

ORDER OF THE COURT OF FIRST INSTANCE (Fourth Chamber)
20 August 1998 *

(Probationary officials – Daily subsistence allowance – Period in respect of which granted – Case manifestly lacking any foundation)

In Case T-132/97,

Michael Collins, an official of the Committee of the Regions of the European Union, residing in Brussels, represented by Vassilis N. Akritidis, of the Athens Bar, and Jonathan R. Branton, Solicitor, with an address for service in Luxembourg at the Chambers of Arsène Kronshagen, 12 Boulevard de la Foire,

applicant,

v

Committee of the Regions of the European Union, represented by Nicholas Forwood QC, 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 for annulment of a decision of the Committee of the Regions refusing to pay the applicant the daily subsistence allowance provided for in Article 10 of Annex VII to the Staff Regulations for the entire period of his probation plus one month,

* Language of the case: English.

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

composed of: P. Lindh, President, K. Lenaerts and J.D. Cooke, Judges,

Registrar: H. Jung,

makes the following

Order

Facts and procedure

- 1 The applicant took up employment with the Committee of the Regions on 1 March 1995, as a member of the temporary staff. On 3 April 1996, he was appointed as a probationary official in the Litigation Unit of the Directorate for Administration, Personnel, Finance and Litigation with effect from 16 April 1996. His probationary period came to an end on 15 January 1997.
- 2 By letter of 2 July 1996 to the Secretary-General of the Committee of the Regions, entitled 'Failure to provide a Daily subsistence allowance – Article 10 of Annex VII to the Staff Regulations. Complaint under Article 90(2) of the Staff Regulations', the applicant complained that the Committee of the Regions had failed to apply the provisions of Article 10 of Annex VII to the Staff Regulations by not granting him the daily subsistence allowance on his taking up employment as a probationary official. He referred specifically to the judgment of the Court of Justice in Case C-43/94 P *Parliament v Vienne* [1995] ECR I-2441.

- 3 On 22 October 1996, the Directorate for Administration, Personnel, Finance and Litigation of the Committee of the Regions drew up a statement of the applicant's daily subsistence allowance entitlement as a probationary official – of which he received a copy on 6 November 1996 – fixing the period in respect of which that allowance was granted at 120 days.
- 4 By letter of 9 January 1997 to the Secretary-General of the Committee of the Regions, citing as its subject-matter his complaint of 2 July 1996, the applicant pointed out that he had requested the application of Article 10 of Annex VII to the Staff Regulations with regard to payment of the daily subsistence allowance. He further asserted that, as a probationary official, he was entitled to the daily subsistence allowance for the whole of his probationary period plus one month, under the second part of Article 10(2), point (b), of Annex VII to the Staff Regulations. In support of that assertion, he referred in particular to the judgments in Case T-33/95 *Lozano Palacios v Commission* [1996] ECR-SC II-1535, Case T-137/95 *Mozzaglia v Commission* [1996] ECR-SC II-1657 and Case T-74/95 *Monteiro da Silva v Commission* [1996] ECR-SC II-1559.
- 5 By letter of 24 January 1997, the Secretary-General informed the applicant that his complaint had been rejected in so far as it sought payment of the daily subsistence allowance for the whole of his probationary period.
- 6 By application lodged at the Registry of the Court of First Instance on 24 April 1997, the applicant brought the present proceedings.

Forms of order sought

7 The applicant claims that the Court should:

- annul the decision of the Committee of the Regions inasmuch as it refused to pay him the daily subsistence allowance provided for in Article 10(2) of Annex VII to the Staff Regulations for the entire period of his probation plus one month;
- order the Committee of the Regions to pay him the daily subsistence allowance for the entire period of his probation plus one month, together with default interest of 8% per annum from the date when it became payable, minus the amount of BFR 101 880 which was paid to him by the Committee of the Regions as daily subsistence allowance for the first 120 days of his probationary period; and
- order the Committee of the Regions to pay the costs.

8 The Committee of the Regions contends that the Court should:

- dismiss the application as unfounded; and
- order the applicant to pay the costs.

Law

9 Under Article 111 of the Rules of Procedure of the Court of First Instance, where an action is manifestly lacking any foundation in law, the Court may give a decision on the action by reasoned order, without taking further steps in the proceedings.

- 10 In the present case, the Court considers that it has sufficient information from the documents before it. There is therefore no need to open the oral procedure.

Admissibility

- 11 The Committee of the Regions has not raised any objection to the admissibility of the present action.
- 12 However, under Articles 90 and 91 of the Staff Regulations, an application is not admissible unless it is brought against an act adversely affecting the applicant, and only acts which directly and immediately affect the applicant's legal situation can be regarded as adversely affecting him (see Case 204/85 *Stroghili v Court of Auditors* [1987] ECR 389, paragraph 6). Since the rules of admissibility laid down in those two articles are a matter of public policy, the Community judicature must consider them of its own motion (see Case T-587/93 *Ortega Urretavizcaya v Commission* [1996] ECR-SC II-1027, paragraph 25).
- 13 In addition, it is settled case-law that the precise categorisation of a letter or memorandum is to be determined by the Court alone and not by the intention of the parties (see Case T-115/92 *Hogan v Parliament* [1993] ECR II-895, paragraph 36).
- 14 In the present case, the letter of 2 July 1996, although described by the applicant as a complaint under Article 90(2) of the Staff Regulations, was not made against any act adversely affecting him within the meaning of that article. It is clear from the documents before the Court that when that letter was sent the Committee of the Regions had not adopted any decision whatever concerning payment of a daily subsistence allowance to the applicant as a probationary official. In such circumstances, granting of that allowance must necessarily be conditional on a prior request made by the official, in order to enable him to communicate his claims to the administration and set out the grounds of his entitlement to have those claims satisfied under Article 10 of Annex VII to the Staff Regulations (see, to that effect,

the Opinion of Advocate General Da Cruz Vilaça in Case 280/85 *Mouzourakis v Parliament* [1987] ECR 589, at p. 600).

- 15 However, it is clear from the wording and tenor of the applicant's two letters of 2 July 1996 and 9 January 1997, and from the forms of order which he seeks in these proceedings, that in the first letter he was requesting payment of the daily subsistence allowance as from the time he was appointed as a probationary official, under Article 10 of Annex VII to the Staff Regulations, and that in the second letter he was in fact contesting the decision of 22 October 1996 granting him an amount equivalent to the daily subsistence allowance for a period of only 120 days, on the ground that under the second part of Article 10(2), point (b), of Annex VII to the Staff Regulations he was entitled to the daily subsistence allowance for the whole of his probationary period plus one month.
- 16 The letter of 2 July 1996 must therefore be regarded as a request under Article 90(1) of the Staff Regulations for payment of the daily subsistence allowance, and the letter of 9 January 1997 as a complaint under Article 90(2) against the decision of 22 October 1996 granting him that allowance for a period of only 120 days.
- 17 The form of order sought by the applicant must therefore be interpreted as annulment of that latter decision.
- 18 Since both the complaint and the application were lodged within the relevant time-limits, the action is therefore admissible.

Substance

Arguments of the parties

- 19 The applicant disputes the manner in which the Committee of the Regions has interpreted and applied the first subparagraph of Article 10(2) of Annex VII to the Staff Regulations ('the debated provision'). He maintains that point (a) of the debated provision concerns a single situation, that of an official not entitled to the household allowance, whereas point (b) concerns two separate situations, that of an official entitled to the household allowance and that of a probationary official. Those latter two situations, he considers, are separate and not cumulative – as is, moreover, clear from the use of the word 'or' rather than 'and' in the debated provision. There is nothing in the wording of point (b) which requires the two conditions to be applied cumulatively.
- 20 The purpose of the daily subsistence allowance is to compensate an official for the inconvenience resulting from the precarious nature of the employment relationship. Its amount is set at fixed levels. It is not a direct reimbursement of expenses actually incurred, as is the case under Article 9 of Annex VII to the Staff Regulations for expenses incurred in the case of a definitive change of residence, but rather a general compensation for all the expenses that may be incurred, and the inconveniences that are naturally incurred, when a person is in transition between two places of permanent establishment.
- 21 The Court of Justice has held that Article 9(3) of Annex VII to the Staff Regulations implies that the employment relationship of the person concerned remains precarious until the end of the probationary period, that a probationary official's situation is not consolidated until he has been established and that the correct interpretation of that provision merely provides further argument for continuing to pay the daily subsistence allowance throughout that period of precarious employment (see Case C-43/94 P *Vienne*, cited above, paragraphs 27 and 28). The employment situation of a probationary official who is not entitled to the household allowance is in no way less precarious than that of a probationary official who is entitled to that allowance, nor does it continue for a shorter period of time. The interpretation of the Court of Justice as to the purpose of the daily subsistence allowance makes no

connection whatsoever between an official's entitlement to that allowance and the same official's entitlement to the household allowance.

- 22 The applicant stresses that a probationary official suffers from the insecurity of his employment until the probationary period is over, irrespective of whether he is entitled to the household allowance or not. Because of the precarious nature of his employment, it is natural and usual for a probationary official not to effect definitive removal until some time after the probationary period has ended. It is thus entirely logical that the period of payment of the daily subsistence allowance for probationary officials should be the period of probation plus one month, a view further evidenced by the fact that under Article 9 of Annex VII to the Staff Regulations an official has one year from the end of his probationary period in which to effect definitive removal.
- 23 The applicant submits that the Court of First Instance removed any possible ambiguity concerning the interpretation of the debated provision when it stated at paragraph 45 of its judgment in *Lozano Palacios*, cited above, which concerned a probationary official not entitled to the household allowance: 'For a probationary official, the period in respect of which the [daily subsistence] allowance is granted is normally the period of probation plus one month (see Article 10(2))' (see also *Monteiro da Silva* and *Mozzaglia*, cited above). The only likely interpretation of the term 'normally', he submits, is that it provides for the exceptional case of a probationary official's deciding to effect removal before the end of the probationary period — resulting in the cessation of his entitlement to the daily subsistence allowance in accordance with the last subparagraph of Article 10(2) of Annex VII to the Staff Regulations.
- 24 Acknowledging that an official entitled to the household allowance may have a greater level of expense during the precarious probationary period, the applicant points out that such a possibility is fully compensated by providing such officials with a higher level of daily subsistence allowance than that for a probationary official who is not entitled to the household allowance (see the table of entitlements under Article 10(1) of Annex VII to the Staff Regulations). Beyond that equalisation of differences, the applicant contends that the period of precariousness

for a probationary official who is not entitled to the household allowance is equivalent to that for a probationary official who is entitled to that allowance. Since those two equivalent situations are treated differently, there is thus discrimination.

- 25 The Committee of the Regions submits, with regard to the purpose of the daily subsistence allowance, that entitlement to all the allowances provided for in Annex VII to the Staff Regulations must be determined consistently with their purpose. It is clear from Article 71 of the Staff Regulations that that purpose is to compensate officials, within the limits and subject to the conditions laid down in Annex VII, for expenses which they have incurred by reason, *inter alia*, of their appointment. In the case of the daily subsistence allowance, Article 10(1) of Annex VII to the Staff Regulations makes it clear that the expenses concerned are only those which arise from the need of the official to change his place of residence in order to satisfy the requirements of Article 20 of the Staff Regulations. The objective pursued by the grant of the daily subsistence allowance is compensation for the expenses and inconvenience occasioned by the need for an official to move and establish a provisional residence at his place of employment 'while maintaining, also on a provisional basis, his previous residence' (see the judgment in Case T-15/93 *Vienne v Parliament* [1993] ECR II-1327, paragraph 35, and also Case 148/73 *Louwage v Commission* [1974] ECR 81, paragraph 25, *Mouzourakis*, cited above, paragraph 9, and Case T-63/91 *Benzler v Commission* [1992] ECR II-2095, paragraph 20).

- 26 The link between the need to retain two residences, albeit provisionally, and the entitlement to the daily subsistence allowance is confirmed by the last paragraph of Article 10(2) of Annex VII to the Staff Regulations, under which that allowance is not to be granted beyond the date on which the official effects his removal in order to satisfy the requirements of Article 20 of the Staff Regulations.

- 27 As regards the normal interpretation of the debated provision, the Committee of the Regions considers that a grammatical construction of its wording, which is essentially the same in all the language versions, unambiguously demonstrates, first, that the maximum period for which the allowance is payable depends on which of two precise categories the case falls into – officials who are not, and officials who are, entitled to the household allowance – and, second, that in the explicitly specified cases of officials entitled to the household allowance, that period varies according to whether the official concerned is a probationary official or not. There is thus no ambiguity in the debated provision. The applicant's interpretation, disregarding as it does the fact that the provisions for probationary officials were not incorporated as a *lex specialis* applicable to all such officials, would do violence to the very words and grammatical structure of that provision.
- 28 As regards the rationale for the differing maximum periods for the grant of the daily subsistence allowance to probationary officials, the Committee of the Regions observes that those periods reflect, and can be justified by, the fact that those who do not have a household within the meaning of the Staff Regulations will not normally have any reason to maintain for their own use a previous permanent place of residence in the place from which they are recruited. The allowance payable to them therefore envisages that for the first 15 days they may have to find temporary hotel accommodation but that after that period they will have found more permanent longer-term accommodation at their place of work.
- 29 By contrast, in the case of a probationary official entitled to the household allowance, the precarious nature of the engagement during the probationary period has the principal effect of making it reasonable for the whole of the household not to move to the official's new place of work definitively until after his appointment has been confirmed. It would be seriously disruptive of the social and economic lives of an official's family and dependants if, on one spouse's appointment on a probationary basis, the whole household were to be expected to move to the official's place of work, only then to face the possibility that, if the appointment is not confirmed at the end of the probationary period, they would have either to return to their place of origin – but not normally to the same residence – and try to reestablish the economic and social links that had earlier been broken, or to remain in the place of work to which the appointment had been made, with the difficulty of finding new employment and establishing social and educational links

in an unfamiliar environment. By allowing the probationary official to maintain his previous residence, where the rest of his household remains pending the completion of his probationary period, but then expecting the official to remove his household shortly thereafter, the regulations ensure a fair balance between the legitimate needs of the probationary official and his household on the one hand and the needs of the Community institutions and of proper budgetary control and efficient administration on the other.

- 30 That interpretation is not discriminatory. Discrimination consists of treating equivalent situations differently. In the present case, there is a very real difference between the situation of a probationary official who is not, and that of one who is, entitled to the household allowance.
- 31 The Committee of the Regions stresses that the case-law links entitlement to the daily subsistence allowance to the circumstance that the official in question is still maintaining, on a provisional basis, his previous place of residence, while being required to establish a second place of residence at his place of work (see *Lozano Palacios*, cited above, paragraph 55). That link is relevant not only to the interpretation of Article 10(1) of Annex VII to the Staff Regulations but also to the rationale for the difference of treatment between officials who are entitled to the household allowance and those who are not.
- 32 The Committee of the Regions points out that the case-law does not include any case in which a probationary official not entitled to the household allowance has been held entitled to a daily subsistence allowance for a period longer than 120 days. In *Vienne*, *Monteiro da Silva* and *Mozzaglia*, cited above, the applicants were all probationary officials entitled to the household allowance. As regards paragraph 45 of the *Lozano Palacios* judgment, cited above, the Committee of the Regions points out that the issue in that case was not the length of time for which the daily subsistence allowance should be payable but whether it was payable at all.

Findings of the Court

- 33 Article 20 of the Staff Regulations requires an official to reside in the place where he is employed or at no greater distance therefrom than is compatible with the proper performance of his duties.
- 34 Article 71 provides that an official is to be entitled, as provided for in Annex VII, to reimbursement of expenses incurred by him on taking up appointment, transfer or leaving the service, and also to reimbursement of expenses incurred by him in the course of or in connection with the performance of his duties.
- 35 Article 10(1) of Annex VII to the Staff Regulations specifies that where an official furnishes evidence that he must change his place of residence in order to satisfy the requirements of Article 20 of the Staff Regulations, he is to be entitled to a daily subsistence allowance, the amount and duration of which are specified.
- 36 The debated provision states that the period in respect of which the daily subsistence allowance is granted is to be as follows:
- ‘(a) in the case of an official who is not entitled to the household allowance: 120 days;
 - (b) in the case of an official who is entitled to the household allowance: 180 days or, if the official is a probationer, the period of probation plus one month.’
- 37 In the present case, it is not disputed that the applicant satisfied the requirements of Article 10 of Annex VII to the Staff Regulations as regards entitlement to the daily subsistence allowance. Nor is it disputed that he was not, at least at the material time, entitled to the household allowance.

- 38 The issue is thus confined to the question whether the applicant was entitled, simply by reason of his status as a probationary official, to payment of the daily subsistence allowance provided for in the debated provision for the whole of his probationary period plus one month, even though he was not entitled to the household allowance.
- 39 It is quite clear from the actual wording of the debated provision that the period in respect of which the daily subsistence allowance is granted depends, in the first place, solely on whether the recipient is entitled to the household allowance. If he is not, then point (a) of the debated provision applies and the period is 120 days. Only if the recipient is entitled to the household allowance does point (b) apply, distinguishing, in the second place, between probationary and other officials. The latter are entitled to receive the daily subsistence allowance for a period of 180 days and the former for the duration of their period of probation plus one month.
- 40 The use of the colon after the words ‘in the case of an official who is entitled to the household allowance’ precludes any other construction.
- 41 That finding is also consistent with the purpose of Article 10 of Annex VII to the Staff Regulations. The objective of the daily subsistence allowance, which may be granted only in respect of a period not exceeding certain limits, is, *inter alia*, to compensate for the expenses and inconvenience occasioned in particular by the precarious situation of a probationary official who is required to establish a provisional residence at his place of employment while maintaining, also on a provisional basis, his previous residence (see the judgments in *Mouzourakis*, cited above, paragraph 9, and *Mozzaglia*, cited above, paragraph 46).
- 42 Whilst the employment relationship is equally precarious for probationary officials who are entitled to the household allowance and those who are not, and whilst that precariousness continues until they become established officials on completion of their probationary period, it is none the less much more difficult, and also more risky, for a probationary official having a household within the meaning of the Staff

Regulations to transfer that whole household to his place of employment, with all the consequences thereby entailed as regards, in particular, the spouse's employment and the children's education, than it is for a probationary official not having a household, within the meaning of the Staff Regulations, to move. Since those in the latter category will thus experience fewer difficulties in changing their residence, the authors of the Staff Regulations did not consider that they were required to maintain their previous residence, on a provisional basis, throughout their probationary period.

- 43 As the Committee of the Regions has rightly pointed out, the debated provision grants probationary officials not entitled to the household allowance the daily subsistence allowance for a period of 120 days in order to enable them to find accommodation suitable to their requirements in the place of employment and to make arrangements with regard to their previous residence, for example by letting or subletting it.
- 44 It follows, moreover, from the foregoing that, in view of the differences between the situation of probationary officials who are entitled to the household allowance and the situation of those who are not, the wording of the debated provision is not incompatible with the principle of non-discrimination.
- 45 The applicant can derive no support from the judgments in *Lozano Palacios*, *Monteiro da Silva* and *Mozzaglia*, cited above. There, the Court decided only the question whether the officials concerned had had to change their place of residence for the purposes of Article 10(1) of Annex VII to the Staff Regulations, and not that of the period in respect of which the daily subsistence allowance was to be granted. In addition, the sentence cited by the applicant, which is exactly the same in the three judgments (see paragraphs 45, 45 and 38 respectively) appears in a purely narrative section, simply summarising in a few words the tenor of Article 10(2) of Annex VII to the Staff Regulations.

- 46 Nor are Case T-15/93 *Vienna v Parliament* and Case C-43/94 P *Parliament v Vienna*, both cited above, of any assistance to the applicant. In those judgments, the Court of First Instance and the Court of Justice ruled, in substance, only on the question whether a probationary official who had already received a daily subsistence allowance as a member of the auxiliary and of the temporary staff, was entitled to full application of Article 10 of Annex VII to the Staff Regulations.
- 47 It follows from all of the foregoing that the application must be dismissed as manifestly lacking any foundation in law.

Costs

- 48 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. However, Article 88 of those rules provides that institutions are to bear their own costs in proceedings brought by servants of the Communities. In the present case, therefore, the parties must each bear their own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber)

hereby orders:

1. The application is dismissed as manifestly lacking any foundation in law.
2. The parties shall each bear their own expenses.

Luxembourg, 20 August 1998.

H. Jung
Registrar

P. Lindh
President