

ORDER OF THE COURT OF FIRST INSTANCE (Second Chamber)

10 December 1997 *

In Case T-134/96,

Hendrik Smets, an official of the Commission of the European Communities, represented by **Nicolas Lhoëst**, of the Brussels Bar, with an address for service in Luxembourg at the offices of **Fiduciaire Myson SARL**, 30 Rue de Cessange,

applicant,

v

Commission of the European Communities, represented by **Julian Currall**, of its Legal Service, acting as Agent, with an address for service in Luxembourg at the office of **Carlos Gómez de la Cruz**, of its Legal Service, **Wagner Centre**, Kirchberg,

defendant,

APPLICATION principally for annulment of the Commission's decision of 7 August 1995 fixing the applicant's travelling time for 1995 at two days,

* Language of the case: French.

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

composed of: A. Kalogeropoulos, President, C. W. Bellamy and J. Pirrung, Judges,

Registrar: H. Jung,

makes the following

Order

Legal background, facts and procedure

1 The duration of an official's annual leave is extended by the travelling times specified in Article 7 of Annex V to the Staff Regulations of Officials of the European Communities.

2 Under the second subparagraph of Article 8(2) of Annex VII to the Staff Regulations, where the distance by rail between an official's place of employment and his place of origin exceeds 500 km and where the usual route involves a sea-crossing, he is entitled, on production of the tickets, to reimbursement of the cost of travel by air.

3 Under the second paragraph and the first sentence of the fifth paragraph of Article 7 of Annex V, when an official whose place of employment and place of origin are

in Europe benefits from the second subparagraph of Article 8(2) of Annex VII, the travelling time based on the distance by rail between the place of origin and the place of employment is to be as follows:

- up to 900 km: one day for the outward-and-return journey,
- more than 900 km: two days for the outward-and-return journey.

- 4 In accordance with the third paragraph of Article 7 of Annex V, special exceptions may be granted on application by the official concerned on production of evidence that the outward-and-return journey cannot be completed in the time allowed.
- 5 Under the second sentence of the fifth paragraph of Article 7 of Annex V, should the place of employment and/or origin be outside Europe, the travelling time is to be fixed by special decision taking into account particular needs.
- 6 On 6 November 1991, the Commission adopted Administrative Circular No 26A, which laid down the specific rules for calculating travelling time for officials serving outside the Community. Under Point II.2 of that circular, officials whose place of origin is more than 2 000 km from their place of employment are to be granted eight and a half calendar days' travelling time.
- 7 The applicant is Head of the Commission Delegation in the Republic of Chad, his place of employment being N'Djamena. As his place of origin is in Belgium, more than 2 000 km from his place of employment, he was entitled to eight and a half days' travelling time in accordance with Circular No 26A.

- 8 On 21 December 1994, the Commission adopted Internal Directive No 8798 on the reimbursement of annual travel expenses (Article 8(2) of Annex VII) and travelling time added to annual leave (second paragraph of Article 7 of Annex V), published in *Administrative Notices* on 4 January 1995 ('the internal directive'). Under the third and fourth indents of the third paragraph of the internal directive:

'In order to harmonize application of the Staff Regulations relating to annual reimbursement of travel expenses between place of employment and place of origin and the travelling time granted for annual leave, the appointing authority:

...

- decides that, since the travelling time granted is a fixed amount of days and is indivisible, it should be reduced in accordance with the second paragraph of Article 7 of Annex V if the official concerned is refunded the cost of an air ticket, even one way;
- decides that two days' (48 hours) travelling time should be granted to officials whose place of employment and/or place of origin is outside Europe, although additional travelling time should be granted if necessary to officials who show that the round trip cannot be made within the time granted.'

- 9 The internal directive entered into force on 1 January 1995.

- 10 By decision of 7 August 1995, the Commission granted the applicant a total of 97.5 days leave for 1995, including, in accordance with the internal directive, two days' travelling time.

- 11 On 6 November 1995, the applicant lodged a complaint under Article 90(2) of the Staff Regulations, challenging that decision in so far as it gave him two days' travelling time.
- 12 By decision of 17 April 1996, notified to the applicant on 1 May 1996, the Commission dismissed that complaint.
- 13 By application lodged at the Registry of the Court of First Instance on 2 September 1996, the applicant brought the present proceedings.

Forms of order sought

- 14 The applicant claims that the Court should:

- find the application admissible and well founded;
- consequently

(1) annul

- the Commission's decision of 7 August 1995 fixing his travelling time at two days, together with any similar subsequent decision,
- to the extent necessary, the decision expressly rejecting the applicant's complaint, adopted on 17 April 1996,

(2) declare the internal directive illegal and accordingly order it to be withdrawn,

(3) declare the applicant to be entitled, for 1995 and for subsequent years, to eight and a half days' travelling time or, at least, to travelling time calculated on the basis of Circular 26A, and

(4) order the defendant to pay all the costs of the proceedings.

15 The Commission contends that the Court should:

— dismiss the application as inadmissible and, in the alternative, unfounded;

— make an appropriate order as to costs.

16 Under Article 111 of the Rules of Procedure, as amended with effect from 1 June 1997 (OJ 1997 L 103, p. 6), where an action is manifestly inadmissible or manifestly lacking any foundation in law, the Court of First Instance may give a decision by reasoned order, without taking further steps in the proceedings. In the present case, the Court (Second Chamber) considers that it has sufficient information from the documents before it and decides, under that article, which is applicable to this case as a procedural provision, that there is no need to take any further steps in the proceedings.

Substance

- 17 The applicant's pleas in law and arguments on the substance of his case may be grouped under four pleas in law alleging, respectively, infringement of Circular No 26A, breach of the principle of the protection of legitimate expectations and of acquired rights, breach of the principle of equal treatment and illegality of the internal directive.

The first plea in law: infringement of Circular No 26A

Arguments of the parties

- 18 The applicant claims that there are no grounds for considering that Circular No 26A has been replaced by the internal directive. Nowhere in that document is it stated that it annuls or amends Circular No 26A, nor even is there any allusion thereto. The two measures were adopted by different authorities: Circular No 26A by an official acting under delegation from the Director-General for Personnel and Administration and the internal directive by the Director-General himself. They are addressed to different categories of official: Circular No 26A to officials serving in a non-member country and the internal directive to all officials. Their purposes, too, are different: Circular No 26A lays down general rules on all types of leave, whereas the internal directive covers only travelling time.
- 19 Since Circular No 26A is thus still in force, the contested decision thus infringed point II.2 thereof by not granting the applicant eight and a half days' travelling time.

20 In the Commission's submission, the internal directive replaced Circular No 26A as regards travelling time, in accordance with the general rule of interpretation that a more recent text is deemed to replace an earlier one. Since its entry into force on 1 January 1995, the internal directive alone governs the questions to which it relates.

Findings of the Court

21 It may be seen from the wording of the internal directive, in particular the third paragraph, fourth indent (see paragraph 8 above), that in adopting it the appointing authority clearly intended to regulate the method of calculating the travelling time for officials whose place of employment and/or place of origin is outside Europe. In that regard, therefore, the internal directive must be interpreted as replacing Circular No 26A as from 1 January 1995.

22 Consequently, Circular No 26A, having been replaced on that point by the internal directive, was no longer applicable when the contested decision was adopted on 7 August 1995.

23 The applicant's first plea thus manifestly lacks any foundation in law.

The second plea in law: breach of the principle of the protection of legitimate expectations and of acquired rights

Arguments of the parties

- 24 The applicant submits that the Commission has failed to respect both his acquired rights and the principle of the protection of legitimate expectations.
- 25 His expectation that he would receive eight and a half days' travelling time was explicitly and officially acknowledged by the Commission, and confirmed by it in Circular No 26A. Having given him that amount of travelling time over a number of years, the Commission had thus conferred legitimate rights on him.
- 26 Admittedly, the Commission is entitled to adopt a new practice, but only in response to a change in objective circumstances. In the present case, the Commission has not shown that the legitimate rights which it had conferred on the applicant were no longer necessary and that a sudden and considerable reduction in his travelling time was required.
- 27 The Commission submits that, in order for a legitimate expectation to arise, the person concerned must have been given precise assurances that the previous situation would be maintained. No such assurance had been given in this case.

Findings of the Court

28 It has consistently been held that the right to claim protection of legitimate expectations extends to any individual who is in a situation in which it appears that the Community administration has, by giving him precise assurances, led him to entertain reasonable expectations (Case T-20/91 *Holtbecker v Commission* [1992] ECR II-2599, paragraph 53, and Case T-207/95 *Ibarra Gil v Commission* [1997] ECR-SC II-31, paragraph 25).

29 It is clear from the documents in this case that the applicant's entitlement to leave, including travelling time, is fixed each year by individual decision. However, the applicant has not alleged that the administration had given him any precise assurance that the travelling time of eight and a half calendar days which he had been given by individual decisions until 1994 would be maintained.

30 The mere fact that, on the basis of Circular No 26A, the applicant was given eight and a half calendar days' travelling time over a number of years up to 1994 is not in itself sufficient to confer upon him any legitimate expectation that the same travelling time would be maintained for him in subsequent years. Such a situation is *a fortiori* unacceptable in this case since, under the fifth paragraph of Article 7 of Annex V, the travelling time for officials whose place of employment and/or origin is outside Europe is to be fixed by special decision 'taking into account particular needs'. Such needs are to be determined in each case in relation to the means of transport available.

31 In any event, in a context such as that of the present case, observance of the principle of the protection of legitimate expectations cannot prevent new rules from applying to the future effects of situations which arose under earlier rules in the absence of any undertaking on the part of the public authority (see Case 112/80 *Dürbeck v Hauptzollamt Frankfurt am Main-Flughafen* [1981] ECR 1095, paragraph 48; Joined Cases T-6/92 and T-52/92 *Reinartz v Commission* [1993] ECR II-1047, paragraph 85; Joined Cases T-97/92 and T-111/92 *Rijnoudt and Hocken v*

Commission [1994] ECR-SC II-511, paragraph 104; and Case T-177/95 *Barraux and Others v Commission* [1996] ECR-SC II-1451, paragraph 47).

- 32 As regards the alleged infringement of an acquired right, the mere fact that the applicant was given eight and a half days' travelling time over a number of years up to 1994 is not in itself sufficient to confer upon him any acquired right to the maintenance of the same advantage for subsequent years (*Reinarz*, cited above, paragraph 84).
- 33 The applicant's second plea thus manifestly lacks any foundation in law.

The third plea in law: breach of the principle of equal treatment

Arguments of the parties

- 34 The applicant submits that, by adopting the internal directive, the Commission treated in an identical manner situations which are objectively very different, namely that of officials such as the applicant whose places of employment and/or origin are outside Europe and that of officials whose places of employment and origin are in Europe.
- 35 Travelling time for officials whose place of employment and place of origin are in Europe is governed by the first and second paragraphs of Article 7 of Annex V and reimbursement of their travel expenses by Article 8(1) to (3) of Annex VII. Travelling time for officials whose place of employment and/or origin is outside Europe,

on the other hand, is governed by the fifth paragraph of Article 7 of Annex V and reimbursement of their travel expenses by Article 8(4) of Annex VII.

- 36 By aligning the situation of the officials concerned by the second sentence of the fifth paragraph of Article 7 of Annex V, whose place of employment and/or origin is outside Europe, with the situation of those concerned by the second paragraph of Article 7, whose place of employment and place of origin are in Europe, the Commission treated in the same way situations which are fundamentally different. For British, Irish, Swedish and Finnish officials, who are those principally concerned by the second paragraph of Article 7 of Annex V, the distance between the places of employment and origin is a few hundred kilometres, whilst an official serving outside Europe is often several thousand — sometimes over 20 000 — kilometres from his place of origin and subject to local conditions often rendering journeys longer and more difficult.
- 37 Moreover, the decision of 7 August 1995 and the internal directive allow two days' travelling time for the outward-and-return journey, with the result that officials have only one day for the outward journey and one day for the return journey.
- 38 As regards the possibility of requesting additional travelling time, provided for in the fourth indent of the third paragraph of the internal directive, the Commission acknowledged in its decision dismissing the applicant's complaint that distance and local conditions were still of considerable significance, regardless of air travel, in the case of officials serving in a non-member country. It had none the less sought to give officials serving in a non-member country the same travelling time, as a general rule, as that for officials employed within the Community who qualify for reimbursement of their air fare.

- 39 Moreover, to require officials serving outside Europe to prove in every case that the journey between the country of employment and the country of origin takes more than one day constitutes discrimination in relation to officials whose place of employment and place of origin are in Europe and who automatically receive a higher, fixed amount of travelling time.
- 40 The Commission's position is, moreover, incoherent inasmuch as, in its internal directive of 21 February 1996 on special leave for elections, published in *Administrative Notices* on 5 March 1996, it allowed three days' travelling time for officials whose place of employment is more than 2 000 km from the place of vote.
- 41 Finally, the applicant states, as a point of information, that because flights between N'Djamena and Paris are infrequent and awkwardly scheduled, it is generally necessary to spend a night in Paris on both the outward and the return journey. That already brings the travelling time up to four days, or six calendar days, not counting any delays or unforeseen incidents.
- 42 The Commission accepts that Article 7 of Annex V recognizes a possible distinction between officials employed within the Community and those serving in non-member countries: it fixes the travelling time directly for the former and refers to a special decision for the latter.
- 43 However, service in a non-member country does not necessarily mean that the official concerned will have to make longer journeys. A journey by air within Europe takes the same time as a journey of the same distance between Europe and another continent. It is therefore legitimate to treat all those who travel the same distance by air in the same way, subject to any properly substantiated exceptions.

- 44 The fact that it is possible to obtain additional travelling time means that the purpose of travelling time — to enable the official to travel without having to deduct the time required from his own leave entitlement — can be respected. Whilst the third paragraph of Article 7 of Annex V provides for a similar derogation for air travel within Europe, it is clear that this possibility is used above all for certain long-haul flights outside Europe. Account can thus be taken of particular situations such as extremely long distances, irregular or infrequent flights, slow or unreliable aircraft and regular delays.
- 45 As regards travelling time for elections, the difference between the three days allowed in that context and the two days of which the applicant is complaining exists for everybody. The three days, moreover, constitute a maximum.
- 46 The applicant has not demonstrated that he cannot complete the journey between Brussels and N'Djamena within the two days allowed. As regards the information he has provided in that regard, such circumstances, if in fact established in a specific case, would be taken into account by allowing additional travelling time equivalent to the extra time required.

Findings of the Court

- 47 It has consistently been held that an official is not entitled to act in the interests of the law or of the institutions and may put forward, in support of an action for annulment, only such claims as relate to him personally (Case 85/82 *Schloh v Council* [1983] ECR 2105, paragraph 14; Case 204/85 *Stroghili v Court of Auditors* [1987] ECR 389, paragraph 9; and Case T-163/89 *Sebastiani v Parliament* [1991] ECR II-715, paragraph 24). The Court will therefore take account of the applicant's arguments only to the extent that the internal directive or the decision of 7 August 1995 may have infringed the principle of equal treatment in relation to him personally.

- 48 Essentially, the applicant complains of discrimination in that the internal directive allows him, as an official serving outside Europe and travelling by air to his place of origin in Europe, only two days' travelling time for his annual leave, whereas, under the second paragraph of Article 7 of Annex V, the same travelling time is allowed for the officials referred to in the second subparagraph of Article 8(2) of Annex VII, whose place of employment and place of origin are both in Europe and are over 900 km apart.
- 49 It is true that, as the applicant submits, the internal directive adopts the same basic rule — two days' travelling time — for two categories of official entitled to reimbursement of their air fares: those covered by the second subparagraph of Article 8(2) of Annex VII, whose place of employment and place of origin are both in Europe and are over 900 km apart, and those such as the applicant whose place of employment and/or place of origin are outside Europe.
- 50 However, the applicant's argument presupposes that travelling time for officials whose place of employment is outside Europe and whose place of origin is in Europe (for example, in North Africa and Belgium respectively) is necessarily greater than for those covered by the second subparagraph of Article 8(2) of Annex VII, whose place of employment and place of origin are both in Europe and are over 900 km apart (for example, in Belgium and Finland respectively). Where air travel is concerned, however, there is no reason to suppose that to be the case.
- 51 Moreover, the fourth indent of the third paragraph of the internal directive provides that additional travelling time may be granted if necessary to officials whose place of employment and/or place of origin is outside Europe and who show that the round trip cannot be made within the two days.

- 52 In those circumstances, the mere fact that in the internal directive the appointing authority adopted a travelling time of two days as a basic rule for officials serving outside Europe, whilst at the same time allowing for the possibility of granting derogations if necessary, is not sufficient to establish a breach of the principle of equal treatment with regard to the applicant.
- 53 It was therefore for the applicant, in so far as he considered that the two days' travelling time granted to him by the contested decision was inadequate, to submit an individual request, on the basis of the fourth indent of the third paragraph of the internal directive, for additional travelling time as necessary. At no time, however, did he submit such a request.
- 54 Contrary to the applicant's submission, the fact that he considers himself obliged to submit such a request, having regard to the distance between his place of employment and his place of origin, cannot be regarded as discriminatory. Any official who has been given two days' travelling time and who considers that to be inadequate, must submit a substantiated request in order to obtain additional travelling time, whether under the internal directive or under the third paragraph of Article 7 of Annex V.
- 55 Furthermore, the only officials who automatically receive more than two days' travelling time are certain officials covered by the first paragraph of Article 7 of Annex V, who receive a flat-rate payment for travel expenses calculated on the basis of the rail fare. Since rail journeys are involved, the situation of those officials is in no way comparable to that of the applicant, who is entitled to the reimbursement of his air fare.
- 56 The applicant has therefore not demonstrated any breach of the principle of equal treatment in his regard either by the internal directive or by the contested decision.

57 That being so, that fact that travelling time is calculated differently in another internal directive, that of 21 February 1996 on special leave for elections (paragraph 40 above), is irrelevant. In any event, the travelling times laid down therein apply without distinction to all places of employment, whether within or outside Europe.

58 The applicant's third plea thus manifestly lacks any foundation in law.

The fourth plea in law: illegality in the drafting of the internal directive and failure to state reasons

Arguments of the parties

59 The applicant submits, first, that by fixing the new travelling time by internal directive, the Commission was clearly seeking to 'misuse' Article 110 of the Staff Regulations, which provides for consultation of the Staff Committee and the Staff Regulations Committee before the adoption of implementing provisions. The Commission should have consulted those bodies if it intended to make any substantial change to the travelling time allowed for officials serving outside Europe.

60 Secondly, the internal directive has no legal basis inasmuch as it modifies the situation of officials whose place of employment and place of origin are outside Europe, although its stated subject refers only to Article 8(2) of Annex VII and the second paragraph of Article 7 of Annex V.

61 Thirdly, the internal directive is also contradictory in that its preamble refers to the need to 'establish' the criteria for granting the travelling time added to annual leave, whereas the fourth indent of its third paragraph reduces travelling time.

62 Fourthly, the internal directive is unclear as to whether the third indent of the third paragraph concerns officials whose place of employment and place of origin are in Europe or those whose places of employment and/or origin are outside Europe and whether the travelling time provided for in the fourth indent refers to working days or calendar days.

63 Fifthly and lastly, contrary to Article 25 of the Staff Regulations, there is no adequate statement of reasons for the third indent of the third paragraph of the internal directive. The Commission should have explained why the travelling time laid down in Circular No 26A was no longer necessary and why a sudden and substantial reduction in his travelling time was required. Neither the fact that reimbursement is made on a flat-rate basis nor the fact that the journey is by air constitutes an adequate reason for the reduction of travelling time, since officials' habits have not changed.

64 The Commission submits, in particular, that consultation of the bodies referred to in Article 110 of the Staff Regulations is not obligatory and that it has not misused its powers, that it is clear from its wording that the internal directive concerns officials serving outside Europe and that the internal directive is precise and adequately reasoned.

Findings of the Court

- ⁶⁵ First of all, the internal directive does not constitute a 'general provision for giving effect' to the Staff Regulations within the meaning of Article 110 thereof but an internal decision of a general nature indicating a rule of conduct which the administration imposes on itself (see Case 190/82 *Blomefield v Commission* [1983] ECR 3981, paragraph 20; Case 343/82 *Michael v Commission* [1983] ECR 4023, paragraph 14; and Case T-2/90 *Ferreira de Freitas v Commission* [1991] ECR II-103, paragraph 61). Nor is there any evidence to suggest that, by adopting the internal directive in the context of the fifth paragraph of Article 7 of Annex V, the defendant intended to misuse its powers under Article 110 of the Staff Regulations.
- ⁶⁶ Secondly, as regards the legal basis for the internal directive, there is nothing in principle to prevent the appointing authority from drawing up rules by an internal directive of general effect to govern the exercise of the discretion conferred upon it by the Staff Regulations (*Ferreira de Freitas*, cited above, paragraph 61). Even if the internal directive does not mention the fifth paragraph of Article 7 of Annex V in its title, it is clear from the fourth indent of its third paragraph that it concerns the application of that provision as from 1 January 1995.
- ⁶⁷ Thirdly, even if that part of the preamble which states that the criteria for granting travelling time must be 'established' is not a complete indication of the aim of the internal directive, the Court cannot discern any contradiction or lack of clarity in the internal directive which might affect its legality.
- ⁶⁸ Finally, as regards the statement of reasons in the internal directive, it has consistently been held that the question whether the statement of reasons for a measure meets the requirements of Article 190 of the EC Treaty or Article 25 of the Staff Regulations must be assessed with regard not only to its wording but also to its

context and to all the legal rules governing the matter in question (Case 185/83 *University of Groningen v Inspecteur der Invoerrechten en Accijnzen* [1984] ECR 3623, paragraph 38; Case C-285/94 *Italy v Commission* [1997] ECR I-3519, paragraph 48; and Case T-266/94 *Skibsværftsforeningen and Others v Commission* [1996] ECR II-1399, paragraph 230).

- 69 Having regard to its context, the Court considers that there is an adequate statement of reasons for the fourth indent of the third paragraph of the internal directive. It is clear from the whole text of the internal directive, and in particular from its third paragraph (see paragraph 8 above), that the appointing authority considered it necessary to harmonize the relevant provisions under the Staff Regulations and to fix travelling time at two days, subject to duly substantiated derogations, for the officials covered by the fifth paragraph of Article 7 of Annex V, in view of the fact that the journeys in question were normally by air. Such a statement of reasons is sufficient to enable the applicant to decide whether the internal directive is justified and the Court to review its legality.
- 70 The applicant's fourth plea thus manifestly lacks any foundation in law.
- 71 It follows from all the foregoing that the application must be dismissed as manifestly lacking any foundation in law, in accordance with Article 111 of the Rules of Procedure.

Costs

- 72 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. However, Article 88 of those rules provides that institutions are to bear their own costs in proceedings brought by servants of the Communities. Since the applicant has been unsuccessful, the parties must each bear their own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber)

hereby orders:

- 1. The application is dismissed.**
- 2. The parties shall each bear their own costs.**

Luxembourg, 10 December 1997.

H. Jung

Registrar

A. Kalogeropoulos

President