ORDER OF THE COURT OF FIRST INSTANCE (Third Chamber)
16 December 1994 *

(Preliminary issue – Application citing as defendants the Commission and the JET Council – Capacity of the JET Joint Undertaking to be made a defendant – Admissibility)

In Case T-177/94,

Henk Altmann and 56 other applicants whose names appear in the Annex hereto, represented by Kenneth Parker QC, and Rhodri Thompson, Barrister, of the Bar of England and Wales, having an address for service in Luxembourg at the Chambers of Messrs Elvinger and Hoss, 15 Côte d'Eich,

applicants,

v

Commission of the European Communities, represented by Hans Gerald Crosland, of the Legal Service, acting as Agent, with an address for service in Luxembourg in the office of Georgios Kremlis, of the Legal Service, Wagner Centre, Kirchberg,

defendant,

CONCERNING, at the present stage of the procedure, the admissibility of the action in so far as it is brought against the JET Council,

* Language of the case: English

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

composed of: J. Biancarelli, President, C.P. Briët and C.W. Bellamy, Judges,

Registrar: H. Jung,

makes the following

Order

Facts

1 The Joint European Torus (JET), Joint Undertaking ('JET' or 'the Joint Undertaking') was established by Council Decision 78/471/Euratom of 30 May 1978 (OJ 1978 L 151, p. 10), adopted under Articles 46, 47 and 49 of the Treaty establishing the European Atomic Energy Community ('the EAEC Treaty'). Its aim is to construct a large torus facility and its auxiliary facilities ('the Project'). Its seat is at Culham, in the United Kingdom.

2 Under the Statutes of the Joint Undertaking ('the Statutes'), annexed to the abovementioned decision, its Members are the European Atomic Energy Community, certain Member States, certain Member States' organizations with responsibility in the field of atomic energy and one organization belonging to a non-member country. The organs of the Joint Undertaking are the JET Council and the Director of the Project.

3 Article 8 of the Statutes concerns the Project Team. Staff are to be made available to the Joint Undertaking by its Members. The staff made available by the United Kingdom Atomic Energy Authority ('the UKAEA') remain in its employment (Article 8.4). Staff made available by the other Members are recruited by the Commission to temporary posts (Article 8.5). In the latter case, the Member

making the staff available must undertake to re-employ them when the contract for their work on the Project expires (Article 8.8 – the so-called 'return ticket' system).

4 In 1983, a number of staff employed by the UKAEA and made available to JET requested to be recruited by the Commission as temporary staff. Those requests were not granted, so they brought an action before the Court of Justice (Joined Cases 271/83, 15, 36, 113, 158 and 203/84 and 13/85 *Ainsworth* v *Commission and Council* [1987] ECR 167). In its judgment, the Court found that the JET management required candidates of British nationality to apply to the UKAEA and not to any other Member of JET and that such an obligation constituted discrimination on grounds of nationality with no objective justification, which was therefore illegal, but that it had not affected the applicants' position (paragraphs 19 to 29). It held, however, that the special position of the UKAEA as host organization of the Project meant that the difference in treatment established by the Statutes as between staff employed by the UKAEA and staff employed by the Commission was objectively justified (paragraphs 30 to 39).

5 In February 1990, considering that the factual situation had changed since the date of that judgment, 206 of the UKAEA staff made available to JET petitioned the European Parliament to call upon the Commission and the Council to put an end to the discrimination which they claimed to have suffered.

6 Following that petition and a number of discussions, the Commission decided to appoint a panel of 'wise men' (known as 'the Pandolfi Panel') and an external consultant to carry out a study of the problem. The report of the Pandolfi Panel, dated 16 September 1992, recommended, *inter alia*, that steps should be taken to ensure that UKAEA staff made available to JET could have the opportunity to be recruited by the Commission on conditions to be determined.

7 Following the publication of that report, by individual letters dated 18 to 29 January 1993, the applicants in the present case, who are all British members of the UKAEA

staff made available to JET, wrote to the Director of JET requesting to be recruited as temporary staff of the Community. No reply was made to those requests.

8 The applicants then submitted two joint complaints, dated 12 and 17 August 1993, against the rejection of their requests. Those complaints were sent to the Secretary-General of the Commission, the Secretary-General of the Council, the Director of JET and the Chairman of the JET Council. Only the Commission sent an answer, dated 14 January 1994 and received at the end of the same month, in which it rejected the complaints. The Commission specified that its decision was in response to a complaint against the implied decision rejecting the requests 'lodged with the appointing authority' for recruitment as temporary staff of the Community.

Procedure

9 By application registered at the Court of First Instance on 22 April 1994, Dr Altmann and 56 other applicants whose names appear in the Annex hereto, which forms an integral part of this order, brought the present action. Both the Commission and the JET Council are cited as defendants.

10 Considering that the JET Council was not a Community institution or organization, the Registry served the application only on the Commission.

11 The Commission's defence was lodged at the Registry on 29 July 1994.

12 When serving the defence on the applicants on 1 August 1994, the Registry drew their attention to the fact that the application had not been served on the JET Council because it was not clear under which arrangement it could be considered a defendant in proceedings before the Court.

13 By letter of 12 August 1994, the applicants expressed their concern at the procedure followed and stated why they considered that the application should be served on the JET Council.

14 By letters of 22 September 1994, the Court, considering that the applicants had raised a preliminary plea within the meaning of Article 114(1) of the Rules of Procedure, invited the Commission and the JET Council to submit their observations on the applicants' request that the application should be served on the JET Council and provided the JET Council with a copy of the application, for information.

15 By documents received at the Registry on 12 and 17 October 1994 respectively, the Commission and the JET Council submitted their observations on the applicants' request.

Forms of order sought

16 In their application, the applicants claim that the Court should:

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

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

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

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

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

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

(4) to the extent that:

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

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

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

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

(6) require the Commission and/or the JET Council to implement all the recommendations of the Pandolfi Panel report;

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

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

(9) order that the costs of the application shall be paid by the defendants; and

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

17 In its defence, the Commission, which considers that in their first claim the applicants are seeking the annulment of the Commission's decision of 14 January 1994, contends that the Court should:

– dismiss the application as unfounded in its entirety; and

– make the appropriate order as to the costs of the proceedings.

Arguments of the parties and of the JET Council on the capacity of the JET Council to be made a defendant to the proceedings

18 The applicants argue that because the JET Council's functions are wide-ranging (see Articles 4.2.1, 4.2.2(b), 4.2.2(d), 4.2.2(k), 8.5 and 8.9 of the Statutes), particularly in the assignment and management of staff, any judgment which did not bind the JET Council could be deprived of effect by its opposition.

19 In addition, the procedures and rules of which the applicants complain were adopted and maintained in force by the JET Council; in particular, the JET Council has obstructed the applicants in their attempt to obtain 'return tickets' from Members other than the UKAEA for the purpose of being recruited by the Commission and has prevented the implementation of the Pandolfi Panel's recommendations.

20 Although, therefore, the JET Council and the Commission theoretically share responsibility for the appointment of JET staff, in practice control rests with the JET Council.

21 Furthermore, as an addressee of the applicants' complaints which it must be deemed to have rejected by implied decision, the JET Council can properly be cited before the Court.

22 Finally, if the Court were to decide that the conduct complained of by the applicants was required under the Statutes but that the Statutes were vitiated by illegality, the judgment would have to bind the JET Council because any amendment to the Statutes must be proposed by a Member of the JET Council and approved by the JET Council itself.

23 Those arguments are closely linked to, and should consequently be examined with, the substance of the case. The applicants therefore request that the application be served on the JET Council.

24 The Commission points out, first, that the Court's jurisdiction in the present case is governed by Article 152 of the EAEC Treaty, by Article 3(1)(a) of Council Decision 88/591/ECSC, EEC, Euratom of 24 October 1988 establishing a Court of First Instance of the European Communities (OJ 1988 L 319, p. 1), last amended by Council Decision 94/149/ECSC, EC of 7 March 1994 (OJ 1994 L 66, p. 29), by Articles 90 and 91 of the Staff Regulations of Officials of the European Communities ('the Staff Regulations') and by Article 73 of the Conditions of Employment of Other Servants of the European Communities ('the Conditions of Employment'). In that context, the application for the annulment of the Commission's decision of 14 January 1994 is admissible in so far as it is brought against the Commission.

25 The Commission goes on to state that the organs of the Joint Undertaking are the JET Council and the Director of the Project. However, the JET Council neither represents nor constitutes the Joint Undertaking.

26 Although the Statutes identify the JET Council's responsibilities and tasks, some of which relate to staff matters, it is incorrect to say that the JET Council controls the appointment of staff by directing the Commission. On the contrary, under Article 4.2.2(d) of the Statutes, the JET Council merely nominates the Director and the senior staff with a view to their appointment by the Commission or the UKAEA. Recruitment of staff is governed by Article 8 of the Statutes and is the responsibility of either the Commission or the UKAEA.

27 The Commission adds that the JET Council is not a separate legal entity against which an action can be brought relating to its responsibilities and tasks. Only the Joint Undertaking is endowed, under Article 49 of the EAEC Treaty, with legal personality and any proceedings must be brought against the Joint Undertaking itself. An action brought against the JET Council alone, as one of the organs of the Joint Undertaking, is therefore inadmissible.

28 The Commission also considers, however, that in the light of the fifth paragraph of Article 49 of the EAEC Treaty – under which, save where jurisdiction is conferred upon the Community judicature by the Treaty, disputes in which Joint Undertakings are concerned are to be determined by the appropriate national courts and tribunals – read together with Article 22.1 of the Statutes – under which English law is to apply in any matter not covered by those Statutes – it is not clear whether the Court of First Instance has jurisdiction to hear a case brought against the Joint Undertaking.

29 The JET Council points out that the legal entity of the JET Project is the Joint Undertaking, governed by Articles 45 to 51 of the EAEC Treaty and comprising the Commission and 14 other Members (States, agencies and laboratories). The JET Council is merely an organ of the Joint Undertaking, reporting to its Members (Articles 3.1 and 4.2.1 of the Statutes). The legal representative of the Joint Undertaking is the Director of the Project (Article 7.1).

30 The JET Council further points out that the Joint Undertaking is not an employer but that, under the Statutes (Articles 4.2.2(d), 8.1, 8.3, 8.4 and 8.5), it nominates senior staff and that staff are recruited and made available to the Project by the UKAEA or the Commission, as appropriate. In any event, the JET Council does not direct the Commission.

31 The JET Council considers, therefore, that there are sound legal and practical reasons for not allowing it to be made a defendant to the proceedings.

Findings of the Court

32 Under Article 111 of the Rules of Procedure, where it is clear that the Court has no jurisdiction to take cognizance of an action or where the action is manifestly inadmissible, it may, by reasoned order and without taking further steps in the proceedings, give a decision on the action.

33 The present preliminary issue raised under Article 114(1) of the Rules of Procedure, which concerns solely whether the application in this case should have been served on the JET Council, necessarily requires the Court to consider whether it has jurisdiction to take cognizance of an action brought by persons claiming the status of members of the temporary staff of the European Communities against the Joint Undertaking or the JET Council.

34 The Court has jurisdiction, under Articles 152 of the EAEC Treaty and 3(1)(a) of Council Decision 88/591, cited above, 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.

35 It has consistently been held (see, for example, *Ainsworth*, cited above, paragraph 12) that Article 152 of the EAEC Treaty must be interpreted as meaning

that it applies not only to persons who have the status of officials or of servants other than local staff but also to persons claiming that status.

36 Although the present case certainly concerns a dispute between the Community and a number of persons who claim the status of servants, this Court considers none the less that, in order to be made a defendant to the proceedings, the JET Council must be capable of being regarded as forming part of the Community.

37 In that regard, it has consistently been held (see, for example, Joined Cases 94 and 96/63 *Bernusset* v *EEC and Commission* [1964] ECR 297; Case 28/64 *Müller* v *Council of the EEC and Council of the EAEC* [1965] ECR 237; and Case 167/80 *Curtis* v *Commission and Parliament* [1981] ECR 1499) that an action must be brought against the institution to which the applicant is attached.

38 From that point of view, this Court considers that the JET Joint Undertaking is not an institution of the Community. The institutions of the Community are defined in Chapter I of Title Three of the EAEC Treaty (Articles 107 to 160c) and comprise the European Parliament, the Council, the Commission, the Court of Justice and the Court of Auditors. Title Three, 'Provisions governing the institutions', covers also the Economic and Social Committee (Articles 165 to 170). The Joint Undertaking, however, was established by the Council under, in particular, Articles 46, 47 and 49 of the EAEC Treaty, which form part of Title Two, 'Provisions for the encouragement of progress in the field of nuclear energy'.

39 Nor is the situation of the Joint Undertaking covered by the second paragraph of Article 1 of the Staff Regulations which provides that, for the purposes of those regulations, the Economic and Social Committee and the Court of Auditors are to be treated as institutions of the Communities.

40 In Case 110/75 *Mills* v *Investment Bank* [1976] ECR 955, however, the Court of Justice held that it had jurisdiction in any dispute between the European Investment Bank ('the EIB') and its servants even though those servants were subject neither to the Staff Regulations nor to the Conditions of Employment and even though the EIB was not one of the institutions of the Community. That decision was based on, first, the fact that the EIB was established by Article 129 of the EEC Treaty, to which its Statute is annexed (paragraphs 7 to 9); secondly, the fact that, under that Statute, officials and other employees of the EIB are engaged and discharged by the President, under whose authority they are placed (paragraph 10); and, thirdly, on the fact that the Protocol on the Privileges and Immunities of the European Communities applies to the staff of the EIB, who are thereby placed in the same legal position as that of the staff of the institutions (paragraphs 11 to 13). The Court therefore concluded that the EIB formed part of the Community and that the terms of Article 179 of the EEC Treaty extended to disputes between the EIB, a Community body established and endowed with legal personality by the Treaty, and its servants.

41 This Court considers, however, that the position of the JET Joint Undertaking cannot be equated with that of the EIB as analysed by the Court of Justice in *Mills*. First, the Joint Undertaking was not set up by the EAEC Treaty itself but by a Council Decision taken under Articles 46, 47 and 49 of the Treaty. Secondly, its Members are the Community itself, certain Member States and certain national organizations – including one from a non-member country – with responsibility in the field of atomic energy. Thirdly, even though the JET Council nominates the Director and the senior staff of the Project with a view to their appointment by the Commission or the UKAEA, as appropriate, and determines their period of assignment, the Joint Undertaking is not the employer of its staff. All the staff made available to the Joint Undertaking are employed either by the UKAEA or by the Commission, in accordance with Article 8.4 and 8.5 of the Statutes. Fourthly, and lastly, the Protocol on the Privileges and Immunities of the European Communities does not apply to the case of the Joint Undertaking, in contrast to the provision made for the EIB (see Article 22 of the Protocol).

42 In addition, the Court considers that it is clear from the Statutes that only the Commission or an authority appointed by and acting on delegation from the Commission may enter into contracts recruiting, as temporary staff of the

Community, staff to be made available to the Joint Undertaking (see Case T-558/93 *Düchs* v *Commission* [1994] ECR-SC II-0000, paragraph 39).

43 It is, moreover, clear from Section 5.11 of the Supplementary Rules concerning the Assignment and Management of the Staff of the JET Joint Undertaking ('the Supplementary Rules') adopted by the JET Council under Article 8.5 of the Statutes and produced as Annex 4 to the petition to the European Parliament, that the power of the Director of the Project to engage temporary staff of the European Communities up to and including Grade A 4 is exercised under delegation from the Commission. It also appears from Section 4.8 of the Supplementary Rules that, in respect of the rights and obligations of temporary staff, the Director exercises powers delegated to him by the Commission. In other cases, the Director asks the Commission to take the appropriate action (Section 5.10 of the Supplementary Rules).

44 In the light of the foregoing considerations, the Court finds that the JET Joint Undertaking does not form part of the Community. The jurisdiction conferred on this Court under Article 152 of the EAEC Treaty thus does not cover disputes between the JET Joint Undertaking and persons made available to it who claim the status of temporary staff of the Community. The same is true *a fortiori* with regard to the JET Council, which is merely an organ of the Joint Undertaking (see Articles 3.1 and 4.2.1 of the Statutes).

45 In accordance with Article 111 of the Rules of Procedure, the action must therefore be declared manifestly inadmissible in so far as it is brought against the Joint Undertaking or the JET Council. In those circumstances, the applicants' request that the application be served on the JET Council cannot be entertained.

Costs

46 Since the application has not been formally served on the JET Council and since it has not instructed counsel, it is not necessary to rule on costs in its regard. Any other decision on costs must be reserved for the decision disposing of the case.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby orders:

1. **The action is dismissed as manifestly inadmissible in so far as it is brought against the JET Council.**

2. **Costs are reserved.**

Luxembourg, 16 December 1994.

H. Jung
Registrar

J. Biancarelli
President