

OPINION OF MR ADVOCATE GENERAL  
 DA CRUZ VILAÇA  
 delivered on 12 May 1987\*

*Mr President,  
 Members of the Court,*

1. On 20 February 1984, the applicant, Marco Castagnoli, was recruited as a member of the auxiliary staff and assigned to the Joint Research Centre at Ispra, a Commission establishment. The applicant was engaged to perform the duties of an unskilled labourer in Category D, Group IX, Class 3. The contract was concluded for a period of four months and was subsequently renewed for two successive periods each of the same duration.

2. Before the expiry of the second extension, the Head of the Administration and Personnel Division at the Joint Research Centre informed the applicant, by letter of 22 January 1985, that, in accordance with Article 52 of the Conditions of Employment of Other Servants of the European Communities ('the Conditions of Employment'), his contract could not be renewed beyond 21 February 1985.

3. As a result of that letter, on 15 February 1985 the applicant sent the Commission a note, for the purposes of Article 90 of the Staff Regulations of Officials of the European Communities ('the Staff Regulations'), in which he challenged the Commission's description of his status as a member of the auxiliary staff. The applicant alleged that he had just become aware that he had been recruited in order to replace a certain Augusto Zappatini, a member of the temporary staff appointed for an indefinite period, who had been retired on grounds of invalidity on 1 January 1982 and that, consequently, he (the applicant) was entitled

to the status of a temporary employee as opposed to that of an auxiliary staff member.

4. The Commission treated Mr Castagnoli's note as a complaint within the meaning of Article 90 (2) of the Staff Regulations and rejected it. The applicant accordingly brought this action, in which, alleging an infringement of the relevant Italian legislation (Law No 230 of 18 April 1962) and of Articles 3, 51 and 52 of the Conditions of Employment, he maintains that the decision terminating his employment is unlawful and he seeks a declaration that he is entitled to the status of a member of the temporary staff 'with effect from 22 February 1984 or any other date (prior or subsequent) which the Court considers appropriate, and to damages from the date from which his entitlement is recognized as taking effect to the date of his actual appointment'.

5. The Commission has raised the question of the admissibility of the application as a preliminary issue. I propose to begin my analysis of the case with that issue and to confine myself, of course, to the allegation that the complaint was submitted out of time, the only allegation maintained by the Commission throughout the proceedings.

#### I — Admissibility of the application

6. According to the Commission, the applicant submitted his complaint after more than three months had elapsed since the conclusion of the contract of employment as subsequently extended, most recently on 17 October 1984. It follows, in its view, that the application is automatically inadmissible.

\* Language of the Case: Portuguese.

7. In order to resolve that problem, it is necessary to set out clearly the subject-matter of the application and of the complaint which preceded it.
8. The applicant is clearly responsible for introducing in both of those documents a number of ambiguities concerning both the identification of the contested measure and the claims put forward.
9. I shall attempt to dispel the uncertainty and clarify matters.
10. In his *complaint* of 15 February 1985, the applicant expressly challenged 'the appointment criterion adopted' in relation to him 'by the appointing authority', which had only just come to his attention through indirect channels. Since it is the appointment criterion which the applicant contests, that necessarily calls in question the original contract under which he was recruited as a member of the auxiliary staff.
11. In his reply the applicant explained, however, that his complaint was ultimately directed against the measure adopted on 22 January 1985 refusing any further extension of his contract and thereby preventing him from continuing to occupy the post which he had filled for over a year.
12. In his complaint, the applicant claimed that he was entitled to 'the status of a member of the temporary staff for an indefinite period', without specifying the date from which that status should be accorded to him.
13. In his *application*, on the other hand, the applicant challenges 'the criteria adopted by the appointing authority as a result of which the applicant was dismissed on 21 February 1985 as a member of the auxiliary staff'.
14. In his application, the applicant claims that he is 'entitled to be made a member of the temporary staff with effect from 22 February 1984 or any other date (prior or subsequent) which the Court considers appropriate'.
15. What conclusions can we draw in the midst of all that uncertainty?
16. The applicant's key contention is that it is unacceptable for an auxiliary staff member to be recruited in order to replace a member of the temporary staff who is permanently unable to perform his duties. That being so, the allegedly unlawful measure capable of adversely affecting the applicant must from the very outset have been the initial contract of employment dated 20 February 1984.
17. In any event, the applicant cannot claim the status of a temporary employee from the commencement of the contractual relationship, with all the consequences which that entails, without contesting the very measure which conferred a different status upon him.
18. Moreover, according to Article 52 of the Conditions of Employment, a contractual relationship may be maintained, on expiry of the second extension, only if the contract conferred on the applicant the status of a member of the temporary staff for an indefinite period, as opposed to that of a member of the auxiliary staff which cannot be extended for longer than one year under the Staff Regulations. That must perforce be apparent from the original contract since the two successive extensions maintained the initial terms of the contract and merely prolonged the validity of the contract itself.
19. In those circumstances, the three-month period laid down in Article 90 (2) of the Staff Regulations should start to run from the date on which the initial contract of

employment was concluded, that is to say 20 February 1984, and the application is in principle manifestly out of time.

20. The same conclusion would follow even if — assuming the measures renewing the original contract are separable and each is treated as a fresh contract — the applicant were allowed to challenge only the last, most recent of those measures, which was notified to him on 17 October 1984. As the applicant gave his consent on 24 October 1984, the three-month period for the submission of complaints expired on 24 January 1985, and the complaint submitted on 15 February 1985 is therefore out of time.

21. No doubt aware of that fact, the applicant pointed out in his reply that his complaint was directed not 'against the measure adopted in October 1984 extending his temporary contract for four months, but against the measure adopted on 22 January 1985 refusing any further extension'.

22. For the reasons which I mentioned earlier, however, it makes no sense, in my view, to challenge any of those measures without contesting the original contract and the status which it conferred on the applicant.

23. The applicant maintained, however, in his reply, that he could not have been required to contest the status conferred by his contract before the expiry thereof, since that would have led to his instant dismissal.

24. I shall disregard the contradiction between that argument and the argument which the applicant put forward in his complaint of 15 February 1985, in which he stated that, if he had known beforehand that he had been recruited in order to replace a member of the temporary staff for an indefinite period, he would have taken action sooner.

25. I shall also disregard the fact that, if the applicant had lodged a complaint immediately after the initial contract was concluded, a favourable decision would have entailed recognition of his status as a member of the temporary staff for an indefinite period *ab initio* and it would have been possible to dismiss him only in accordance with the Staff Regulations.

26. However, it is undoubtedly significant that the applicant would not have suffered any particular damage if he had lodged a complaint in due time after the final renewal, but during the currency of the contract, since — unless the application proved to be well-founded — there were no circumstances in which the contract could be renewed again, having regard to Article 52 (b) of the Conditions of Employment.

27. Moreover, in my view, the judgments given by the Court in similar cases, on the question whether requests for reclassification submitted by Community officials after their establishment were lodged in due time, are applicable here. In a recent judgment,<sup>1</sup> the Court held, confirming a trend which it had been developing with regard to specific cases in previous judgments,<sup>2</sup> that, notwithstanding the precariousness of a probationary official's position, the measure adversely affecting him, in the case of a request for reclassification, is the decision appointing him as a probationary official and not the decision establishing him and it is from the date of the former decision that time starts to run for the purposes of bringing proceedings.

28. However, the applicant has also alleged that he learned only shortly before being

1 — Judgment of 7 May 1986 in Case 191/84 *Barrena v Commission* [1986] ECR 1541, paragraph 11 of the decision.

2 — Judgment of 18 June 1981 in Case 173/80 *Blasig v Commission* [1981] ECR 1649 at p. 1658; judgment of 1 December 1983 in Case 190/82 *Blomefield v Commission* [1983] ECR 3981 at p. 3991.

notified of the expiry of his contract that he had been recruited in order to replace a member of the temporary staff who had been permanently retired on grounds of invalidity.

29. That fact, according to the structure of the applicant's argument wherein the contested measure is the communication of 22 January 1985, is wholly irrelevant.

30. Moreover, that fact is difficult to reconcile with the importance which the applicant also attached to his fear of dismissal had he reacted during the currency of his contracts for a limited period.

31. Whatever the merits of the applicant's argument that he only belatedly became aware of a connection between his recruitment and the retirement of Mr Zappatini, a temporary employee — a connection which the Commission does not dispute — it may be regarded as a new fact which is capable of reopening the period for the submission of complaints in accordance with the second indent of Article 90 (2) of the Staff Regulations.<sup>3</sup> In any event, the application of the second indent *in fine* of Article 90 (2) would be justified and the period would start to run only as from the date on which the applicant learned of facts which were capable of substantiating his complaint. The applicant would thus have challenged in due time the status conferred upon him by the initial contract and the application would consequently be admissible.

32. It must be acknowledged that the mistakes made by the applicant throughout the proceedings in designating the subject-matter of the application do not militate in favour of an unequivocal solution to that problem.

<sup>3</sup> — Judgment of 15 May 1985 in Case 127/84 *Eisly v Commission* [1985] ECR 1437, paragraphs 9 to 13 of the decision.

33. I have already acknowledged, however, that, in the version of his application in which he claims to be entitled to the status of a member of the temporary staff as from 22 February 1984, the applicant necessarily contests by implication the initial contract which placed him in the category of auxiliary staff. Let us assume, therefore, that, as the applicant subsequently became aware of facts capable of substantiating his complaint, the latter was lodged in due time and the application is consequently admissible.

34. Accordingly, I now turn to the substance of the case.

## II — Substance

35. In challenging the status conferred upon him, the applicant relied in the first place on the relevant Italian legislation (Law No 230 of 18 April 1962), which prohibits the conclusion of 'more than two contracts for a fixed term'.

36. However, that argument — which, as the applicant acknowledges in his reply, he put forward as an example of legislation that was particularly expressive of the general principles common to the Member States' laws on labour relations — is not relevant.

37. Contractual relations between the Community institutions and temporary or auxiliary members of their staff are governed exclusively by Community law, in particular the Conditions of Employment and the Staff Regulations.<sup>4</sup>

38. It is appropriate, therefore, to consider those provisions.

<sup>4</sup> — See the judgment of 1 April 1987 in Case 257/85 *Dufay v European Parliament* [1987] ECR 1561; see also the judgment of 25 June 1981 in Case 105/80 *Desmedt v Commission* [1981] ECR 1701 at p. 1711, which establishes that relations between officials and the institutions are governed exclusively by the Staff Regulations.

39. According to Article 3 of the Conditions of Employment, auxiliary staff means staff engaged:

- (i) to replace an official or temporary employee who is unable for the time being to perform his duties (subparagraph (b)), or
- (ii) for the performance, within the limits set in Article 52, of duties in an institution but not assigned to a post included in the list of posts appended to the section of the budget relating to that institution (subparagraph (a)).

40. This case is not concerned with subparagraph (b). The Community servant whose duties the applicant may have been called upon to carry out was not temporarily unable to perform them but had been permanently retired.

41. Hence the applicant could have been recruited as an auxiliary member of staff only under subparagraph (a).

42. That is what the Commission maintains, emphasizing that the applicant's contract did not specify the tasks which he was to perform and that he was called upon to carry out the work of an unskilled labourer, without occupying a post included in the list of posts.

43. The Commission argues that the retirement of Mr Zappatini made it possible to release the post which he had occupied and to include it in a common 'pool' of posts available for subsequent reallocation by the Joint Research Centre at Ispra, irrespective of the duties previously attaching to the post and solely in accordance with the priorities and requirements of the service. According to the Commission, that is the system of management applied at the Joint Research Centre and, in accordance

therewith, a vacancy notice was even published in order to fill the post that had fallen vacant in the same division ('infrastructure'), but in another sector, namely the waste-water cleaning plant section instead of the heating and air-conditioning section.

44. The same procedure was adopted at the same time in order to fill a post vacated in another division by the retirement of another employee in the same category as Mr Zappatini.

45. As is clear from the Conditions of Employment, and as the Court has reaffirmed,<sup>5</sup> 'the difference between auxiliary staff and temporary staff lies in the fact that a member of the temporary staff fills a permanent post included in the list of posts, whereas, except in the case of temporary replacement of an official, a member of the auxiliary staff performs administrative work without being assigned to a post included in the list of posts'.

46. However, as the Court has already pointed out,<sup>6</sup> 'a person who claims that a period of employment classified as having been completed in the capacity of a member of the auxiliary staff should be recognized as having been completed in the capacity of a temporary employee must... first prove that posts corresponding to the duties performed by him appeared at that time in the list of posts for the institution and were available'.

47. In my view, the applicant has failed to adduce in these proceedings any evidence which is capable of invalidating the Commission's repeated assertion that he did

5 — Judgment of 23 February 1983 in Joined Cases 225 and 241/81 *Toledano Laredo and Garilli v Commission* [1983] ECR 347 at p. 360, paragraph 6 of the decision. See also the judgment of 1 February 1979 in Case 17/81 *Deshormes v Commission* [1981] ECR 189 at p. 203, and the judgment of 19 November 1981 in Case 106/80 *Fournier v Commission* [1981] ECR 2759 at p. 2769.

6 — *Toledano Laredo*, *supra*, at p. 360.

not occupy a post included in the list of posts since the posts available had been reserved in connection with the performance of other duties and filled in accordance with the procedures laid down by the Staff Regulations.

48. The Commission's order of priorities would have justified the allocation of a permanent post to another department and that is what the Joint Research Centre did in the case of the post previously occupied by Mr Zappatini, a temporary employee, in the exercise of the power conferred by the Staff Regulations to organize its own departments.

49. For that reason, once there were no further vacancies in its list of posts, the Joint Research Centre was unable to recruit a temporary employee to carry out the duties previously performed by Mr Zappatini, even if there had been any vacancies in other departments or establishments of the Commission, which has not been shown to be the case.

50. In those circumstances, it would not have been possible to recruit the applicant as a member of the temporary staff without creating a new post in the list of posts and opening a corresponding heading in the budget, which is an unknown factor in terms of its feasibility and of the difficulties involved.

51. It is also quite clear that, according to the case-law of the Court,<sup>7</sup> a characteristic feature of a contract for the employment of auxiliary staff 'is its precariousness in time, since it can be used only to effect a temporary replacement or to allow the performance of administrative duties which

are of a transitory nature, which fill an urgent need or which are not clearly defined'. It is for applicants to 'prove that the duties which they performed as members of the auxiliary staff were not of a transitory nature, in other words that they were permanent Community public service duties'.<sup>8</sup>

52. In the Commission's view, that was not the case here. The tasks which the applicant had to perform were non-specific and the recruitment of auxiliary staff was, in its opinion, the best way of meeting the requirements of a department whose staff, according to the information given at the hearing, was reduced from 15 or 16 persons in 1982 to 9 at present.

53. However, it must be borne in mind that, as the Court has quite properly stated,<sup>9</sup> the conditions applicable to auxiliary staff 'may not be improperly used to entrust permanent duties for long periods to such personnel, who would thus be used in an inappropriate manner and subjected to prolonged uncertainty'.

54. Admittedly, the duration of the applicant's contract, including the two extensions thereof, remained within the time-limit specified in Article 52 (b) of the Conditions of Employment, that is to say one year.

55. However, it was preceded by the recruitment for periods of one year of two other auxiliary staff members with the same duties, and was also followed, it would appear, by two further contracts on the same terms.

8 — *Toledano Laredo*, *supra*, at p. 361, paragraph 12 of the decision.

9 — *Deshornes*, *supra*, at p. 201, paragraph 38 of the decision; *Fournier*, *supra*, at p. 2768, paragraph 5 of the decision.

7 — See the judgments cited above.

56. Does that fact constitute evidence of unlawful conduct on the part of the Commission, which is capable of deflecting the auxiliary staff contract from its true purpose so that it is used for the performance of ultimately permanent duties, and which may render the status conferred on the applicant irregular?

57. In my view, that is the crux of the matter.

58. In that regard, it must be borne in mind that:

(a) the applicant has repeatedly stated that both he and the other auxiliary staff members who were recruited on the same terms successively performed the same duties as Mr Zappatini, that is to say the duties of an assistant to a cold-storage plant worker;

(b) the Commission has confined itself, in the proceedings, to the contention that, owing to the classification of the applicant (as a member of the auxiliary staff in Category D IX 3, corresponding to Grade D 4, Step 1 or 2, in the category of temporary staff) and his level of training (unskilled labourer with no experience relating to cold storage for industrial purposes), it was impossible for him fully to replace Mr Zappatini, a highly experienced skilled worker in Grade C 2;

(c) the Commission has acknowledged, however, that the applicant was recruited in order to fill, temporarily and in part, the vacancy created by the departure of Mr Zappatini whose duties were, from the outset, performed by auxiliary staff members. The

Commission even conceded at the hearing that the recruitment of auxiliary staff after Mr Zappatini's departure was designed to prevent hold-ups and a temporary interruption of the work, which was an indication that the duties to be performed were necessary;

(d) in memoranda dated 3 October 1984 and 21 January 1985, Mr Castagnoli's superior stated that the applicant was working 'in place of Mr Zappatini' and that his post 'corresponds to that which was occupied by Mr Zappatini'.

59. Accordingly, the fact that the duties performed — over a period of at least five years — were permanent duties seems to me to have been established to a sufficient extent in these proceedings.

60. The urgent nature of the duties to be carried out does not alter the fact that they are permanent duties and it can justify the engagement of auxiliary staff only if suitable posts provided for in the budget were not *immediately* available.<sup>10</sup>

61. In practice, the applicant occupied, in the third year following Mr Zappatini's departure, the same post, that is to say he performed the same duties as Mr Zappatini, regardless of the fact that, in view of his lack of experience, he was unable to perform them in the same way. The appointing authority simply considered that the same duties could thenceforth be carried out by any worker who was still an apprentice, instead of a skilled worker.

62. Accordingly, there are serious objections to the legality of the procedure followed in that regard by the defendant.

<sup>10</sup> — *Toledano Laredo, supra*, at p. 363, paragraph 17 of the decision.

63. However, that is not sufficient, in my view, to uphold the application in its entirety.

64. In my view, the Court can hardly declare that the applicant is entitled to the status of a member of the temporary staff — as opposed to that of a member of the auxiliary staff — from the date on which his contract was concluded, with all the effects resulting therefrom, including the renewal of the contractual relationship beyond 21 February 1985.

65. On the one hand, the Court cannot take the place of the administration in the choice of its employees.

66. On the other hand, the reasons relied upon by the applicant could also be invoked by any other auxiliary staff members who had carried out the same duties, some of whom might still be able to take action within the time-limits laid down for the institution of proceedings. Yet it would not be possible for the same post to be occupied simultaneously by several persons with the status of temporary employees.

67. Nor can it be said that the applicant's classification would enable him to occupy a post created for the purpose.

68. However, there would appear to be some justification for granting the applicant the compensation he seeks in respect of the period for which he was employed as an auxiliary staff member and which corresponds at least to the difference between the salary which he was paid and the salary which he would have received if he had been recruited as a member of the temporary staff, that is to say, according to the Commission, BFR 44 016 and BFR 44 172 per month, respectively.

69. The fact that a post was not available in the list of posts to which the applicant could have been assigned as a temporary employee does not alter that conclusion, since the Joint Research Centre itself found it necessary to transfer to another department the post previously occupied by Mr Zappatini, without concomitantly releasing another post that was appropriate to the duties to be carried out by the applicant.

70. III — In those circumstances, I suggest that the Court:

Order the Commission to pay the applicant compensation equal to the difference between his salary as a member of the auxiliary staff for a period of one year and the amount which he would have received if he had been recruited in respect of the same period as a member of the temporary staff in the equivalent category, increased by any further sums to which, in the latter (but not in the former) case, he would have been entitled either during the performance of the contract or by virtue of its termination;

Declare the application unfounded with regard to the other heads of claim;

Order the Commission to pay, in addition to its own costs, one-half of the applicant's costs, the rest to be borne by the applicant since he has failed in some of his submissions.