999.

159 The applicants have produced figures for each individual claim and the method of calculation used. They explain that their calculation does not take account of the effect of different rates of taxation nor of the United Kingdom tax regime applicable to the amounts received by way of damages. As regards the particular case of Mr Walton, who was recruited as a temporary servant in 1999, they point out that he was not recruited under the terms of the guarantee offered to former members of the project team.

160 The Commission denies that the applicants have any right to compensation and refers to the grounds of the judgment in *Altmann*, which should apply a fortiori to

staff outside the project team. It contends that, if any liability is to be attributed to it, it can only be on the basis of a service-related fault and can arise only as of the date of the judgment in *Altmann*. The claim of Mr Walton, who was recruited as a temporary servant in 1999, is only admissible in respect of the period prior to that recruitment.

161 The Commission denies any entitlement to compensation after the date of expiry of the JET project, on 31 December 1999. It adds, as regards the incidence of tax, that liability or otherwise to national taxes is an inevitable and relevant difference between those employed under national law and those employed under the Community rules and that it is not certain that damages for a service-related fault would necessarily be treated as giving rise to a UK tax liability by the Inland Revenue.

Findings of the Court

162 The financial loss alleged by the applicants is made up in the main of a loss of revenue from remuneration, related benefits and pension rights acquired during or by virtue of their employment with JET and a loss of revenue as a result of the loss of the prospect of employment which might have been offered them by the Commission after 1999.

163 That loss is inferred from a comparison between the financial terms of employment the applicants would have enjoyed if they had been recruited to posts as temporary servants and their actual terms as employees of outside undertakings. It is common ground that the position of contract staff was worse in financial terms than that of temporary servants.

164 During the time spent working for the JET Joint Undertaking, the applicants' loss lies in the difference between the salaries, related benefits and pension rights which

the persons concerned would have received or acquired if they had worked for the JET project as temporary agents and the salaries, related benefits and pension rights which they actually received or acquired as contract staff.

165 As regards subsequent employment prospects, the loss alleged derives from the possibility the applicants would have had of being offered a contract as a temporary servant after termination of the JET project. Such a prospect of recruitment appears very hypothetical in the absence of any indication of the needs of the EAEC on expiry of the JET Joint Undertaking as regards jobs of the type occupied by the applicants and, more particularly, of any information suggesting a continuity between the JET Joint Undertaking and the bodies covered by the European Fusion Development Agreement, referred to in paragraph 8 above, which conducted the research previously conducted by the Joint Undertaking. As the loss is not proven as regards prospects of employment after 31 December 1999, the applicants' claim for damages under that head must be rejected.

166 The damages due should be calculated, for each applicant, as of the effective date of the earliest contract concluded or renewed with the applicant in each case, that date being no more than five years before the submission of his claim for compensation to the Commission.

167 The damages due to each applicant cannot be determined by the Court of First Instance on the basis of the evidence on the Court case-file. The parties are therefore called upon to seek a settlement on the basis of the following principles and criteria.

168 First, the parties must reach agreement on the post and grade each of the applicants would have held, on the basis of the functions they carried out, if they had been

offered a contract as a temporary servant from the date indicated in paragraph 166 above.

169 They must then agree on the appropriate reconstruction of the career of each of the persons concerned, from the time of their recruitment or the start of the five-year period referred to in paragraph 166, at the earliest, taking account of the average increase in salary for the equivalent post and grade of a member of the EAEC staff, working for JET if applicable, and any promotions each of them may have had during that period in the light of the grade and post selected, on the basis of the average number of promotions of temporary servants of the EAEC in a comparable position.

170 The comparison between the position of a temporary servant of the Communities and that of a member of the contract staff such as each of the applicants must be made in respect of net amounts, net of contributions, deductions or other levies charged under the applicable legislation. In that regard, the effect of the Community and British tax regimes respectively on the sums at issue cannot affect the terms of the comparison, which must be of amounts net of tax, bearing in mind that officials and other servants of the Communities are subject to tax payable to the Communities (Regulation (EEC, Euratom, ECSC) No 260/68 of the Council of 29 February 1968 laying down the conditions and procedure for applying the tax for the benefit of the European Communities (OJ, English Special Edition, 1968 (I), p. 37) as last amended by Council Regulation (EC, Euratom) No 1750/2002 of 30 September 2002 (OJ 2002 L 264, p. 15)).

171 The damages must be calculated in respect of a period commencing on the date defined in paragraph 166 above and ending on the date on which the applicant concerned stopped working for the JET project if that was before the end of the project on 31 December 1999, or on that date if he worked for the JET project until its conclusion. In the particular case of Mr Walton, who, the parties agree, was recruited as a temporary servant in 1999, the period for which he is entitled to

compensation ends on the date of his recruitment under the Conditions of Employment.

172 The applicants have made observations concerning tax which might be charged by the British tax authorities on damages such as those at issue here, in reparation of loss caused by the Community.

173 However, the damages due to each applicant intended to compensate for loss of salary and related benefits assessed net of tax as stated in paragraph 170 above, and calculated, according to the same rules, taking Community tax into account, must be covered by the tax regime applicable to the sums paid by the Communities to their staff, pursuant to Article 16 of the Protocol on the Privileges and Immunities of the Officials and Other Servants of the European Communities. The damages in question, thus interpreted as net of any taxation, cannot therefore be subject to deductions of national tax. No additional damages are therefore due by way of compensation for such deductions.

174 The parties are to reach agreement on the basis of the principles and criteria set out above within six months of notification of the judgment. It they fail to agree, they must put before the Court of First Instance within the same period their submissions on the quantum of damages (see, to that effect, Case 180/87 *Hamill* v *Commission* [1988] ECR 6141).

Costs

175 Costs are reserved.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber)

hereby, by way of interlocutory judgment:

1. **Orders the Commission to pay damages for the financial loss sustained by each of the applicants as a result of the fact that they were not recruited as temporary servants of the Communities during the time they worked at the Joint European Torus (JET) Joint Undertaking;**

2. **Orders the parties to produce to the Court of First Instance within six months of this judgment an agreement on the quantum of damages due in reparation of the said loss;**

3. **In the absence of agreement orders the parties to put before the Court of First Instance within the same period their submissions on the quantum of damages;**

4. **Reserves the costs.**

Vesterdorf Jaeger Legal

Delivered in open court in Luxembourg on 5 October 2004.

H. Jung B. Vesterdorf

Registrar President