JUDGMENT OF THE COURT OF FIRST INSTANCE
(First Chamber)
12 July 2007 *

(Staff employed at the JET Joint Undertaking — Application of a legal status different from that of members of the temporary staff — Compensation for material damage sustained)

In Case T-144/02,

**Richard J. Eagle**, residing in Oxfordshire (United Kingdom) and the 12 applicants whose names appear in the annex, represented by D. Beard, Barrister,

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 to determine pursuant to the judgment of the Court of First Instance of 5 October 2004 in Case T-144/02 *Eagle and Others* v *Commission* [2004] ECR II-3381 the amount of compensation due for the financial loss sustained by each of the applicants 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,

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

composed of B. Vesterdorf, President of the Chamber, M. Jaeger and H. Legal, Judges,

Registrar: C. Kristensen, Administrator,

having regard to the written procedure and further to the hearing on 20 March 2007,

gives the following

## Judgment

### Background to the dispute and procedure

1 By judgment of 5 October 2004 in Case T-144/02 *Eagle and Others* v *Commission* [2004] ECR II-3381 ('the interlocutory judgment'), the Court of First Instance held that, in failing, in breach of the Statutes of the Joint European Torus (JET) Joint Undertaking, to offer the applicants contracts as members of the temporary staff, the Commission had committed an act of culpable illegality such as to give rise to the liability of the European Community, that that unlawful conduct had resulted in the loss to them of a genuine chance of recruitment as members of the temporary staff and that the applicants' loss lies in the difference between the salaries, related benefits and pension rights which the persons concerned would have received or acquired if they had worked for the JET project as members of the temporary staff and the salaries, related benefits and pension rights which they actually received or acquired as members of the contract staff (paragraphs 141, 157 and 164 of the interlocutory judgment).

2 However, the Court of First Instance found that the applicants should have submitted their requests for compensation within a reasonable period, which cannot exceed five years from the time they became aware of the discrimination they complain of, and held that the damages due should be calculated, for each applicant, from the effective date of the earliest contract concluded or renewed with the applicant in each case, that date being no more than five years before the submission of his request for compensation to the Commission (paragraph 71 of the interlocutory judgment).

3 Since the Court of First Instance was not in a position to determine the damages due to each of the applicants, the interlocutory judgment (paragraph 167) fixed the principles and criteria on the basis of which the parties were called upon to seek a settlement, failing which they were to put their submissions on the quantum of damages before the Court of First Instance.

4 Accordingly, the parties were to:

(1) determine the post and grade which each applicant would have held, on the basis of the functions he carried out, if he had been offered a contract as a member of the temporary staff on the effective date of the earliest contract concluded or renewed, that date not to be earlier than five years from the presentation of the request for compensation (paragraphs 166 and 168 of the interlocutory judgment);

(2) reconstruct the career of the person concerned from the time of his recruitment or the start of the abovementioned five-year period at the earliest, taking into account:

— the average increase in salary for the equivalent post and grade of a member of the staff of the European Atomic Energy Community (EAEC), working for JET if applicable;

— any promotions the person concerned may have had during that period in the light of the grade and post selected, on the basis of the average number of promotions of members of the temporary staff of the EAEC in a comparable position (paragraph 169 of the interlocutory judgment);

(3) make the comparison between the situation of a member of the temporary staff of the Communities and that of a member of the contract staff in respect of net amounts, net of contributions, deductions or other levies charged under the applicable legislation (paragraph 170 of the interlocutory judgment).

5 The Court of First Instance held that the liability period runs from the effective date of the earliest contract concluded or renewed in the five-year period before

the submission of the request for compensation and ends either on the date on which the person concerned stopped working for the JET project, if that was before the end of the project on 31 December 1999, or on that date if he worked for the JET project until its conclusion (paragraph 171 of the interlocutory judgment).

6 Finally, the Court of First Instance held that, since the damages compensate for the loss of salary and related benefits covered by the Protocol on the Privileges and Immunities of the European Communities and are calculated taking into account Community tax, they are net of any taxation and cannot be subject to deductions of national tax (paragraph 173 of the interlocutory judgment).

7 Being unable to reach an agreement on all the points relating to the precise determination of the damages due to each of the applicants, the parties sent their submissions on the quantum of damages to the Court of First Instance on 28 October 2005.

8 By measure of organisation of procedure notified on 19 December 2006, the Court of First Instance requested from the parties, in accordance with Article 64 of its Rules of Procedure, information and clarification concerning the points of difference which remained between them with regard to the assessment of the damage suffered by each of the applicants.

9 The applicants replied to the Court of First Instance's request by letter lodged at the Registry on 19 February 2007. The Commission made its observations known on the applicants' replies by letter lodged at the Registry on 1 March 2007.

10 In their replies to the Court of First Instance's request, the parties, who set out their submissions on the quantum of damages following the measure of organisation of procedure, indicated that they had resolved certain of their disagreements and highlighted the points which were still at issue.

11 By order of the President of the First Chamber of the Court of First Instance of 7 March 2007, the application of the United Kingdom of Great Britain and Northern Ireland to intervene presented on 27 February 2007 was dismissed as being out of time in accordance with the combined provisions of Articles 115(1) and 116(6) of the Rules of Procedure.

12 At the hearing on 20 March 2007, the parties presented their oral arguments and their answers to the questions put by the Court of First Instance. The Commission submitted an amended version of the annexes to its observations of 1 March 2007.

13 At the end of the hearing, the President granted the applicants one week in which to submit any amendments in the light of the documents submitted at the hearing by the Commission. On 27 March 2007, following an application from the applicants, the President granted an extension of the time to the Commission and to the applicants until 30 March and 3 April 2007 respectively to enable the Commission to make final corrections to its submissions on the quantum of damages and the applicants to formulate their observations thereon.

14 The oral procedure was closed on 17 April 2007.

**Submissions of the parties**

15 The applicants claim that the Court of First Instance should:

— order the Commission to compensate them for their loss of earnings and other benefits caused by the breaches of Community law committed in respect of them, by paying a total amount for all the applicants of GBP 2 629 269, as at 31 October 2005;

— order the Commission to pay the costs.

16 The Commission, supported by the Council, contends that the Court of First Instance should:

— order it to compensate the applicants pursuant to the interlocutory judgment in accordance with its observations, in the total amount for all the applicants of GBP 574 424;

— order it to pay half the applicants' costs.

**Law**

*Scope of the dispute rationae personae*

17 In reply to the questions asked by the Court of First Instance at the hearing, the applicants stated that three of them — T. F. Atkins, E. Junger and J. Fanthome — were not submitting claims for damages.

18 It is consequently necessary for the Court of First Instance to take formal note of this and to find that 10 of the 13 applicants are submitting claims for damages.

19 It is also necessary to take formal note of the withdrawal of the Commission's contention made in its observations of 1 March 2007 that the Court of First Instance should rule on the question of a potential offset between any damages owed by the Commission to Mr Walton in execution of the present judgment and the amounts which the Commission states are owed to it by him pursuant to its decision of 27 May 2005 (see, on offset of amounts receivable, Case T-231/04 *Greece* v *Commission* [2007] ECR II-63, paragraph 11 et seq.).

*On the quantum of the claims for damages*

20 Without raising a plea of inadmissibility, the Commission contends that the applicants' claims for damages for the liability period laid down in the interlocutory judgment (1995 to 1999) are more than one and a half times greater than their original claims. It considers that, although those claims have been adjusted by the applicants in the light, inter alia, of information which it provided to them in the course of their discussions, that substantial increase in the applicants' claims may fail to satisfy the provisions of Article 44 of the Rules of Procedure.

21 As to the principle, it is necessary to point out that the Court of Justice allowed an increase in the original claims in a case in which an interlocutory judgment had laid down the method for calculating the loss suffered and in which an expert's report had been ordered, holding those amended claims to be admissible. It found that they represented a permissible, indeed necessary, amplification of the claims contained in the application, especially inasmuch as, first, the Court of Justice determined the criteria necessary in order to calculate the damage for the first time in its interlocutory judgment and, second, the exact composition of the damage and the precise method of calculating the compensation payable had not yet been debated. The Court of Justice added that it had ordered the parties to submit statements of their views with supporting figures in the event of their failing to reach agreement on the quantum of damages. It held that that order would be pointless and meaningless if, following delivery of that judgment, the

parties were precluded from formulating claims different from those contained in their application (Joined Cases C-104/89 and C-37/90 *Mulder and Others* v *Council and Commission* [2000] ECR I-203, paragraphs 38 to 40).

22 Similarly, in the present case, since the interlocutory judgment laid down the period for which compensation is due, the elements which go to make it up and the method to be followed in determining the exact amount of damages accruing to each applicant, it must necessarily be possible to adjust the quantum of the individual claims of each applicant after that judgment.

23 Moreover, according to the court file, the applicants' claims for damages of 28 October 2005, revised in the light of the grounds of the interlocutory judgment, are lower and not higher than their original claims, if one takes into consideration their total amount and not, as the defendant has done, only that part of the original claim which relates to the liability period.

24 It follows from the foregoing that the Commission's observation on the quantum of the final claims must be dismissed as irrelevant.

*Preliminary observations*

25 The purpose of the present judgment is to determine the damages due to the applicants in compensation for the loss arising from the unlawful conduct found by the interlocutory judgment, in accordance with the principles and criteria laid down therein, as set out at paragraphs 1 to 6 above, where the parties have not been able to reach a complete agreement on all the points at issue for the purpose of putting into effect the principles and criteria laid down by the Court of First Instance.

26 It is necessary to state at the outset that the interlocutory judgment has not been challenged (i) on the principle of recognition of Community liability owing to the unlawful conduct found, (ii) on that of the recognition of the loss suffered by the applicants, whose rights to compensation were limited to a maximum of five years, or (iii) as regards the principles and criteria which are to be used to determine the damages due to each of the applicants. That judgment has therefore become definitive on all those points, which have acquired the status of res judicata and are binding for the final resolution of the dispute (judgment in Case C-281/89 *Italy* v *Commission* [1991] ECR I-347, paragraph 14; and orders in Case C-397/95 P *Coussios* v *Commission* [1996] ECR I-3873, paragraph 25; and Case C-277/95 P *Lenz* v *Commission* [1996] ECR I-6109, paragraphs 48 to 54; and, as to the res judicata authority of an interlocutory judgment, *Mulder and Others* v *Council and Commission*, paragraphs 54 to 56). The Commission has, moreover, pointed out in its abovementioned observations of 1 March 2007, that neither it nor the applicants have brought an appeal before the Court of Justice against the interlocutory judgment of 5 October 2004 and that that judgment has therefore acquired the definitive status of res judicata.

27 Moreover, as the dispute stood at the close of the oral procedure, it was apparent that, in comparison with their respective claims of 28 October 2005, the parties had reached agreement on a certain number of general or specific questions concerning the determination of the damages due to each applicant in the light of the principles and criteria laid down by the interlocutory judgment.

28 It appears that the parties are agreed on the general methodology for calculating the applicants' losses, the identification of the main components of income, whether Community or national, to be taken into account, the application of simple interest at a rate of 5.25% to the final amount of the damages due to the applicants, and the fact that the damages received by each of them are not taxable under United Kingdom legislation, the question of the tax regime applicable to the damages having been expressly and definitively dealt with by the interlocutory judgment (see paragraph 6 above).

29 The submissions lodged by the parties on 28 October 2005 state that differences remain regarding six points necessary for a precise determination of the damages due to each applicant and which the parties submit to the Court of First Instance

for a ruling. They concern, first, the start of the liability period for each applicant (see paragraph 5 above), second, the grade and step to be determined for each of them at the start of the liability period (see paragraph 4 above), third, the promotions from which the applicants would have benefited (see paragraph 4 above), fourth, the related benefits linked to the salaries which they would have been able to receive (see paragraph 1 above), fifth, the contributions, deductions and other charges which must be taken into consideration in order to determine the net revenue of a member of the temporary staff and that of a member of the contract staff (see paragraph 4 above) and, sixth, the pension rights which each of the applicants could claim (see paragraph 1 above).

30 Following the measure of organisation of procedure referred to in paragraph 8 above, the parties reached further agreement on certain aspects of the points of disagreement set out above. Total agreement was, however, only achieved on contributions, deductions and other charges to take into account in order to determine the income actually received by the parties concerned in their capacity as contract staff. More or less significant differences remain however concerning other points in dispute.

31 Moreover, the parties, whose views converge in that respect, set out in their pleadings and at the hearing their difficulties in securing acceptance by the United Kingdom tax authorities that, pursuant to the Court of First Instance's finding in its interlocutory judgment, the damages to be received by the applicants cannot be subject to the deduction of national tax, those authorities having indicated their intention to tax, if not the principal, then at least the interest accruing on the damages. The applicants and the Commission claim that the Court of First Instance should give a specific ruling on the question of the exemption from tax of the damages, including both principal and interest.

32 It is necessary to examine the six headings set out at paragraph 29 above one after the other, highlighting the points of disagreement and, also, the question of the tax regime for interest due on the damages which the applicants are to receive.

*Points of agreement*

The start of the liability period

33 The Court of First Instance held in the interlocutory judgment that the damages due should be calculated, for each applicant, from the effective date of the earliest contract concluded or renewed with the applicant in each case, that date being no more than five years before the submission of his request for compensation to the Commission and falling between 12 November 1994 and 16 February 1995 (paragraphs 83 and 166 of the interlocutory judgment). Moreover, it is clear from the judgment (paragraph 171) that the liability period ends on the date on which the applicant concerned stopped working for the JET project if that was before the end of the project on 31 December 1999, or on that date if he worked for the JET project until its conclusion, it being specified that in the particular case of Mr Walton who was recruited as a member of the temporary staff in 1999, the period for which he is entitled to compensation ends on the date of his recruitment under the Conditions of Employment of other servants of the European Communities.

34 It follows from the inquiries and in particular from the replies to the measure of organisation of procedure referred to at paragraph 8 above, that the applicants were unable to overcome the difficulties they encountered in determining the exact date of the start of the liability period for each of them, owing to the existence of weekly and monthly methods of payment, the late renewal of their contracts and, in the case of two of them, of non-annual contracts. In the light of these facts, established by consulting the JET archives, which made determining the start date of the liability period particularly sensitive, the applicants came to an agreement with the Commission to adopt 1 March 1996 (five years before their request for compensation) as the start date for the period.

35 In view of the specific difficulties alleged by the applicants in using the contractual documents referred to and of the agreement of the Commission, it is for the Court of First Instance, which in the interlocutory judgment called on the parties to reach agreement, to take formal note of the agreement reached by the parties and to declare the date fixing the start of the liability period for each of the applicants to be 1 March 1996, as indicated in the second column of Annex 2 to the present judgment.

36 Consequently, the applicants' alternative proposition set out in their reply to the measure of organisation of procedure to the effect that account should be taken not of the effective date of the earliest contract concluded or renewed but of the first date at which a payment was due must be dismissed, a suggestion which was moreover contested by the defendant as being inconsistent with the grounds of the interlocutory judgment (paragraph 166).

Contributions, deductions and other charges

37 The Court of First Instance held in the interlocutory judgment (paragraph 170) that, in order to determine the damage suffered, the comparison between the position of a member of the temporary staff of the Communities and that of a member of the contract staff, such as each of the applicants, must be made in respect of net amounts, net of contributions, deductions or other levies charged under the applicable legislation.

38 Further to the measure of organisation of procedure, in accordance with the abovementioned grounds of the interlocutory judgment, for the calculation of the income received as contract staff, the applicants deducted the amounts initially included in their claims of 28 October 2005 corresponding to pension fund payments. The Commission accepted that methodology.

39 It is necessary for the Court of First Instance to take formal note of that in order to make its finding as to the net revenue that each applicant actually received as a member of the contract staff during the liability period.

*Points of disagreement*

Grade and step at the start of the liability period

— Arguments of the parties

40 The applicants assert that the grade and step are to be determined, not only taking into account their academic qualifications and their previous professional experience, but also on the basis of the career of each person at JET from the moment he in fact started working there, which, for a number of them, will be before the start of the liability period. They are of the view that, by its interlocutory judgment, the Court of First Instance laid down a test of functional equivalence between posts held as contract staff and those held as temporary staff. The applicants state that, in order to establish that functional equivalence, they consulted a memorandum of the Head of Contracts at JET, Mr Byrne, of 25 August 1989.

41 The applicants assert, in reliance on the interlocutory judgment, that, since they were in fact recruited to work for JET, the Commission cannot require the same level of evidence today — which would in certain cases be impossible to produce — as would have been required in the actual recruitment exercise. Moreover, they state that each of them has provided a formal witness statement attesting to his previous career and curriculum vitae.

42 The Commission maintains that the grade and step are to be determined at the effective date of the earliest contract included within the liability period, taking into account the qualifications and previous professional experience of each applicant as if it were a first recruitment. It is of the view that the applicants must produce the same evidence, concerning qualifications and professional experience as if the applicant concerned had actually been recruited. The

defendant contends that it follows from the interlocutory judgment that the Community incurred liability and damages are payable in respect of a maximum period of five years and that earlier contracts cannot be taken into consideration.

43 The Commission states moreover that the relevant documents, which it used to determine posts and grades, are, first, the Commission decision of 11 October 1984 on criteria applicable to the classification by grade and step upon recruitment of scientific and technical staff and, second, the Commission decision, which came into force on 1 September 1983, concerning the criteria applicable to appointment in grade and classification in step on recruitment, as regards administrative staff.

44 The defendant also raises the question of the admissibility of the evidence which was sent to it by the applicants, mostly in July, or even in September or October 2005, in the light of Article 44 of the Rules of Procedure.

— Findings of the Court

45 As a preliminary point, as to the evidence concerning the applicants' qualifications and professional experience which is of assistance in determining the grade and step of each of the applicants at the start of the liability period, it must be observed that, in its interlocutory judgment, the Court of First Instance held that, in view of their qualifications in particular, the applicants had genuine prospects of being appointed as members of the temporary staff (paragraphs 155 and 157 of the interlocutory judgment). Therefore, in order to determine the damages due to each of the applicants, it is not necessary to examine whether at the start date of the liability period the party concerned fulfilled the conditions for such recruitment. It follows from the grounds of the interlocutory judgment that the level of evidence required in order to determine the classification of each applicant cannot be equivalent to that for an actual recruitment, as the Commission maintains.

46 Regarding the defendant's allegation that certain evidence which the applicants sent to it between the months of July and October 2005 was out of time under Article 44 of the Rules of Procedure, the admissibility of that evidence cannot be challenged on the facts of the present case.

47 In fact, it was the grounds of the interlocutory judgment, ruling on the principle of Community liability, which defined the loss suffered by the applicants, fixed the method to follow in determining the amount thereof and which, by referring in particular to the academic qualifications and professional experience and to the functions carried out at JET, enabled the parties to identify the relevant factors for the determination of the damages due. Having regard to the extensions of time requested by the applicants in respect of which the defendant did not raise an objection and the fact that the defendant allowed the applicants access to the JET archives only at the end of December 2005, it is not possible to challenge the admissibility of any evidence whatsoever.

48 As to the classification in grade and step of each of the applicants at the start of the liability period, it is necessary to point out that, in the interlocutory judgment, the Court of First Instance held that the posts and the qualifications of the applicants, as listed by the Commission, appear comparable, in terms of their nature and level, to those of the actual members of the project team. It stated (paragraph 121) that the Commission admitted that there was no fundamental difference between the members as such of the project team and the applicants, the qualifications and professional experience of both being similar. It also found (paragraph 122) that similarity of functions to be confirmed by the JET establishment plan.

49 Thus, it follows from the interlocutory judgment (paragraphs 166 and 168) that the post, the grade and the step to be determined for each applicant must correspond to the functions they carried out at JET at the effective date of the earliest contract concluded or renewed within the liability period, the functions at issue being those which the party concerned carried out at JET at that date, if he was already working there previously, which is the case for most of the applicants, or rather the functions with a view to which he at that time started to work there. The classification of each applicant must therefore be decided in

the light of his actual recruitment by JET, which was, generally, before the start date of the liability period.

50 Whilst the Court of First Instance limited each applicant's right to compensation to a period of no more than five years, it nevertheless held that, from the outset, that is to say, from their first employment, the parties concerned should have been recruited as temporary staff, the unlawful conduct having persisted throughout the duration of JET (paragraphs 127 and 139 of the interlocutory judgment). Contrary to the Commission's contention, the finding of unlawful conduct relates to the entire duration of the employment at JET but compensation is due, on the grounds set out in the interlocutory judgment (paragraphs 57 to 84), only for the liability period defined thereby.

51 Consequently, the situation of each applicant at the start of the liability period must not be deemed equivalent to that on first recruitment, but dealt with having regard to the fact that, from his first engagement as a member of the contract staff, the party concerned should have been recruited as a member of the temporary staff, which means taking into account, where appropriate, the 'career' he had up to the start of the liability period, in order to determine the classification which corresponds to the functions carried out by each of them at the start of that period.

52 Moreover, contrary to the Commission's contention, taking into account the earlier 'career' at JET does not, strictly speaking, mean reconstructing that career, but rather taking into account, where appropriate, the classification which the party concerned had reached as a member of the contract staff at JET, as follows from the interlocutory judgment, which refers to the functions carried out by each applicant at the start of the liability period, in order to determine the post and the grade of each applicant (paragraphs 166 and 168), it being recalled that the Court of First Instance found an equivalence between the posts, the qualifications and the professional experience of the applicants and the actual members of the project team (paragraphs 121 and 122 of the interlocutory judgment). The classification to be determined at the start of the liability period must consequently take into account that functional similarity.

53 In order to determine the classification of each of the applicants at the start of the liability period, all the relevant evidence available mentioned by the parties must be used, namely, first, the memorandum of the Head of Contracts at JET of 25 August 1989, which established a correspondence between the grades of members of the contract staff and eight grades relating to staff of the EAEC, and the classification of members of the contract staff at JET as it appears in the register for such staff for the year 1994 and, secondly, the Commission decision of 11 October 1984 on criteria applicable to the classification by grade and step upon recruitment of scientific and technical staff and the Commission decision, which came into force 1 September 1983, concerning the criteria applicable to appointment in grade and classification in step on recruitment, as regards administrative staff.

54 Under those different documents, the classification of each of the applicants in grade and step at the start of the liability period is determined in the following way.

55 First, it is necessary to determine the classification of each applicant as a member of the contract staff on the effective date of the earliest contract concluded or renewed in the period selected, as can be established from the memorandum of the Head of Contracts at JET of 25 August 1989 and from the register of members of the contract staff at JET for the year 1994. Except in the case of a first recruitment, that classification as a member of the contract staff will take into account the evolution of the personal situation of the staff members concerned from their initial recruitment to the date of renewal of their contract starting the liability period, in accordance with the principles set out above.

56 Secondly, it is necessary to determine the corresponding grade and step of a member of staff of the EAEC equivalent to that classification, based on the Commission decision of 11 October 1984 on criteria applicable to the classification by grade and step upon recruitment of scientific and technical

staff and the Commission decision, which came into force on 1 September 1983, concerning the criteria applicable to appointment in grade and classification in step on recruitment, as regards administrative staff.

57 In view of the foregoing the classification in grade and step of each of the applicants at the start of the liability period is to be determined as indicated in the third column of Annex 2 to the present judgment.

Promotions

— Arguments of the parties

58 The applicants assert that promotion rates at JET were particularly favourable, which should in the present case imply, first, a move to the next higher grade on the first occasion the step increase takes the salary above step 1 in the next grade, except in three cases in respect of which they concur with the Commission's position, namely, that it was impossible to be promoted from B to A grade, from A5 to A4 grade and from A4 to A3 grade. Secondly, allowance should be made for average career promotion by adding one promotion every five years.

59 The close correlation between the grades claimed by the applicants and the grades in the JET register of contract staff shows that the method proposed is a good one. It also allows appointment to a post of responsibility to be expressed as a promotion.

60 The Commission submits that a change of responsibilities does not automatically lead to a promotion, since no automatic link exists between grade and function and an official can move from the post of administrator to that of Group leader without promotion.

61 In reply to the measure of organisation of procedure, the parties indicated that they had come to an agreement on a rate of promotion of 20% corresponding to one promotion every five years.

62 The Commission continues to disagree as to the way the applicants have applied that rate to the period prior to the liability period in accordance with their methodology, which consists of taking into account the career that they had had at JET before the liability period in order to determine the classification at the start of that period.

— Findings of the Court

63 At the outset it is necessary to state that the point of disagreement raised by the Commission relates not to the effect of the promotions from which the applicants would have benefited during the liability period at the rate agreed between the parties of 20% per annum but to the application of that rate in order to determine the initial classification of each, at the start of the liability period, by reconstructing, where appropriate, the earlier career of the party concerned at JET. Those criticisms concern therefore the determination of the grade and the step at the start of the liability period and are unrelated to the promotions during the period which is being reconstructed here.

64 As regards the taking into consideration of those promotions which took place before the liability period, which is thus not in issue here, it must nonetheless be observed, in the light of the defendant's concerns, that it is clear that, since it has been found (see paragraph 50 et seq. above), in accordance with the grounds of the interlocutory judgment, that in order to determine the classification at the

start of the liability period of each applicant it is necessary to take into account the career of the party concerned from this actual recruitment, that method of 'career reconstruction' must include the promotions from which he could have benefited. The parties having accepted that the rate of promotion at JET was 20%, the applicants were logically entitled to use that rate in order to make that initial 'career reconstruction', for the purpose of determining the grade and the step of each applicant at the start of the liability period.

65 As regards promotions during the liability period, the Court of First Instance held in the interlocutory judgment (paragraph 169) that the parties should agree on the reconstruction of the careers of each of the applicants from the date of recruitment or the start of the five-year period for which damages are due, taking into account the average increase in salary for the equivalent post and grade of a member of the EAEC staff, working for JET if applicable, and any promotions the person concerned may have had during that period in the light of the grade and post selected, on the basis of the average number of promotions of members of the temporary staff of the EAEC in a comparable position.

66 It is clear from the interlocutory judgment that the reconstruction of the potential promotions during the liability period must be determined in the light of the grade and the step selected at the start of that period at the earliest, by applying the average promotions granted to members of the temporary staff of the EAEC in a comparable position, in other words working at JET, in accordance with the promotion practices in operation at JET.

67 In the light of the situation of the actual members of the project team at JET, the Court of First Instance considered that the applicants had been kept in a legal position in which they suffered discrimination constituting a culpable illegality (paragraphs 140 and 141 of the interlocutory judgment) and that they had, consequently, suffered loss (paragraphs 164 and 169 of the interlocutory judgment). Consequently, the 'comparable position' which must serve as the

point of comparison in order to determine the career progressions from which the applicants would have benefited is that — where appropriate more favourable — of the actual members of the project team at JET.

68 Any access to posts entailing particular responsibility is not to be taken into account in that calculation since, as the Commission contends, no automatic link exists between grade and function and an official can change post without receiving a promotion. On the other hand, the reconstructed promotions must include changes of step and grade in accordance with the practices at JET.

69 It is therefore necessary to take into account, in accordance with the principles laid down by the interlocutory judgment, the reconstructed promotions based on the foregoing grounds in order to determine the net revenue that each applicant would have received as a member of the temporary staff during the liability period.

Related benefits

— Arguments of the parties

70 The applicants claim that net revenue actually received by each of them must be calculated net of the amounts they earned when they worked during their leave or when they worked overtime, as if each of them had worked the same number of days as a member of the temporary staff of the EAEC in an equivalent position without working overtime. They argue that to take account of the amounts actually received by the applicants in this way (higher than those received by members of the temporary staff of JET) would cancel out any compensation in respect of paid leave and overtime.

71 The Commission contends that the sums received by the applicants for paid holidays and overtime because of the flexibility they enjoyed enabling them, unlike members of the temporary staff of the EAEC, to increase their income

must be taken into account in calculating the income received by the persons concerned as members of the contract staff. As regards the determination of the Community income which each of them could have received, it points out that evidence must be adduced that the person concerned fulfilled the conditions for that part of the compensation corresponding to certain allowances, such as household allowance, child allowance and education allowance.

72 Concerning any missions undertaken by the applicants, the Commission claims that what is at issue is not the reimbursement of lost income but the reimbursement of expenses. Concerning daily allowances received by certain applicants who lived far away from the JET premises, the defendant contends that the Staff Regulations do not offer an equivalent advantage to members of the temporary staff and that the corresponding allowances must be treated for accounting purposes as income actually received as members of the contract staff.

73 Further to the measure of organisation of procedure, it is apparent that the parties came to an agreement on the following points.

74 As regards paid leave, it is permissible, in view of the fact that the majority of the applicants did not benefit from any, to include in the amounts received by the applicants as members of the contract staff the income they earned for having worked the same number of hours they would have worked if they had been members of staff of the EAEC.

75 Concerning overtime, the parties have agreed to distinguish the situations of the applicants according to whether they fall within category A or category B. First, since members of the staff of the EAEC in category A, unlike the contract staff of which the applicants were members, were not paid for overtime performed, the applicants accept the 10% uplift applied by the Commission to their national income. Secondly, it is apparent that staff of the EAEC in category B (and those in category C) received compensation for overtime not financially but by way of time off, which now proves impossible to calculate. Consequently, the applicants

decided not to take overtime into account on either side of the equation (national income and Community income). The Commission however continued to apply the uplift of 10% uniformly to the income received by the applicants as contract staff. This therefore leads to a divergence in the assessment of that income in the figures submitted by the parties.

— Findings of the Court

76 The Court of First Instance held in the interlocutory judgment (paragraph 164) that during the time spent working for the JET Joint Undertaking the applicants' loss lies in the difference between the salaries, related benefits and pension rights which the persons concerned would have received or acquired if they had worked for the JET project as members of the temporary staff and the salaries, related benefits and pension rights which they had actually received or acquired as members of the contract staff.

77 It follows from this, first, that in order to determine the net national income that each applicant would have received during the liability period if he had been recruited as a member of the temporary staff, it is necessary to take into account all the advantages to which the party concerned would have been entitled, having regard to the criteria concerning his personal and professional situation in respect of which he was able to provide written evidence. Conversely, it is not necessary to include the claims for expenses which would have been received for missions, the Commission contending in that regard, without being contradicted, that, at JET all subsistence costs were reimbursed, whilst there was little or no daily allowance.

78 Secondly, in order to determine the net national revenue received by each applicant as a member of the contract staff during the liability period, it is necessary to take into account the entire salary that the parties concerned received on that basis, in particular, the daily allowance which certain of the applicants may have received for having to commute to the JET premises.

79 As to paid leave, it is necessary to take into account the agreement reached by the parties and the sums received by the applicants for having worked a number of hours equivalent to the working hours which they would have had as staff of the EAEC.

80 As regards overtime, it is necessary to apply, as the parties have agreed, an uplift of 10% to the income received by the parties concerned as contract staff, inasmuch as members of the staff of the EAEC in category A were not paid for overtime worked, unlike members of the contract staff such as the applicants.

81 Concerning the applicants who are classified in category B, the Court of First Instance notes that the defendant is not contending that the applicants' allegations — to the effect that staff of the EAEC in categories B and C received compensation for overtime not financially but by way of time off, the calculation of which now proves impossible — are incorrect. Against that background, the most appropriate solution is that submitted by the applicants, namely not to take the overtime into account for the purpose of determining either the income received by the applicants as members of the contract staff or the income which they would have been paid as members of the temporary staff of the EAEC.

82 Consequently, it is necessary for the Court of First Instance to take formal note of the net income which each applicant would have received as a member of the temporary staff in the course of the liability period and that which he actually received as a member of the contract staff in the course of the same period, in accordance with the principles stated above regarding the related benefits.

83 It follows from the foregoing that the amount of net income received by the members of the contract staff, the amount they should have received as members of the temporary staff, the amount of the loss resulting from the difference between these two amounts and the accrued amount of the loss resulting from the updating of that last amount to 31 December 1999 are those which appear in columns (1), (2), (3) and (4) respectively of Annex 3 to the present judgment.

Pension rights

— Arguments of the parties

84 The applicants assert that they are entitled to compensation for loss of pension rights and that that cannot be replaced by a severance grant. They state that most of them worked at JET for a longer period than the five years maximum on the basis of which damages for each are to be calculated. They consider that the proper approach for determining the pension rights at issue is to calculate the cost of an annuity equivalent to the pension that they would have received if they had been treated in a lawful manner and to take into account the proportion of that sum corresponding to the liability period.

85 The Commission contends that the applicants are entitled to claim a severance grant only, since the Court of First Instance has held that the period of Community liability for non-recruitment giving rise to a duty to compensate is a maximum of five years. Granting pension rights in consideration of facts prior to that period, namely that some of the applicants were working beforehand at JET, which would require reliance on contracts concluded before the start of the liability period, would go against the limitation imposed by the Court of First Instance.

— Findings of the Court

86 The Court of First Instance held in the interlocutory judgment (paragraph 164) that, during the time spent working for the JET Joint Undertaking, the applicants' loss includes the pension rights which correspond to the difference between the pension rights which the persons concerned would have acquired if they had worked for the JET project as members of the temporary staff and the pension rights which they actually received or acquired as members of the contract staff.

87 Moreover, the Court of First Instance held that damages must be calculated in respect of a period commencing on the effective date of the earliest contract concluded or renewed with the applicant in each case, that date being no more than five years before the submission of his request for compensation to the Commission and ending on the date on which the applicant concerned stopped working for the JET project if that was before the end of the project on 31 December 1999, or on that date if he worked for the JET project until its conclusion (paragraph 171 of the interlocutory judgment).

88 It is absolutely clear from the grounds of the interlocutory judgment that the Court of First Instance expressly recognised that the applicants were entitled to compensation in respect of pension rights. Thus, although it may have limited the admissibility of the claims for damages to a maximum period of five years from each applicant's claim for damages, it is not to be inferred from this that that element in the damages should in all cases be replaced by a severance grant. The interpretation put forward by the Commission in that respect cannot consequently be upheld.

89 As pointed out at paragraph 51 above, the Court of First Instance in the interlocutory judgment held that, from the outset, the applicants should have been recruited as temporary staff and that the unlawful conduct lasted longer than the liability period. That finding necessarily entails account being taken

of the fact that the applicants were able to acquire pension rights for the entire period that each of them actually worked at JET, but compensation for any such rights is limited to the liability period.

90 Consequently, in order to determine that part of the damages corresponding to pension rights, it is necessary to consider, for each of the applicants, the date of their first actual recruitment at JET, where appropriate before the liability period, the damages being due in respect of the loss of pension rights for a maximum of five years corresponding to the liability period. Those five years do not therefore constitute the only years of entitlement to rights. It is in fact the whole period of employment for each applicant at JET which entitles him to pension rights, the respective rights then being reduced in proportion to the ratio of the liability period to his total period of employment, in accordance with the grounds stated in the interlocutory judgment.

91 Moreover, it is necessary to consider whether the damages due in respect of pension rights may not be lower than the actuarial value of the reserves built up in the name of each applicant by workers' and employers' contributions in respect of the maximum of five years corresponding to the liability period.

92 Where, conversely, an applicant, because in particular he has worked at JET for fewer than 10 years, would not in any event, under the provisions of the Staff Regulations, be entitled to a service pension but only to a severance grant, compensation in respect of the loss of that grant, reduced in proportion to the ratio of the liability period to his total period of employment, constitutes the alternative which must necessarily be granted to him in accordance with the grounds of the interlocutory judgment. It is clear from the applicants' replies to the measure of organisation of procedure that, in their claims at the final stage, those amongst them who have worked for less than 10 years at JET are seeking a severance grant in lieu of pension rights.

93 The foregoing assessment is not called into question by the factors which the Commission has relied on.

94 Although in its judgment in Case C-262/88 *Barber* [1990] ECR I-1889 the Court of Justice limited the temporal effects of the interpretation given to Article 141 EC owing to overriding considerations of legal certainty precluding the calling into question of legal situations which have exhausted all their effects in the past, that solution does not appear to be relevant to the present case.

95 The facts of the present case, concerning compensation for loss caused by the unlawful conduct by the Community towards the applicants, are not comparable to those of that previous case, which raised the problem of the retroactive revision of pension schemes throughout the territory of the Community with significant financial implications. Moreover, the defendant has not relied on any overriding considerations of legal certainty.

96 In addition, the Commission's allegation, to the effect that no pension funds existed at JET for the period before the liability period and therefore granting pension rights to the applicants in respect of that earlier period would have the effect of according them an advantage from which staff of the EAEC employed by JET did not benefit, cannot be upheld either.

97 It follows from the combined provisions of Articles 2 and 39 of the Conditions of Employment of other servants of the European Communities, which governs, inter alia, staff of the EAEC, that members of the temporary staff have a right to a service pension or a severance grant subject to the conditions laid down in the Staff Regulations of Officials of the European Communities. Article 8.5 of the Statutes of the JET annexed to Council Decision 78/471/Euratom of 30 May 1978 on the establishment of the 'Joint European Torus (JET), Joint Undertaking' (OJ 1978 L 151, p. 10), in the version relevant for the determination of the applicants' pension rights, expressly invokes the Conditions of Employment of other servants of the European Communities in respect of the staff recruited as members of the temporary staff, as the applicants should have been. Therefore,

even if, in practice, the system provided for by the appropriate texts was not complied with for staff of the EAEC employed by JET, that regrettable fact cannot be relied on by the defendant in determining the damages due to the applicants as a result of its unlawful conduct towards them.

98 Furthermore, although the applicants have been claiming damages in respect of loss of pension rights from the lodging of their action in 2002 and the interlocutory judgment expressly held that such damages were recoverable in principle, it must be observed that the Commission has not adduced evidence of the accuracy of its allegation or submitted details as to the practical difficulties liable to result therefrom.

99 In view of the foregoing the damages payable to the applicants in respect of the loss of pension rights or, where appropriate, a severance grant in accordance with the grounds stated above, are to be determined as indicated in column 5 of Annex 3 to the present judgment.

On the total amount of the damages due to each of the applicants

100 The Court of First Instance held in the interlocutory judgment (paragraph 164) that, during the time spent working for the JET Joint Undertaking, the applicants' loss lies in the difference between the salaries, related benefits and pension rights which the persons concerned would have received or acquired if they had worked for the JET project as members of the temporary staff and the salaries, related benefits and pension rights which they actually received or acquired as members of the contract staff.

101 It follows from all the foregoing that the definitive amount of damages due to each of the applicants in compensation for the loss in question, as at 31 December 1999, the date which, in any event, concludes the liability period, is the total sum indicated in column 6 of Annex 3 to the present judgment. From that date, interest is to accrue on that sum at the rate of 5.25%, as indicated at paragraph 28 above, until the actual payment of the damages.

*Tax treatment of the applicants' compensation*

102 The parties have set out the problems liable to arise nationally in the context of the implementation of the present judgment, as a result of the intention of the United Kingdom tax authorities to tax, if not the principal, at least the interest accruing on the damages at issue in the present case, contrary to the terms of the interlocutory judgment.

103 It must be pointed out that the Court of First Instance has held that, since the damages due to each applicant were intended to compensate for loss of salary and related benefits assessed net of tax and calculated, according to the same rules, taking Community tax into account, they must benefit from the tax regime applicable to the sums paid by the Communities to their staff, pursuant to Article 16 of the Protocol on the Privileges and Immunities of Officials and Other Servants of the European Communities. The damages in question, thus interpreted as net of any taxation, cannot therefore be subject to deductions of national tax. No additional damages are therefore due by way of compensation for such deductions (paragraph 173 of the interlocutory judgment).

104 It follows from the interlocutory judgment that both the principal of the damages due to each applicant and the interest accruing thereon, which reflects the cost of the time taken to make good the damage to the parties concerned and is therefore inextricably linked to the principal, cannot in any case be subject to any deduction of national tax which would have the direct effect of reducing the compensation for that damage. Moreover, as is clear from the interlocutory judgment, the Community cannot be ordered to pay additional damages to the applicant, which would be unconnected with the unlawful conduct declared by the Court of First Instance, in order to compensate for the reduction of

the damages finally retained by the parties concerned, owing to national tax decisions, such a payment being tantamount to an increase without due cause in the budget of a Member State.

105 Without there being any need to prejudge any of the procedural consequences, the expediency of which it is for the Commission to consider, to which the Member State concerned would be liable in such a case, the Court of First Instance can only confirm that the damages due to the applicants are entirely exempt from tax under national provisions, as regards both the principal and interest, an exemption which arises from the grounds of the interlocutory judgment, which has acquired the definitive status of res judicata, as indicated at paragraphs 26 and 28 above.

**Costs**

*Arguments of the parties*

106 The applicants, who claim that the Court of First Instance should order the Commission to pay their costs pursuant to Article 87 of the Rules of Procedure, state that, although the Court of First Instance has restricted the liability period, they have not failed on a distinct head of claim and their costs are not proportionate to the length of the liability period.

107 The Commission maintains that the applicants cannot claim to have won since they have been defeated on one of the essential issues, namely limitation, which has the effect of making a five or six-fold reduction in their original claims. It notes that the Court of First Instance devoted nearly one half of the interlocutory judgment in Case T-144/02 of 5 October 2004 to that question and it considers

that one conceivable approach would be to order it only to pay one half of the applicants' costs.

*Findings of the Court*

108 It must be recalled that the costs of the proceedings were reserved by paragraph 4 of the operative part of the interlocutory judgment.

109 It follows from Article 88 of the Rules of Procedure of the Court of First Instance, which applies to the present case, that, since the dispute was dealt with under the heading of litigation in disputes between the Community and its staff (paragraph 52 of the interlocutory judgment), in that context, without prejudice to the second subparagraph of Article 87(3), the institutions are to bear their own costs.

110 Under Article 87(3) of the Rules of Procedure, where each party succeeds on some and fails on other heads, or where the circumstances are exceptional, the Court of First Instance may order that costs be shared or that each party bear its own costs.

111 Moreover, Article 87(4) of the Rules of Procedure provides that the Member States and institutions which intervened in the proceedings are to bear their own costs.

112 It must be observed that, as is apparent both from the operative part of the interlocutory judgment and from the grounds set out in support thereof, the applicants have essentially been successful. The Court of First Instance has recognised their right to compensation for the damage suffered by each of them on account of the fact that they were not recruited as a members of the temporary staff of the Communities for the time they worked at the JET Joint

Undertaking. Hence, the point made by the defendant — that the Court of First Instance limited the liability period — in no way mitigates the finding of full responsibility on the part of the Community for the unlawful conduct, which was found for the entire period during which the applicants worked at JET.

113 Furthermore, even though the applicants' claims for compensation have been partly unsuccessful, inasmuch as the Court of First Instance has not upheld all the claims in respect of the damage at issue, the fact remains that all the applicants have obtained compensation greater than that which the Commission was willing to grant them (see *Mulder and Others* v *Council and Commission*, paragraphs 363 to 365).

114 It is necessary, in those circumstances, to order that, in respect of the entire proceedings before the Court of First Instance, the Commission is to bear its own costs and pay those of the applicants and that the Council, as intervener, is to bear its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber)

hereby:

**1. Orders the Commission to pay to each of the applicants damages corresponding to the sum indicated for each of them in column 6 of Annex 3 to the present judgment;**

**2. Orders that that sum shall bear interest at the rate of 5.25% from 31 December 1999 until actual payment;**

**3. Orders the Commission to bear its own costs and to pay the costs of the applicants incurred in respect of the entire proceedings before the Court of First Instance;**

**4. Orders the Council to bear its own costs.**

Vesterdorf Jaeger Legal

Delivered in open court in Luxembourg on 12 July 2007.

E. Coulon
Registrar

B. Vesterdorf
President

**Annex 1**

List of Applicants (13)

| | | |
|---|---|---|
| Atkins T.F. | Brickley Carol | Eagle Richard J. |
| Fanthome John G. | Felton Robert | Gaberscik Alexander |
| Gardener Martin | Grant Michael George | Junger Edward |
| Marren Clifford | Marrs Beryl | Sands David |
| Walton Robert C. | | |

**Annex 2**

| Name of applicant | Start of the liability period | Grade and step at the start of the liability period |
|---|---|---|
| Brickley | 1 March 1996 | A 5/2 |
| Eagle | 1 March 1996 | B 1/8 |
| Felton | 1 March 1996 | A 5/3 |
| Gaberscik | 1 March 1996 | A 7/1 |
| Gardener | 1 March 1996 | B 1/7 |
| Grant | 1 March 1996 | B 2/4 |
| Marren | 1 March 1996 | B 1/5 |
| Marrs | 1 March 1996 | B 1/8 |
| Sands | 1 March 1996 | B 2/1 |
| Walton | 1 March 1996 | A 5/5 |

## Annex 3

| Name of applicant | Total net income received as member of the contract staff (1) *National income* (GBP) | Total net income of an equivalent member of the temporary staff (2) Community income (GBP) | Difference: simple net loss (3 = 2 - 1) (GBP) | Difference: accrued net loss (4 = 3 updated to 31 December 1999) (GBP) | Loss of service pension (or severance grant) (5) (GBP) | Total loss as at 31 December 1999 (6 = 4 + 5) (GBP) |
|---|---|---|---|---|---|---|
| Brickley | 55 885 | 127 702 | 71 817 | 78 799 | 12 233 | 91 033 |
| Eagle | 102 784 | 186 517 | 83 734 | 90 189 | 147 220 | 237 410 |
| Felton | 127 231 | 198 678 | 71 447 | 76 915 | 48 132 | 125 047 |
| Gaberscik | 61 513 | 87 728 | 26 215 | 28 210 | 12 346 | 40 555 |
| Gardener | 104 242 | 262 987 | 158 745 | 170 348 | 121 464 | 291 812 |
| Grant | 62 745 | 167 619 | 104 875 | 111 738 | 127 730 | 239 467 |
| Marren | 111 040 | 207 958 | 96 918 | 104 288 | 123 823 | 228 111 |
| Marrs | 102 977 | 186 517 | 83 540 | 89 981 | 162 080 | 252 061 |
| Sands | 72 970 | 157 228 | 84 259 | 90 038 | 88 551 | 178 589 |
| Walton | 113 978 | 210 673 | 96 695 | 103 612 | 104 409 | 208 021 |