OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN
delivered on 10 July 1986

My Lords,

Mrs Anne-Marie Christ (née Clemen), Mrs Olga Priplata (née Schneider) and Miss Elizabeth McDonnell were at all material times temporary staff of the Commission in category C. By an application dated 4 March 1985 and received at the Registry on 4 April 1985, the applicants ask the Court to:

(a) annul the salary statements for May 1984 issued by the Commission to Mrs Priplata and Miss McDonnell and that for July 1984 issued to Mrs Christ as well as all subsequent salary statements inasmuch as they apply Regulation (ECSC, EEC, Euratom) No 2615/76 (Official Journal, 1976 L 299, p. 1) adopted by the Council on 21 October 1976, which adds a fourth paragraph and accompanying table of salaries to Article 20 of the Conditions of Employment of other Servants of the European Communities;

(b) order the Commission to pay all the costs of the case pursuant to Article 69(2) of the Rules of Procedure and also the expenses necessarily incurred by the applicants for the purposes of the procedure, in particular, the travel and subsistence expenses and the fees of a lawyer pursuant to Article 73(b) thereof.

Article 2 of the Conditions of Employment of other Servants of the European Communities (the 'Conditions of Employment') provides that 'temporary staff' means

(a) staff engaged to fill a temporary post; (b) staff engaged to fill temporarily a permanent post; (c) staff engaged to assist a person holding an office under the Treaties and (d) 'staff engaged to fill temporarily a permanent post paid from research and investment appropriations and included in the list of posts appended to the budget relating to the institution concerned'. This last category was added to the conditions of employment by Article 1(2) of Regulation No 2615/76.

Article 20 of the Conditions of Employment provides *inter alia* that Article 66 of the Staff Regulations shall apply by analogy to temporary staff, with the effect that temporary staff are to be paid the same basic salaries as established officials. However, Article 1(5) of Regulation No 2615/76 added a fifth (unnumbered) paragraph to Article 20 which was in the following terms:

'However, the basic monthly salaries of staff to whom Article 2(d) applies shall be determined for each grade and step in accordance with the following table:'

The basic salaries shown in that table are identical to those shown in the table for established officials as regards categories A, LA and B, but they are approximately 5% lower for all steps in Grades C and D.

It is thus the fifth rather than the fourth paragraph of Article 20 which the applicants seek to challenge.

Those amendments came into force on 30 October 1976 (pursuant to Article 3 of Regulation No 2615/76). Whilst the fourth category of temporary staff still stands, the Council repealed the table of basic salaries applying specifically to them in June 1985. Council Regulation (ECSC, EEC, Euratom) No 1578/85 of 10 June 1985 (Official Journal 1985, L 154, p. 1) provided, at Article 7, that:

'In Article 20 (of the Conditions of Employment of other Servants of the European Communities), the fifth paragraph and the scale of basic monthly salaries shall be deleted.'

Pursuant to Article 13 of Regulation No 1578/85, that repeal took effect on 1 January 1985 in relation to temporary staff employed on the date when the Regulation came into force — 14 June 1985 — which was the case of the applicants.

The three applicants were employed respectively on 1 July 1979, 4 July 1979 and 1 June 1979 as temporary staff under Article 2(a) of the Conditions of Employment. In 1983 they were assigned to temporary posts in a research project known as 'FAST'. Those posts were treated in the accounts as permanent posts from 1 January 1984. The Commission sent the applicants a proposal of an amending clause to their contracts transforming them into contracts as temporary staff under Article 2(d) of the Conditions of Employment, i. e. staff engaged to fill temporarily a permanent post paid from research and investment appropriations. The proposals bear the stamp 30 March 1984, but the applicants maintain that the proposals were only sent to them on 17 April 1984, and signed and returned by Mrs Christ and Miss McDonnell at the end of April 1984 and by Mrs Priplata at the beginning of May 1984. This is not denied by the Commission.

The amending clause did not specify that their salary would drop by approximately 5%. At the hearing the Court was told that the applicants did not then appreciate the effect of that amendment and did not make enquiries about it. It was only upon reading their salary statements for May 1984 that Mrs Priplata and Miss McDonnell realized, and it was only on reading her salary statement for July 1984 that Mrs Christ realized, that their basic salary had been reduced.

The appointing authority sought to apply the lower salary retrospectively as from 1 January 1984; but when the applicants protested, the appointing authority conceded that it would not be right to do so for the period from 1 January to 30 March 1984.

On 25, 26 and 20 July 1984 the three applicants respectively lodged a complaint under Article 90(2) of the Staff Regulations. They complained about the drop in salary consequent upon the amendment of their contracts from ones under Article 2(a) to ones under Article 2(d) of the Conditions of Employment. The Commission rejected those complaints by identically-worded notes dated 4 January 1985 to Mrs Christ and 10 January 1985 to Mrs Priplata and Miss McDonnell. The date of notification of these decisions was 21 January 1985 to Miss McDonnell and 25 January 1985 to

Mrs Christ and Mrs Priplata (evidenced by signed receipts annexed to the application). Their application was lodged at the Court within the time limit laid down in Article 91 of the Staff Regulations.

The Commission accepts that the claims are admissible. As a matter of form the administrative complaints were directed at the amending clauses, the application at the salary statements. It is, however, plain from the observations in the complaint that it is the effect of Regulation No 2615/76 on the salary statements, through the amending clause in the contract, that is complained about. In substance complaint and application are directed to the same object. I consider that the application cannot be said to be inadmissible as not being directed to the same matter as the complaint.

The application is, however, now limited to the period from 1 April to 31 December 1984 since the effect of the repeal of the fifth paragraph of Article 20 of the Conditions of Employment was that the applicants were paid the same salaries as officials in that category and grade as from 1 January 1985.

The applicants' case is that what has happened is contrary to the principle of equal treatment recognized by the Court in such cases as Case 156/78 *Newth* v *Commission* [1979] ECR 1941 and Joined Cases 198-202/81 *Micheli* v *Commission* [1982] ECR 4145. They received 5% less than other staff doing the same jobs and who were in comparable situations; they received as a result of the amendment 5% less than they previously got for doing the same work; being in category C they were treated less well than staff also falling under Article 2(d) but in categories A and B whose salaries were the same as those of established officials without a reduction of 5%.

The Commission takes the view that differences between different categories of officials or temporary staff are not to be regarded as discriminatory. It relies on the Court's judgments in Joined Cases 118-123/82 *Celant* v *Commission* [1983] ECR 3012 at paragraph 22 and Case 171/84 *Soma* v *Commission*, judgment of 23 January 1986 at paragraph 30, and on the Opinion of Mr Advocate General Darmon in Case 326/82 *Aschermann* v *Commission* [1984] ECR 2253 at 2268, where he accepted that temporary staff paid from research and investment appropriations are not recruited on the same conditions or in the same position, even if graded in the same categories, as officials or other temporary staff referred to in Articles 2(a), (b) and (c) of the Conditions of Employment. In particular it is said by the Commission that Regulation No 2615/76 created a new category 2(d) in order to improve the lot of persons previously employed as establishment or local staff at Joint Research Centres. They got substantially higher pay. A distinction was made between categories A and B on the one hand and categories C and D on the other for budgetary reasons. There were many establishment and local staff in the latter category, few in the former, so that in order to keep the total cost down the latter did not get the same salaries as other staff in the same categories. It was only in 1985 when

funds were available, and the second, permanent, FAST project was under way, that this 5% 'discrepancy' was removed.

The general proposition that staff in different positions may be treated differently seems to me to be well established. Whether there has been unequal treatment in the sense of unfair or discriminatory treatment must, however, be decided on the facts of each case. There seems to me to be a crucial difference between the *Celant* and the *Soma* cases on the one hand and the present cases on the other. In the former the staff were not 'temporary staff' before their inclusion as temporary staff by Regulation No 2615/76. As a result of their inclusion in the category of temporary staff they received substantial benefits. The fact that all staff did not get identical pension benefits was found to be justified in the circumstances. Here the applicants were already temporary staff (under Article 2(a)) before they were transferred to the category of staff defined in Article 2(d). I do not consider that they fall within the decision in *Celant* and *Soma*. Nor do I see that Mr Advocate General Darmon's Opinion deals with the precise situation which arises here.

In my view the applicants are entitled to compare their position under Article 2(d) with that of other staff doing comparable work but who are or who remain under Article 2(a). They are also entitled to compare their position after the amendment with their own previous position under Article 2(a). There was a difference in treatment and it has not been shown to be objectively justified. Moreover, they can, in my opinion, say that the distinction between category A and B officials and themselves was not justified at the date of transfer even if, for the reasons given, it may have been justified in 1976 in respects of persons transferred from local staff to temporary staff. It is plain that by 1983 the original reasons for making the distinction, even if justified originally, had gone — 'that inequality of remuneration cannot reasonably be maintained in the face of the equality of work and of jobs' (Statement of reasons accompanying Commission proposal for the repeal of the provision complained of; Proposal Official Journal 1983 C 213, p. 7, Statement COM(83)455 final). I can see no acceptable reason in 1984, when the applicants were transferred from Article 2(a) to Article 2(d), for making a distinction between category C and categories A and B.

Accordingly, in my view, there has been on their transfer *prima facie* unequal treatment as to salary which has not been shown to be objectively justified.

The Commission argues that the applicants freely accepted the amendment to the terms of their contract of employment. The first sentence in the fourth paragraph of each of the decisions rejecting the applicants' complaints, however, reads: '... the Commission was obliged either to terminate your contract of (and here the Commission gives the date of each of the original contracts of employment in 1979) or to propose to you the amendment of that contract, which was done'. In other words, they could either sign the proposed amendment or lose their job. In those

circumstances I consider it impossible to accept the argument that the applicants had waived their rights of action in the present case.

The Commission then contends that the transfer to posts under Article 2(d) of the Conditions of Employment gave the applicants pension rights which they did not have under Article 2(a). This was only for a limited period since Regulation No 2799/85 of 27 September 1985 (Official Journal 1985 L 265, p. 1) has now introduced a pension for temporary staff under Article 2(a) of the Conditions of Employment, with effect from 9 October 1985. However, the pension rights which the Commission contends that the applicants now enjoy are only potential rights. They will only actually draw a pension if, upon reaching the relevant age, they fulfil all the qualifying conditions for one, in particular that they have done 10 years service. It seems to me that merely potential rights enjoyed for a period of some months do not constitute a sufficient difference in circumstances to justify the difference of treatment of which the applicants complain. Moreover, as was pointed out at the hearing, if the applicants had left during 1984 their severance payment would have been based on their lower salary.

The Commission further argues that the transfer to posts under Article 2(d) of the Conditions of Employment represents an improvement in the applicants' job security. It is true that, in budgetary terms, the applicants are now on permanent posts whereas under Article 2(a) of the Conditions of Employment they were on temporary posts. On the other hand, they are still temporary staff subject to dismissal on three months' notice. It seems to me that it cannot be said that the difference in status relied on by the Commission objectively justifies the unequal payment of the applicants for work which was at all material times identical to what they had done before.

Finally, the Commission made a submission to the effect that the claims were of minor importance. It argues that the applicants' claims had already largely been met by the decision not to apply the reduction of their salary retrospectively and by the introduction of Regulation No 1578/85. It reproached them for quibbling over the small amounts still outstanding. That is a double-edged submission. I do not consider that the present claim can be considered *de minimis* or that the applicants, who are in category C, have acted unreasonably in pursuing their claim.

Accordingly, I am of the opinion that the salary statements for May 1984 issued by the Commission to Mrs Priplata and Miss McDonnell and that for July 1984 issued to Mrs Christ as well as all subsequent salary statements inasmuch as they apply Regulation No 2615/76, which adds a fifth paragraph and accompanying table of salaries to Article 20 of the Conditions of Employment, should be annulled. The Commission should pay the applicants' costs.