Reports of Cases

ORDER OF THE EUROPEAN UNION CIVIL SERVICE TRIBUNAL (First Chamber)

13 July 2010*

(Civil service — Staff employed at the JET project — Actions for damages — Reasonable period — Out of time)

In Case F-103/09,

ACTION brought under Article 270 TFEU, applicable to the EAEC Treaty in accordance with Article 106a thereof,

John Allen, residing in Horspath (United Kingdom), and the 113 other applicants whose names are set out in the annex, who worked at the Joint European Torus (JET) Project, represented by P. Lasok QC, I. Hutton and B. Lask, barristers,

applicants,

v

European Commission, represented by J. Currall and D. Martin, acting as Agents,

defendant,

THE CIVIL SERVICE TRIBUNAL (First Chamber),

composed of S. Gervasoni (Rapporteur), President, H. Kreppel and M. I. Rofes i Pujol, Judges,

Registrar: W. Hakenberg,

makes the following

Order

1 By application received at the Registry of the Tribunal on 22 December 2009 by fax (the original being lodged on 24 December 2009), the applicants brought the present action primarily seeking an order that the European Commission compensate them for the material harm which they suffered as a result of the fact that they were not recruited under contracts as temporary servants during the time they worked at the Joint European Torus (JET) Joint Undertaking.

* Language of the case: English.

Factual background to the dispute

2 The JET Joint Undertaking was established by Council Decision 78/471/Euratom of 30 May 1978 (OJ 1978 L 151, p. 10) for the purposes of the implementation of the 'Fusion' programme of the European Atomic Energy Community, which provided for the construction, operation and exploitation of a large torus facility of the Tokamak type and its auxiliary facilities. Originally scheduled for a period of 12 years, the JET Project was extended on three occasions: until 31 December 1992 by Council Decision 88/447/Euratom of 25 July 1988 (OJ 1988 L 222, p. 4), until 31 December 1996 by Council Decision 91/677/Euratom of 19 December 1991 (OJ 1991 L 375, p. 9), and until 31 December 1999 by Council Decision 96/305/Euratom of 7 May 1996 (OJ 1996 L 117, p. 9). The Project formally came to an end on 31 December 1999.

3 The applicants worked at the JET Project. They were employed and remunerated by third party companies with which the JET Joint Undertaking had concluded contracts and had no legal relationship with the Commission.

4 By judgment of 5 October 2004 in Case T-45/01 *Sanders and Others* v *Commission* [2004] ECR II-3315 ('*Sanders*'), the Court of First Instance of the European Communities (now the General Court of the European Union) held that the Commission, by failing to offer a post as a temporary servant to a certain number of persons who worked in circumstances similar to those of the applicants, had committed a wrongful act entailing its liability.

5 By judgment of 12 July 2007 in Case T-45/01 *Sanders and Others* v *Commission* [2007] ECR II-2665, the General Court ordered the Commission to pay compensation to the victims of the unlawful conduct referred to above.

6 By a joint letter of 6 February 2009, the applicants submitted a request to the Commission on the basis of Article 90(1) of the Staff Regulations of Officials of the European Union ('the Staff Regulations'), seeking compensation for the material loss which they had each suffered as a result of the fact that they were not recruited as temporary servants during the time they worked at the JET Joint Undertaking.

7 By letter of 30 April 2009, the Commission rejected that request on the ground that the applicants had not submitted their applications for damages within a reasonable period.

8 By a joint letter of 18 June 2009, the applicants lodged a complaint on the basis of Article 90(2) of the Staff Regulations.

9 By decision of 25 September 2009, the Commission rejected that complaint ('the decision rejecting the complaint').

Forms of order sought and procedure

10 The applicants claim that the Tribunal should:

— annul the decision rejecting the complaint;

— declare that the applicants had a right to be treated, and should have been treated, as 'other personnel' and/or recruited as such, in accordance with Article 8 of the original JET statutes;

— declare that the Commission discriminated against the applicants without objective justification during their engagement on the JET Project as regards their remuneration, pension rights and related benefits, and security of future employment;

— order the Commission to compensate the applicants for the loss of earnings, pension and related benefits and privileges occasioned by the aforesaid breach of Community law, including interest thereon as appropriate;

— order the Commission to pay the costs.

11 By a separate document sent to the Tribunal Registry, the Commission raised three pleas of inadmissibility. In that application for a decision not going to the substance of the case, filed pursuant to Article 78 of the Rules of Procedure, the Commission contends that the Tribunal should:

— dismiss the action as inadmissible;

— order the applicants to pay the costs.

12 The applicants submitted their observations on the pleas of inadmissibility raised by the Commission.

13 In addition, the applicants submitted an application for measures of organisation of procedure, on the basis of Articles 54 and 55 of the Rules of Procedure, in order to be able to quantify their loss more precisely.

14 By order of 7 May 2010, the Tribunal, taking formal notice of the fact that two applicants wished to discontinue the proceedings, ordered that their names be removed from the list of applicants.

15 By letter of 21 May 2010, the applicants requested the Tribunal to hold a hearing should it decide to rule on the pleas of inadmissibility raised by the Commission without deciding on the substance of the case.

16 By letter of 3 June 2010, the applicants were informed that the Tribunal considered that it was not appropriate to organise a hearing.

17 By letter of 4 June 2010, the Commission submitted, first, that it was appropriate that the Tribunal should rule on the pleas of inadmissibility which it had raised by separate document without deciding on the substance of the case, and, secondly, that, having regard to the fact that the action was clearly out of time, the case should be settled by order, without holding a hearing beforehand. Nevertheless, in the light of the interests at stake, the Commission stated that it understood the request for the organisation of a hearing submitted by the applicants.

18 By order of 5 July 2010, the Tribunal, taking formal notice of the fact that a third applicant wished to discontinue the proceedings, ordered that his name be removed from the list of applicants.

Law

19 In accordance with Article 78(2) of the Rules of Procedure, if a party applies to the Tribunal for a decision on inadmissibility not going to the substance of the case, the remainder of the proceedings on the plea of inadmissibility is to be oral, unless the Tribunal decides otherwise. In the present case, being of the view that it has sufficient information available to it from the documents produced by the parties, the Tribunal considers that it is not necessary to open the oral procedure and that it is appropriate to rule by reasoned order, pursuant to Article 78(3) of the Rules of Procedure.

The scope of the dispute

20 The Tribunal considers that the forms of order formally sought by the applicants which are, first, a 'declaration' of a legal situation and, secondly, an 'order' that the Commission pay a sum by way of compensation for loss must be interpreted together as, in fact, constituting claims for damages.

21 It follows that, pursuant to Article 91 of the Staff Regulations, the plea of inadmissibility raised by the Commission against the second, third and fourth heads of claim and alleging that the Tribunal does not have jurisdiction to hear and determine such heads of claim must be rejected.

The claims for annulment of the decision rejecting the complaint

22 It is settled case-law that an institution's rejection of a request for compensation and the rejection of the complaint directed against the rejection of the request for compensation are an integral part of the administrative procedure prior to the bringing of an action for liability before the Tribunal. Consequently, the claims for annulment directed against those decisions cannot be assessed independently of the claims for damages as formulated in the forms of order sought. The only effect of those measures by which the institution adopts a position during the pre-litigation stage is to enable the party who claims to have suffered loss to file an application for damages before the Tribunal (see, inter alia, Case T-389/02 *Sandini* v *Court of Justice* [2004] ECR-SC I-A-295 and II-1339, paragraph 56). Consequently, there is no need to rule independently on the claims for annulment submitted against the decision rejecting the complaint.

The claims for damages

23 The Commission has raised two pleas of inadmissibility in relation to those claims:

— the first, contending that the application for damages was out of time;

— the second, invoking a lack of any particulars concerning the extent of the loss allegedly suffered by the applicants.

24 The first plea of inadmissibility calls for particular consideration.

Arguments of the parties

25 The Commission contends that the claims for damages filed by the applicants are inadmissible since the request for compensation, submitted on the basis of Article 90(1) of the Staff Regulations, was made out of time.

26 In support of its arguments, the Commission relies inter alia on *Sanders*, according to which a request for compensation should be submitted within a reasonable period in order to comply with the principles of legal certainty and the protection of legitimate expectations, this being a period of five years in the present case, which starts to run from each annual employment contract, whether it be the original contract or a renewal thereof, concluded by the applicants (paragraph 59 of the judgment).

27 In the present proceedings, having regard to the date of the lodging of the request for compensation and the date on which JET's activities ended, the applicants' request for compensation was not submitted within a reasonable period.

28 The applicants maintain, on the contrary, that their claims for damages as formulated in the forms of order sought are admissible, for various reasons.

29 First, they argue that a request for compensation, submitted under Article 90(1) of the Staff Regulations and based on an institution's wrongful failure to adopt a decision, is not subject to any time-limit, since there is no provision to this effect in the Staff Regulations. Furthermore, the Court of Justice has had the opportunity to give a ruling on the substance of an action for damages relating to facts which occurred approximately 15 years previously (see Case 106/08 *Fournier* v *Commission* [1981] ECR 2759).

30 Secondly, the applicants criticise *Sanders* in so far as it held that an action for damages, to be admissible, had to be preceded by a request for compensation submitted within a reasonable time period. They maintain that the legislature made a conscious decision not to set a time-limit for that type of proceedings, since the Staff Regulations, by contrast, contain clearly defined time-limits for other proceedings. Moreover, according to the applicants, the need to safeguard the public purse does not warrant establishing a reasonable-time requirement. Next, the case-law to which the General Court referred to justify the existence of a reasonable period as a limitation period in an action for damages was not relevant, could not be transposed by analogy and could not form the basis for such a conclusion. The General Court, moreover, had no jurisdiction to fix a time-limit itself, especially without that rule being coupled with a transitional period. Lastly, the applicants submit, relying inter alia on the judgment in Case C-406/08 *Uniplex (UK)* [2010] ECR I-817, paragraphs 39 to 42, that any requirement to bring an action within a 'reasonable period', where that period was not precise, clear and foreseeable would infringe the principle of legal certainty.

31 Thirdly, the applicants consider that the Commission could not rely on the principle of *res judicata* against them in relation to *Sanders and Others* v *Commission*, since they were not parties to that case.

32 Fourthly, and in the alternative, the applicants dispute the starting point for the reasonable period as established by the General Court in *Sanders*. That reasonable period cannot start to run from the conclusion or renewal of their employment contract, given that they did not at that time know of the obligation to act within a reasonable period. The application of the reasonable-period rule under the conditions set by *Sanders* has the effect of preventing any employee in a situation similar to that of the applicants in the case which gave rise to that judgment from being able to bring an action for damages within the time-limit and is therefore contrary to Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, and to Article 1 of Protocol No 1 of that Convention. The true position is that the reasonable period for the purposes of the time-limit to be applied could only start to run from the delivery of a judgment fixing a transitional period of at least six months from which the rules set out in *Sanders* could apply, since it is only from that date that the applicants were duly informed of the change in the state of the law.

Findings of the Tribunal

33 It is settled case-law that it is for officials or other servants to bring before the institution any request for compensation payable by the European Union for loss alleged to be attributable to the institution within a reasonable period, running from the point in time when they became aware of the situation they complain of (Case T-144/02 *Eagle and Others* v *Commission* [2004] ECR II-3381, paragraphs 60, 65 and 66).

34 There is an obligation to act within a reasonable period in all cases where, in the absence of any written rule, the principles of legal certainty or protection of legitimate expectation preclude European Union institutions and natural persons from being free to act without any time constraints, thereby

engendering a risk, amongst other things, of undermining the stability of legal positions already acquired (see, inter alia, *Eagle and Others* v *Commission*, paragraph 57; order in Case T-16/09 P *Marcuccio* v *Commission* of 23 March 2010, paragraphs 33 and 34).

35 The reasonableness of a period is to be assessed in the light of the circumstances specific to each case and, in particular, what is at stake in the case for the person concerned, its complexity and the conduct of the parties (*Eagle and Others* v *Commission*, paragraph 66).

36 In this connection, it is also appropriate to have regard, as a comparative point of reference, to 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, although that limitation period does not apply in disputes between the European Union and its servants. The General Court concluded, in paragraph 71 of *Eagle and Others* v *Commission*, that if the persons concerned considered that they had suffered unlawful discrimination, they should have made a request to the institution that it take steps to afford redress for that situation and bring it to an end within a reasonable period which could not exceed five years from the time they became aware of the situation they complained of (see also to that effect, order in Case T-114/08 P *Marcuccio* v *Commission* [2009] ECR-SC I-B-1-53 and II-B-1-313, paragraph 25, and Case F-125/05 *Tsarnavas* v *Commission* [2007] ECR-SC I-A-1-43 and II-A-1-231, paragraph 71).

37 The applicants, it must be said, dispute the principles referred to above. They submit, first, that there is no time-limit prescribed by a written instrument for actions for damages based on a wrongful failure to adopt a decision.

38 However, it has been consistently held, prior to *Sanders*, that in the absence of any indication in the written instruments as to the time-limit for bringing an action in respect of a given category of proceedings, it is for the European Union courts to fill that gap in the system of remedies. To do so, the court must weigh the applicant's entitlement to effective protection by the courts, which is one of the general principles of European Union law and implies that those subject to its jurisdiction must have a sufficient period of time available to them to assess the lawfulness of the act adversely affecting them or about which they have submitted a complaint and if necessary prepare their case, against the need for legal certainty which requires that, after a certain time, measures taken by European Union bodies become definitive. The reconciliation of those various interests requires that, in the absence of any written rule, disputes should be brought before the court within a reasonable period (see to that effect, order in Case T-202/97 *Koopman* v *Commission* [1998] ECR I-A-163 and II-511, paragraphs 24 and 25; Case T-192/99 *Dunnett and Others* v *EIB* [2001] ECR II-813, paragraphs 51 to 53; and Case T-281/01 *Huygens* v *Commission* [2004] ECR I-A-203 and II-903, paragraphs 46 and 47). The obligation to bring an action within a reasonable period, in the absence of any written provisions, furthermore constitutes a general principle of law (order in Case T-114/08 P, *Marcuccio* v *Commission*, paragraph 27).

39 Consequently, having regard to the principle that actions must be brought within a reasonable period, referred to above, the fact that the Staff Regulations do not expressly provide for a time-limit for the purposes of bringing an action for damages based on a wrongful failure to adopt a decision does not have the effect of allowing an applicant unlimited time within which to bring an action before the court. Thus, in *Sanders*, the General Court did not state a new legal rule on admissibility or exceed its judicial powers but merely applied to proceedings for damages the principle that an action must be brought within a reasonable period in the absence of any express provision on time-limits.

40 Secondly, the applicants are not justified in relying on *Uniplex (UK)* to claim that the obligation to bring an action within a reasonable period, in the absence of any relevant legislative provisions, is contrary to the principle of legal certainty.

41 The judgment in *Uniplex (UK)* was given in a specific legal context which was entirely different from that of the present proceedings. In that judgment, given following a reference for a preliminary ruling concerning the transposition of a directive, the mechanisms for appeal put in place by the Member State concerned were based on a very short time-limit, of three months, which could be reduced by the court. The Court ruled that the uncertainty inherent in that system, which was not sufficiently precise, clear and foreseeable, was contrary to the principle of effectiveness.

42 In the present case, the obligation to act within a reasonable period, as set out in the case-law referred to in paragraph 38 of this order, and the application by analogy of the five-year limitation period provided for in Article 46 of the Statute of the Court, are specifically intended to fill a gap in the law and to prevent it from being possible to bring an action for damages indefinitely, and thereby undermine the stability of legal positions already acquired. The length of such a limitation period is, moreover, such as to ensure a fair balance between the requirements of legal certainty and the entitlement of applicants to effective protection by the courts, under conditions comparable to those applied to any creditor of the European Union.

43 Thirdly, the other criticisms formulated by the applicants against *Sanders* are also unfounded.

44 First, contrary to the applicants' claims, *Sanders* does not in any way depart from the position under the earlier case-law. In *Fournier* v *Commission*, which the applicants cite, the Court did not expressly rule on the issue whether an action for damages, to be admissible, could be brought without any condition as to time-limits. In addition, *Fournier* v *Commission* precedes the order and the judgments cited in paragraph 38 above, in which the General Court applied for the first time the principle that an action should be brought within a reasonable period.

45 Secondly, as regards the challenge submitted in the alternative to the starting point fixed in *Sanders* for the purpose of calculating the reasonable period within which an application for damages must be brought, the applicants' arguments cannot be upheld. According to the applicants, having regard to the fact that that judgment established a new rule, that rule could not be applied immediately without infringing the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 6 and Article 1 of Protocol No 1), the principle of the protection of legitimate expectations, the principle of legal certainty and the principle of non-retroactivity, but only at the end of a formally set transitional period.

46 It is true that it was only from the date of *Sanders* that the General Court specified the duration and the calculation of a reasonable period for the purposes of bringing an action for damages challenging a failure to adopt a decision.

47 However, those rules are more favourable and more precise than those which existed previously. Before *Sanders*, it is apparent from the case-law cited in paragraph 38 that the reasonable period in which an action had to be brought was assessed on a case-by-case basis by the court without any predefined guidelines and was shorter than the period identified in *Sanders*.

48 Moreover, the reasonable period defined by the General Court in *Sanders* enables proceedings on non-contractual liability in staff cases regarding a wrongful failure to adopt a decision to be harmonised with general proceedings on non-contractual liability, which are subject to a limitation period of five years under Article 46 of the Statute of the Court of Justice.

49 In any event, the Tribunal considers that a change in case-law applies, in principle, to the case in which it is adopted, without a transitional period (see, on that issue, judgment of the ECHR of 15 October 2009 in *Micallef* v *Malta*, No 17056/06, paragraph 81; see also point 129 of the Opinion of Advocate General Sharpston in Joined Cases C-145/08 and C-149/08 *Club Hotel Loutraki and Others* [2010] ECR I-4165). The European Court of Human Rights has furthermore held that the requirements of

legal certainty and the protection of legitimate expectations do not render settled case-law unchallengeable (judgment of the ECHR of 18 December 2008 in *Unédic* v *France*, No 20153/04, paragraph 74).

50 Lastly, contrary to the applicants' claims, no written instrument or principle required the Commission to inform them of the existence of *Sanders* in order to allow them to bring an action for damages.

51 As regards specifically the action for damages submitted by the persons who worked at the JET Project, it was held that 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 by reason of the Commission's failure to offer them a contract as a temporary servant (*Sanders*, paragraph 83).

52 In the present case, the applicants submitted their application for damages on 6 February 2009. The employment contracts which they concluded with the third party companies participating in the JET Project had to have been proposed before 31 December 1999, the date that project ended. The applicants were thus aware at the latest at the time of the conclusion of their final employment contract linking them to the JET Project that a post as a temporary servant would not be offered to them, and that was the situation giving rise to the alleged material loss. Accordingly, the request for compensation, which was lodged more than five years after they became aware of that failure to adopt a decision, was not submitted within a reasonable period.

53 It follows from all the foregoing that the claims for damages as formulated in the forms of order sought are inadmissible and must be rejected, without it being necessary to proceed with the measures of organisation of procedure requested.

54 The action must therefore be dismissed in its entirety.

Costs

55 Under Article 87(1) of the Rules of Procedure, without prejudice to the other provisions of the chapter on costs, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Under Article 87(2), if equity so requires, the Tribunal may decide that an unsuccessful party is to pay only part of the costs or even that he is not to be ordered to pay any.

It follows from the grounds set out above that the applicants are the unsuccessful party. Furthermore, the Commission expressly claimed in its pleadings that they should be ordered to pay the costs. As the circumstances of the present case do not warrant the application of Article 87(2) of the Rules of Procedure, the applicants must therefore be ordered to pay all costs.

On those grounds,

THE CIVIL SERVICE TRIBUNAL (First Chamber)

hereby orders:

1. The action is dismissed as inadmissible;

2. Mr Allen and the 110 other applicants whose names have been retained on the list of applicants are directed to pay all the costs.

Luxembourg, 13 July 2010.

W. Hakenberg
Registrar

S. Gervasoni
President

ANNEX

Having regard to the large number of applicants in this case, their names are not set out in this annex.