# ORDER OF THE COURT OF FIRST INSTANCE (Fifth Chamber)

9 November 2009 *

In Case T-45/01 DEP,

**Stephen G. Sanders,** residing in Oxfordshire (United Kingdom), and the 94 other applicants whose names appear in the annex, represented by I. Hutton and B. Lask, barristers,

applicants,

v

**Commission of the European Communities,** represented by J. Currall, acting as Agent,

defendant,

* Language of the case: English.

supported by

**Council of the European Union,** represented by J.-P. Hix and B. Driessen, acting as Agents,

intervener,

APPLICATION for taxation of costs following the judgment in Case T-45/01 *Sanders and Others* v *Commission* [2007] ECR II-2665,

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

composed of M. Vilaras (Rapporteur), President, M. Prek and V.M. Ciucă, Judges,

Registrar: E. Coulon,

makes the following

## Order

### Facts, procedure and forms of order sought

1 By application lodged at the Registry of the Court on 27 February 2001, the applicants, Mr Stephen G. Sanders and the 94 other applicants whose names appear in the annex, claimed compensation for the material loss sustained as a result of the fact that they were not recruited as members of the temporary staff of the European Communities for the time they worked at the Joint European Torus (JET) Joint Undertaking.

2 In its judgment of 5 October 2004 in Case T-45/01 *Sanders and Others* v *Commission* [2004] ECR II-3315 ('the interim judgment'), the Court ordered the Commission of the European Communities to pay damages for the loss sustained by each applicant as a result of not being so recruited and ordered the parties to produce to the Court, within six months of the delivery of that judgment, an agreement on the quantum of damages due or, in the absence of agreement, their submissions on the quantum of damages. The Court reserved the costs.

3 Since the parties could not agree on the quantum of damages, they put before the Court their submissions thereon.

4 In its judgment of 12 July 2007 in Case T-45/01 *Sanders and Others* v *Commission* [2007] ECR II-2665 ('the final judgment') , the Court, after fixing the damages due to each applicant and ordering the Commission to pay them, ordered the Commission to bear its own costs and to pay those of the applicants incurred in respect of the entire proceedings before the Court.

5 Having failed to reach an agreement with the Commission on the amount of costs, the applicants, by document lodged at the Registry of the Court on 4 March 2009, requested the Court to fix, pursuant to Article 92(1) of its Rules of Procedure, the amount of costs at 449 472,14 pounds sterling (GBP).

6 In its observations lodged at the Registry of the Court on 12 June 2009, the Commission requested the Court to fix the amount of costs to be paid to the applicants at GBP 250 000.

**Law**

*Arguments of the parties*

7 The applicants claim that the proceedings lasted six and a half years, required three hearings and two long judgments of the Court and generated a significant amount of work.

8 The range and complexity of the issues in dispute was due, in part, to the attitude of the Commission which, for example, without justification, required proof of its liability in respect of each of the 95 applicants. The uncompromising approach of the Commission, which, wrongly and vigorously, contested the applicants' claim with regard to both the principle of its liability and the question of the quantum of damages, constitutes a relevant factor when determining the recoverability of the costs.

9 In addition, certain questions raised new and important points of law, concerning, in particular, the legal classification of the dispute and whether it was a staff case, the admissibility of the claims for damages in the light of the delay, the application by analogy of the five-year limitation period for actions for damages, and the interpretation of the JET statutes following the judgment in Joined Cases T-177/94 and T-377/94 *Altmann and Others* v *Commission* [1996] ECR II-2041, or required complex factual analyses concerning, in particular, the nature of the tasks carried out by the applicants within JET and the individual reconstruction of careers necessary in order to determine the financial rights of each applicant. The great majority of the issues in dispute were determined by the Court in favour of the applicants.

10 The calculations submitted by the Commission for the purpose of quantifying the damages were frequently inaccurate, requiring the applicants to carry out time-consuming checks.

11 The applicants sought to minimise their costs by instructing counsel direct without going through a solicitor, entrusting less important questions to more junior barristers than their principal counsel, who charged lower rates, and obtaining a financial contribution from the applicants in the allied case, Case T-144/02 *Eagle and Others* v *Commission* [2004] ECR II-3381 and [2007] ECR II-2721.

12 The case was of unprecedented significance in several respects, in particular in view of the fact that the breach of Community law by the Commission occurred in the context of an important Community project and that the Commission's actions continued throughout the duration of that project, concerned the massive and repeated recruitment of contract staff and, accordingly, constituted serious misconduct by that institution.

13 The case was of great financial importance to the applicants, as reflected in the aggregate amount of damages (GBP 29 654 315,55) paid by the Commission, and the costs are, compared with that amount and the number of applicants, modest. The case was also of considerable economic importance for the Communities.

14 The Commission, arguing on the basis that a single agent handled the entire case on its behalf, is wrong to criticise the applicants' use of more than one lawyer and an accountant. Their involvement was made necessary by the complexity of the case and, in respect of the Commission, numerous officials in fact assisted that institution in the proceedings. In any event, the applicants had much more work than the Commission, particularly in view of the apportionment of the burden of proof.

15 The Commission is wrong to compare this case to a normal staff case and to propose, in that context, that the costs should be fixed at GBP 250 000.

16 The applicants' claim for taxation of costs includes a modest element to cover the lost earnings and travel expenses of three lay representatives, who carried out case management tasks which would otherwise have had to be carried out, at far greater

cost, by solicitors. The value added tax (VAT) on recoverable costs is also recoverable, along with the costs incurred in preparing the present application for taxation of costs.

17 The Commission contends that there is nothing to justify an allocation of costs in excess of its proposal of GBP 250 000. That proposal, resulting from the multiplication of a reasonable amount of costs for a staff case (estimated at EUR 8 500) by a factor of 15, to reflect the group nature of the action, and subsequently by a factor of 2.5, to reflect the effort required to determine the individual level of damages, and lastly by a factor of 1/1.3, to reflect the exchange rate, is more than reasonable.

18 The applicants' argument that the amount of their claim is justified in view of the Commission's allegedly abusive approach in its defence in the main proceedings is erroneous.

19 The conduct of a party during the proceedings is only relevant to the decision on the allocation of costs made in the judgment itself.

20 In any event, there is nothing in the application for taxation of costs to suggest any conduct on the part of the Commission which might be termed abusive. The applicants confuse the fact of raising an unsuccessful argument and that of deliberately raising a worthless or vexatious argument. In the present case, the Commission did no more than defend itself and the Court, in its interim and final judgments, in no way indicated that the Commission's conduct was abusive or that the arguments which it put forward were worthless.

21 As to the calculation errors on the part of the Commission, which were minor and moreover almost inevitable, the Commission admitted them without dispute. In addition, the applicants themselves made certain errors of calculation.

22 The Commission, which does not intend to contest specifically any of the arguments put forward by the applicants to justify their use of more than one lawyer, points out however that it defended the case with only one agent who worked largely alone and who was helped by other agents only on certain aspects of the case. It questions the need for representation by two counsel at the hearing of 23 September 2003, in view of the fact that that hearing merely concerned a point of law as to the basis of the action. It challenges the claims in respect of the lost earnings and travel expenses of the applicants' three lay representatives. As to the claims concerning the costs of the present taxation proceedings, they are too high.

23 As to the assertion that the applicants had to do more work than the defendant, the Commission contends that it produced numerous pieces of evidence in the course of the proceedings itself and that it had to spend time studying the evidence produced by the applicants. Only the fees of lawyers who represented the applicants can be taken into consideration. As to the argument that the applicants minimised their costs by instructing counsel direct, it is not a justification for the amount claimed, but is at best an explanation of why that amount was not higher, which is irrelevant.

24 The Commission contends that, until a late stage in the main proceedings, the main issues were common to all the applicants and could thus be examined collectively. It

is correct that those questions were capable of subsequently having different consequences, depending on individual situations, but that in no way detracts from the fact that, at an earlier stage, they were dealt with collectively.

25 The Commission concedes that the present case had particular features and it does not dispute that the case was of significantly greater importance than ordinary staff cases. That is precisely why it made the exceptionally high offer of GBP 250 000. However, there is no reason to go above this in view, in particular, of the fact that the issues raised were, until the interim judgment, largely common to the 95 applicants and that it was only thereafter and, moreover, in a way which was completely manageable in practice, that distinctions had to be made between the applicants.

26 Concerning the applicants' argument that the costs claimed are lower in proportion to those claimed in other cases, the Commission points out that, in other fields, such as competition, mergers and State aid, the costs claimed frequently represent a much smaller proportion of the financial interests involved without that, however, preventing the Community Courts from making very large reductions in the amounts of those costs.

*Findings of the Court*

27 Under Article 91(b) of the Rules of Procedure 'expenses necessarily incurred by the parties for the purpose of the proceedings, in particular the travel and subsistence expenses and the remuneration of agents, advisers or lawyers' are to be regarded as

recoverable costs. It follows from that provision that recoverable costs are limited, first, to those incurred for the purpose of the proceedings before the Court of First Instance and, second, to those which were necessary for that purpose (orders in Case T-38/95 DEP *Groupe Origny* v *Commission* [2002] ECR II-217, paragraph 28, and in Case T-342/99 DEP *Airtours* v *Commission* [2004] ECR II-1785, paragraph 13).

28 It is settled case-law that, in the absence of Community provisions laying down fee-scales, the Court must make an unfettered assessment of the facts of the case, taking into account the purpose and nature of the proceedings, their significance from the point of view of Community law as well as the difficulties presented by the case, the amount of work generated by the proceedings for the agents and advisers involved and the financial interests which the parties had in the proceedings (order in *Airtours* v *Commission*, paragraph 27 above, paragraph 18; see also, by analogy, the order of the President of the Third Chamber of the Court of Justice in Case 318/82 DEP *Leeuwarder Papierwarenfabriek* v *Commission* [1985] ECR 3727, paragraph 3).

29 With regard to the purpose and nature of the proceedings, it should be pointed out that the present case concerned the conditions of recruitment and employment of staff working for the JET joint undertaking and that it thus raised sensitive issues, given the special features of the rules governing the operation of that joint undertaking, already noted by the Court (order in Joined Cases T-177/94 DEP, T-377/94 DEP and T-99/95 DEP *Altmann and Others* v *Commission* [1998] ECR I-A-299 and II-883, paragraph 22). The Commission moreover points out that the particular features of the present case may justify a significant amount of costs.

30 With regard to the interest of the present case from the point of view of Community law, the Court is of the view that, although this case is significant, its significance is

confined to staff cases and, more specifically, within that context, to the relations between the Communities and persons liable to be employed in structures comparable to the JET joint undertaking.

31 With regard to the difficulties presented by the case and the amount of work generated by the proceedings for the applicants' agents and advisers, it is necessary to point out that, at least during the first part of the proceedings before the Court and until the interim judgment, the issues which arose — concerning, in particular, whether the dispute was to be classified as litigation on non-contractual liability or as litigation on the relations between the Community and its servants, the admissibility of the claims for damages in the light of the delay or, further, the interpretation of the JET statutes — were sensitive, but common to all the applicants.

32 It was only in the second part of the proceedings, dealing with the determination of the amount of damages to be paid by the Commission to each applicant, that it was necessary to distinguish between individual situations. In addition, it should be pointed out that the proceedings before the Court then concerned only the points of disagreement remaining between the parties (final judgment, paragraphs 7 to 13 and 39 to 106), since the Court merely took formal note of the points of agreement (final judgment, paragraphs 33 to 38).

33 As to the financial interests which the parties had in the present case, the Court notes that they were very significant, both for the applicants, taken individually, and for the Commission. The case concerned claims for damages in connection with employment relationships extending, for more than half of the applicants, over periods in excess of 10 years (interim judgment, paragraph 27). In that regard, it should be pointed out that the financial significance of the case is only partially reflected in the total amount of damages, namely GBP 29 654 315,55, finally paid by the Commission to the applicants, since that amount is the result of the application, in this case, of a

five-year limitation period based on the period laid down in Article 46 of the Statute of the Court of Justice (interim judgment, paragraphs 57 to 85).

34 In the light of the issues raised, the significance of the proceedings and the technical nature of the calculations needed to determine the applicants' individual rights, the Court finds that the use by the applicants of more than one lawyer, as well as an accountant, was not unjustified, but that the need for the applicants to be represented by two counsel at the hearing on 23 September 2003 has not been established.

35 As to the applicants' argument that the amount of recoverable costs should take account of the Commission's allegedly abusive conduct in the main proceedings, this must be rejected as irrelevant.

36 Although the abusive nature of one party's conduct is relevant for the allocation of costs ordered by the Court in the final judgment or in the order which closes the proceedings, pursuant to Article 87(1) and (3), second subparagraph, of the Rules of Procedure, that abuse is, however, of no relevance at the stage of the taxation of costs, effected by the Court pursuant to Article 92(1) of those rules, since taxation is an objective procedure, the aim of which is to determine the necessary costs incurred for the purpose of the proceedings, irrespective of whether the conduct which gave rise to those costs is abusive or not.

37 In the light of all the foregoing considerations, a fair assessment of all the costs recoverable by the applicants from the Commission will be made by fixing them at GBP 300 000, and that amount takes account of all the circumstances of the case up to the date of this order.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby orders:

**The total amount of costs to be paid by the Commission of the European Communities to Mr Stephen G. Sanders and the 94 other applicants whose names appear in the annex is fixed at 300 000 pounds sterling (GBP).**

Luxembourg, 9 November 2009.

E. Coulon — M. Vilaras

Registrar — President

**Annex**

Keith Ashby,

Mark Ashman,

Geoff Atkins,

Yvonne Austin,

Neville Bainbridge,

R. Baker,

Ian Barlow,

Terry Boyce,

Robert Bracey,

Brian C. Brown,

Mike Browne,

James Bruce,

Neil Butler,

Paul Carman,

Roy Clapinson,

Royce Clay,

Derek Downes,

Graham Evans,

Jim Evans,

Tony Gallagher,

David Gear,

John Gedney,

David Grey,

Barry Grieveson,

Bernhard Haist,

David Hamilton,

Ray Handley,

Roy Harrison,

Michael Hart,

Phillip Haydon,

Ivor Hayward,

Mark Hopkins,

Keith Howard,

Peter Howarth,

Cyril Hume,

Eifion Jones,

Glyn Jones,

Andrew Lawler,

Gordon MacMillan,

Peter Martin,

Christopher May,

Derek May,

Ian Merrigan,

Richard Middleton,

Simon Mills,

Ray Musselwhite,

Tim Napper,

Keith Nicholls,

Mike Organ,

Robert Page,

Dai Parry,

Bill Parsons,

Derek Pledge,

Tim R. Potter,

Geoff Preece,

Tom Price,

Steve Richardson,

Shirley Rivers-Playle,

Alan Rolfe,

Michael Russell,

Stephen Sanders,

Stephen Scott,

John Shaw,

Michael R. Sibbald,

Nigel Skinner,

Paul G. Smith,

Tracey Smith,

Tony Spelzini,

Robin Stafford-Allen,

Robin Stagg,

Graham Stanley,

David Starkey,

Dave Sutton,

John Tait,

Michael E. Taylor,

Paul Tigwell,

George Toft,

Jim Tulloch,

Pat Twynam,

Tony Walden,

Martin Walker,

Norman Wallace,

Patrick Walsh,

Peter Watkins,

Mike Way,

Alan West,

Andy Whitby,

Srilal P. Wijetunge,

Brian L. Willis,

David J. Wilson,

David W. Wilson,

Julie Wright,

John Yorkshades,

David Young.