OPINION OF ADVOCATE GENERAL JACOBS

delivered on 25 September 2001 [1]

1. Mme Simon has appealed against the judgment of the Court of First Instance delivered on 10 May 2000 dismissing her application for annulment of the Commission's decision rejecting her claim for regularisation of her administrative situation and her application for symbolic damages of one euro for non-material damage. [2]

The background to the judgment under appeal

2. Mme Simon is essentially seeking retrospective recategorisation of her status as an employee from May 1966 to October 1995. Throughout that period (with the exception of two brief periods in 1993 and 1994) she was formally employed by a series of independent organisations which the Commission (initially its precursor, the High Authority of the European Coal and Steel Community) had retained by successive contracts to coordinate and distribute to the relevant national industries the results of studies carried out by various experts within the framework of quinquennial ergonomics research programmes for the coal and steel industries carried out by the Commission pursuant to Article 55 of the ECSC Treaty ('Article 55 ECSC'). Mme Simon claims that in reality she was employed by the Commission and that she should be regarded as having been a temporary agent of the Communities throughout the relevant period.

3. Article 55 ECSC requires the Commission to promote technical and economic research relating to the production and increased use of coal and steel and to occupational safety in the coal and steel industries and to that end to organise all appropriate contacts among existing research bodies.

4. Until 1995, as part of its five year ergonomics research programme for the coal and steel industries under that article, the Commission engaged by successive contracts various independent organisations to coordinate and to distribute to the relevant national industries the results of studies under the programme.

1 — Original language: English.

2 — Case T-177/97 [2000] ECR-SC II-319.

5. Those organisations, referred to by the parties and in the judgment of the Court of First Instance as 'supervisory agencies' ('organismes de tutelle'), were contracted by the Commission both to provide consultant experts in the particular field being researched at any given time and to staff an umbrella Bureau de l'action communautaire ergonomique ('the Bureau') which apparently provided the day-to-day logistical support for the successive research exercises.

6. It appears from the judgment under appeal that Mme Simon, who had been a Community official at Grade C from 1957 to 1960, was from 1966 to 1993 employed in Luxembourg by several firms which had been so contracted by the Commission. According to the judgment under appeal, from 1966 to 1980 Mme Simon was employed successively by the Société des sciences médicales, the Ligue luxembourgeoise contre la tuberculose, the Société d'ergonomie de langue française and the Gesellschaft für Arbeitswissenschaft. From 1980, the supervisory agency employing Mme Simon was the Gesellschaft für Sicherheitswissenschaft ('the GFS'). Between 1 March 1993 and 14 January 1994, and then between 1 July and 30 November 1994, Mme Simon was directly employed by the Commission under fixed term employment contracts subject to Luxembourg law. Following a fresh contract between the Commission and the GFS for the period from 1 December 1994 to 31 August 1995, the GFS undertook to coordinate and distribute the results of the studies carried out under the Sixth Ergonomics Programme. Mme Simon was employed again by the GFS, for the same period as that of the contract between the Commission and GFS. That contract, as well as that of Mme Simon, was extended until 25 October 1995. The Commission did not subsequently renew the contract with the GFS and Mme Simon's contract terminated on that date.

7. On 16 January 1996, Mme Simon brought an action for unfair dismissal against the GFS and its director before the Luxembourg Labour Court. By letter dated 28 June 1996, Mme Simon submitted a request to the Commission pursuant to Article 90(1) of the Staff Regulations asking that her work since 1966 be considered to be work carried out by a temporary servant of the Communities. In support of her request Mme Simon claimed that the contracts of employment between her and the supervisory agencies had as their sole object the avoidance of the Conditions of Employment of other servants of the European Communities. Mme Simon also sought one euro in damages for the violation by the Commission of the duty of care owed by it to her.

8. The Conditions of Employment to which Mme Simon refers apply to all staff engaged by contract by the Communities, whether they are temporary staff, auxiliary staff, local staff or special advisers. [3]

3 — Article 1.

Article 90 of the Staff Regulations applies by analogy to such staff. [4]

9. Article 90 of the Staff Regulations provides:

'(1) Any person to whom these Staff Regulations apply may submit to the appointing authority a request that it take a decision relating to him. The authority shall notify the person concerned of its reasoned decision within four months from the date on which the request was made. If at the end of that period no reply to the request has been received, this shall be deemed to constitute an implied decision rejecting it, against which a complaint may be lodged in accordance with the following paragraph.

(2) Any person to whom these Staff Regulations apply may submit to the appointing authority a complaint against an act adversely affecting him, either where the said authority has taken a decision or where it has failed to adopt a measure prescribed by the Staff Regulations. The complaint must be lodged within three months ...'

10. That time runs from the date of publication of the act it if it is a measure of a general nature, or the date of notification of the decision to the person concerned, or the date of expiry of the period prescribed for reply where the complaint concerns an implied decision rejecting a request as provided for in Article 90(1).

11. In the absence of a response by the Commission, on 2 December 1996 Mme Simon submitted a complaint against the implied decision rejecting her request under Article 90(2) of the Staff Regulations.

12. By a decision dated 2 April 1997, notified to Mme Simon on 8 April 1997, the Commission rejected the complaint.

13. On 12 March 1997, the Luxembourg Labour Court declared Mme Simon's claim inadmissible on the ground that she had not proved that she was employed by the GFS or its director.

The procedure before the Court of First Instance

14. On 11 June 1997 the appellant brought an action before the Court of First Instance seeking the annulment of the Commission's

4 — Article 83 of the Conditions.

decision of 2 April 1997 and the payment by the Commission of one euro compensation for the mental distress she had suffered and for the violation by the Commission of the duty of care owed to her.

15. Mme Simon alleged that the Commission had committed a misuse of power and abuse of process. She referred in support of that allegation to *Mulfinger* [5] and *Deshormes*, [6] according to which it is unlawful for the Community to conclude employment or service contracts under the law of a Member State where it chooses that contractual route in order to avoid the application of the Staff Regulations or the Conditions governing the employment of other servants.

16. In order to show that her duties were permanent, definite, Community public-service duties within the meaning of that case-law, [7] Mme Simon made the following points:

(i) she continually exercised her functions under the direct authority of the Commission officials from DG Social Affairs responsible for the ergonomics programmes;

(ii) her employment contributed to the realisation of one of the goals assigned to the Commission by the ECSC Treaty, namely safety at work in the coal and steel industries and the organisation for that purpose of cooperation between research bodies;

(iii) her remuneration — which was unilaterally fixed by the Commission — showed that her work corresponded to that of a Commission official at Grade A5.

The judgment under appeal

17. The Court of First Instance (single judge) dismissed the action.

18. The Court of First Instance noted that by virtue of Article 1 the Conditions of employment of other servants applied to 'servants engaged under contract by the

5 — Case C-249/87 *Mulfinger and Others* v *Commission* [1989] ECR 4127.

6 — Case 17/78 *Deshormes* v *Commission* [1979] ECR 189.

7 — *Deshormes*, cited in note 6, paragraph 46 of the judgment.

Communities'. Article 6 provides that each institution shall determine who shall be authorised to conclude the contracts referred to in Article 1. It follows in the light of the case-law of the Court [8] that a person whose employer is not a Community institution but a legal person subject to the law of a Member State, which cannot be treated as an administrative agency of the institution in question, cannot be regarded as a servant of the Communities. [9] Mme Simon's work was carried out on the basis of contracts of employment or for services between her and the supervisory agencies in question; those agencies were legal persons subject to German or Luxembourg law and the contracts with Mme Simon were governed by Luxembourg law. The Court of First Instance accordingly concluded that during the period between 1966 and 1993, and between 1 December 1994 and 25 October 1995, Mme Simon's successive employers had been those agencies and not the Commission. [10]

19. The Court of First Instance dismissed arguments that the Commission had required Mme Simon to be employed and had fixed the level of her remuneration. It found, first, that the contracts between Mme Simon and the supervisory agencies provided only for the Commission to approve her appointment and ruled that, according to the case-law of the Court of Justice, that did not prevent her employer from being the other party to the contract rather that a Community institution. [11] The Court of First Instance found, second, that Mme Simon's remuneration had been not set by the Commission but only subject to its approval. [12] It also dismissed as irrelevant arguments based on the similarities between Mme Simon's employment and that of a temporary servant of the Commission and on the finding of the Luxembourg Labour Court. [13]

20. Finally, the Court of First Instance held that the cases of *Mulfinger* [14] and *Deshormes* [15] were not relevant to the allegation of abuse of power as those cases concerned contracts concluded by an employee with the Commission itself. As the Commission was not a party to Mme Simon's contracts of employment, it could not be responsible for any abuse of power or procedure in that context. [16]

8 — Joined Cases 87/77, 130/77, 22/83, 9/84 and 10/84 *Salerno and Others* v *Commission and Council* [1985] ECR 2523 and Case 286/83 *Alexis and Others* v *Commission* [1989] ECR 2445.

9 — Paragraphs 37 and 38 of the judgment under appeal.

10 — Paragraphs 40 to 42 of the judgment.

11 — Paragraph 43 of the judgment under appeal, referring to *Salerno*, cited in note 8, paragraph 43 of the judgment.

12 — Paragraph 43 of the judgment under appeal.

13 — Paragraphs 43 to 45 of the judgment.

14 — Cited in note 5.

15 — Cited in note 6.

16 — Paragraphs 46 to 49 of the judgment.

21. The Court of First Instance accordingly dismissed the application for annulment.

The appeal

22. In her appeal Mme Simon requests the Court to:

— annul the judgment of the Court of First Instance;

— annul the Commission decision of 2 April 1997;

— declare that the services provided by her between 15 May 1966 and 25 October 1995 are to be regarded as provided by a temporary servant of the Commission;

— order the Commission to pay the costs of the proceedings before both instances.

23. The Commission requests the Court to:

— declare the appeal inadmissible in that it questions the findings of fact of the Court of First Instance and asks the Court to make a declaration which it is not competent to make on appeal and which was in any event not sought before the Court of First Instance;

— in the alternative, dismiss the appeal as unfounded;

— in the further alternative, in the event that the Court 'decides the impossible' and annuls the judgment of the Court of First Instance, remit the case to the Court of First Instance;

— order the appellant to pay the costs.

Summary of the arguments of the parties

24. It appears from the appeal — although the matter is not entirely clear — that

Mme Simon makes two principal submissions which in her view show that the finding of the Court of First Instance that there was no abuse of power by the Commission was incorrect as matter of law and should be annulled.

25. First, she submits that the Court of First Instance erred in law in dismissing her argument based on abuse of power on the ground that her work had been carried out pursuant to contracts concluded with third parties. The Court should instead have examined the lawfulness of the contracts between the Commission and the successive supervisory agencies.

26. In that context the Court of First Instance should have examined the real aim of the Commission when it entrusted the official management of the Bureau to supervisory agencies having no recognised specific competence either in managing Community programmes or in the substantive fields concerned. The supervisory agencies were, as their description suggests, simply intended to supervise a unit which was in fact set up and managed by high level Community officials so as to enable the Community to fulfil its obligations under Article 55 ECSC. The Court however did not examine all the evidence adduced in order to ascertain whether it constituted sufficient objective, relevant and consistent proof that the Commission's sole purpose in using the supervisory agencies was to finance the Bureau and in particular to cover the salaries of those there employed and not, as the Commission claimed, to carry out the duties of information and coordination imposed on it by virtue of Article 55 ECSC. Nor did the Court correctly evaluate the Commission's evidence seeking to justify its right to interfere in the administrative and financial management of the Bureau.

27. Moreover the Court of First Instance should have made an assessment of the duties which the supervisory agencies actually carried out for the benefit of the Commission, namely the financial responsibility for managing the Bureau within the limits of the funds made available by the Commission and the obligation to appoint a director of the Bureau with a maximum of two assistants.

28. Second, the Court of First Instance should have examined the nature of the links between on the one hand Mme Simon and on the other hand, first, the supervisory agencies and, second, the Commission. In particular it should have assessed both whether the real relationship of employer and subordinate was between herself and the supervisory agencies or between herself and the Commission and whether Mme Simon's work fell within the definition of permanent duties of the Community public service which the Treaties assign to the institutions.

29. The Commission submits that a plea challenging a finding of fact according to which no misuse of power was established is inadmissible. [17] In any event, although the Court of First Instance is bound to deal with all the pleas before it, it is not bound to deal individually with each and every point of fact adduced by way of evidence. It is clear from the judgment that the Court of First Instance carefully considered the plea of misuse of power in the light of the evidence as a whole. In those circumstances it is sufficient that the Court clearly and unequivocally explained — as it did at length in paragraphs 43 to 51 of the judgment — why it rejected that plea.

Admissibility

30. Article 51 of the EC Statute of the Court of Justice provides that an appeal to the Court of Justice shall be limited to points of law and shall lie on the grounds of *inter alia* the infringement of Community law by the Court of First Instance.

31. Article 113 of the Rules of Procedure of the Court of Justice provides that an appeal may seek to set aside, in whole or in part, the decision of the Court of First Instance, and may seek the same form of order, in whole or in part, as that sought at first instance. It shall not seek a different form of order, nor may the subject-matter of the proceedings before the Court of First Instance be changed in the appeal.

32. Before the Court of First Instance Mme Simon sought

(i) annulment of the Commission's decision of 2 April 1997;

(ii) payment of the symbolic sum of one euro damages; and

(iii) costs.

33. In this appeal Mme Simon seeks

(i) annulment of the judgment of the Court of First Instance;

(ii) annulment of the Commission's decision of 2 April 1997;

(iii) a declaration that the services provided by her between 15 May 1966 and 25 October 1995 are to be regarded

17 — Case C-18/91 P *V.* v *Parliament* [1992] ECR I-3997, paragraph 44 of the judgment.

as provided by a temporary servant of the Commission; and

(iv) costs.

34. The Commission's submission that the declaration sought by Mme Simon is inadmissible is in my view correct because such a declaration was not sought before the Court of First Instance.

35. The Commission also submits that the appeal is inadmissible on the ground that it questions the findings of fact of the Court of First Instance.

36. It is correct that the Court of Justice may not review on appeal the assessment of facts by the Court of First Instance. However there may be a fine line between on the one hand reviewing the assessment of facts and on the other hand ensuring that the clear sense of the evidence has not been distorted and that the Court of First Instance correctly defined the legal nature and determined the legal consequences of the facts. Both the latter exercises are within the competence of the Court of Justice on appeal. [18]

18 — Case C-136/92 P *Commission* v *Brazzelli Lualdi and Others* [1994] ECR I-1981, paragraph 49 of the judgment.

37. On that basis I consider that the appeal is in principle admissible in so far as it seeks annulment of the judgment of the Court of First Instance and the Commission's decision of 2 April 1997.

Substance

38. Mme Simon's first submission is to the effect that the Court of First Instance should have examined the lawfulness of the contracts between the Commission and the successive supervisory agencies. In particular it should have examined the real aim of the Commission in resorting to such agencies and should have made an assessment of the duties which they actually carried out.

39. It appears from her application to the Court of First Instance — although the precise meaning of those pleadings is unfortunately not entirely clear — that before that Court Mme Simon's principal complaint was that the contracts between her and the supervisory agencies, described as contracts of employment or for services, were illegal. There is in contrast no apparent allegation that the contracts between the Commission and the supervisory

agencies were illegal. It is therefore in my view entirely understandable that the Court of First Instance proceeded on the basis that it was the legality of the contracts between Mme Simon and the supervisory agencies which was being challenged.

40. In its judgment the Court of First Instance set out Mme Simon's plea that it was unlawful for the Community institutions to have recourse to contracts of employment or contracts for services subject to the law of a Member State if it chose that structure not on the basis of the needs of the service but with a view to avoiding the application of the Staff Regulations or the Conditions of employment of other servants. [19] It explicitly dealt with that plea, noting that the Court of Justice had ruled that the Commission would be responsible for a misuse of procedure if it determined the terms of employment of a person recruited by means of a contract subject to the law of a Member State not in the light of the needs of the service but with a view to avoiding the application of the Conditions of Employment. [20] The Court of First Instance continued by stating — correctly in my view — that that case-law was not applicable to the case before it precisely because the Commission was not a party to the contracts and hence could not have abused its power in that connection. [21]

19 — Paragraph 25 of the judgment.

20 — Case 123/84 *Klein* v *Commission* [1985] ECR 1907, paragraph 24 of the judgment; referred to in paragraph 46 of the judgment under appeal.

21 — Paragraphs 46 to 48 of the judgment of the Court of First Instance.

41. Since it was not separately pleaded before the Court of First Instance that recourse by the Commission to the supervisory agencies was illegal, it is hardly surprising that that Court did not examine that issue. Since that plea has been raised for the first time before this Court, and since the Rules of Procedure of the Court of Justice provide that the subject-matter of the proceedings may not be changed on appeal, [22] Mme Simon's first submission must be dismissed as inadmissible.

42. Mme Simon's second submission is that the Court of First Instance should have examined the nature of the links between her and, first, the supervisory agencies and, second, the Commission. It seems to me however that the Court of First Instance did indeed carefully examine those matters in paragraphs 43 and 44 of its judgment and was moreover correct in saying that that argument is answered by *Salerno*. [23] Mme Simon's second submission is accordingly unfounded.

43. Even however if this Court were to take the view that the judgment of the Court of First Instance could be faulted on either of the grounds put forward by Mme Simon, that would not necessarily mean that the judgment should be annulled.

22 — Article 113, summarised in paragraph 31 above.

23 — Cited in note 8.

44. Mme Simon is in effect claiming that she has been adversely affected because she was employed by a series of supervisory agencies under a series of contracts of employment or for services from May 1966 to October 1995 whereas she should have been employed as a temporary agent by the Commission. It appears from the documents before the Court that she raised that issue with the Commission for the first time in June 1996. Although there is no express time-limit for a request for a decision under Article 90(1) of the Staff Regulations, Article 90(2) requires that a complaint against an act adversely affecting the claimant be lodged within three months. It may be that the Court would or should raise of its own motion the question whether it was open to Mme Simon to challenge a series of contracts of employment going back more than 30 years before the complaint. It may be noted that the Court of First Instance recently dismissed applications by two auxiliary agents working for the Commission and seeking declarations that they should retrospectively be declared temporary agents on the ground that the applications, not having been lodged within three months from the creation of contractual relations with the Commission, were out of time. [24]

45. I would finally note that, even though a direct question to this effect was put at the hearing to her advocate, it is not clear what benefit Mme Simon expects to receive should the Commission's decision of 2 April 1997 be annulled.

46. Even if the Commission were to decide that Mme Simon should be recognised as having been a temporary agent during the relevant period, what would be the practical consequences for Mme Simon of that decision? She is apparently not claiming that she would have been paid more as a temporary agent; on the contrary, she appears to rely on having been paid at the same rate as a Commission official of grade A5 in support of her claim for recognition as a temporary agent. Nor apparently is she seeking financial compensation: although her action before the Court of First Instance included a claim for damages, the amount claimed was the symbolic figure of one euro and she has not appealed against that Court's rejection of the claim. It was moreover stated at the hearing that, during the period in question, Mme Simon paid social security contributions in Luxembourg; she is presumably therefore entitled to social security benefits — presumably including a pension — on that basis. Even however if Mme Simon, by virtue of being retroactively declared to have been a temporary agent, would thereby be entitled in principle to a pension or medical insurance pursuant to the Community's schemes, any such claim in the circumstances of the present case would appear to be insuperably complicated, since back-dated contributions to both the pension fund and the sickness insurance scheme would have to be made for periods during which she was already insured with equivalent schemes in Luxembourg.

24 — Case T-375/00 *Dubigh and Another* v *Commission*, ECR-SC I-A-159, II-733, order of 6 July 2001. See also by analogy Case T-192/99 *Dunnett and Others* v *European Investment Bank*, ECR II-813, paragraphs 48 to 54 of the judgment delivered on 6 March 2001.

Conclusion

47. I accordingly consider that the Court should:

(1) dismiss the appeal;

(2) order the appellant to pay the costs.