

JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber)
23 February 1995

Case T-535/93

F
v
Council of the European Union

(Officials – Recruitment – Refusal of employment on account of physical
unfitness – Rights of the defence – Manifest error of assessment)

Full text in French II - 163

Application for: annulment of the Council's decision not to recruit the
applicant on account of physical unfitness to perform
typing duties.

Decision: Application dismissed.

Abstract of the Judgment

The applicant was successful in an open competition for the constitution of a reserve list of typists. When asked to undergo the medical examination on recruitment, he produced a medical report drawn up on his release from hospital in 1992. That report showed that he had been diagnosed as having a second-degree

chondrosarcoma on the right scapula, and that the tumour had been entirely removed. Having sent that report to a specialized institute for its opinion, the Council's medical officer issued a finding of physical unfitness.

The applicant appealed to the medical committee pursuant to the second paragraph of Article 33 of the Staff Regulations, submitting to the committee a report from his own doctor, whose conclusions differed from those of the medical officer. At its meeting, the medical committee asked the applicant to perform a typing exercise in order to evaluate his mobility and posture. It then issued its opinion, which confirmed that of the medical officer.

The applicant then asked the Council to state the objective scientific factors on which the medical committee had based its opinion. The medical officer informed the applicant's doctor that the committee had based its finding, first, on the risk of a progression of the disease and, secondly, on the post-operative effects disabling the applicant for the duties envisaged, which would involve almost continuous typing.

The first plea, alleging infringement of the rights of the defence

(a) Alleged illegality of the second paragraph of Article 33 of the Staff Regulations, as regards the composition and functioning of the medical committee

The Community judicature ensures the observance of general principles of law, of which fundamental rights form an integral part. In safeguarding such rights, the Court draws inspiration from constitutional traditions common to the Member States and from guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, the European Convention on Human Rights being particularly significant in that respect (paragraph 32).

See: 4/73 *Nold v Commission* [1974] ECR 491, para. 13; 222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, para. 18; 5/88 *Wachauf v Bundesamt für Ernährung und Forstwirtschaft* [1989] ECR 2609, para. 19; C-260/89 *ERT* [1991] ECR I-2925

Article 6 of the European Convention on Human Rights, which the applicant invokes in support of his argument that the second paragraph of Article 33 of the Staff Regulations, referred to above, is illegal, applies only to courts and not to a medical committee which, as in this case, is an appeal body entrusted, in the context of the administrative procedure for appointments, with the task of giving a purely medical opinion after the opinion of the medical officer of the institution (paragraph 35).

In any event, so far as the observance of the defence rights of a candidate for a post is concerned, the composition of the medical committee – which excludes the doctor who issued the initial finding of unfitness and which is not exclusively composed of doctors of the institution in question – and its detailed rules of procedure – which include the keeping of the person concerned informed through his own doctor, the submission of an opinion by a doctor of his choice, and the possibility of carrying out further examinations and obtaining the opinion of specialists – are such as to ensure a full and impartial examination of that candidate's position (paragraphs 35 to 36).

See: 75/77 *Mollet v Commission* [1978] ECR 897; T-121/89 and T-13/90 *X v Commission* [1992] ECR II-2195; T-10/93 *A v Commission* [1994] ECR II-179, paras 23 to 27

(b) The alleged infringement by the institution of its duty to communicate the relevant information to the applicant and his doctor concerning the grounds of unfitness

The duty to state reasons for the refusal to appoint a candidate to a post on grounds of physical unfitness must be balanced with the requirements of medical confidentiality. That balance is achieved by allowing the person concerned to require the grounds of unfitness to be communicated to the attending practitioner of his choice, to enable the latter to advise him on the possibility of challenging the reasons for refusing to recruit him (paragraph 37).

See: 121/76 *Moli v Commission* [1977] ECR 1971; *Mollet v Commission*, cited above; 155/78 *M v Commission* [1980] ECR 1797; *X v Commission*, cited above; *A v Commission*, cited above

In this case, the Council has complied with its obligation to communicate to the applicant and his doctor all the relevant information concerning the grounds on which the opinions of unfitness were based (paragraph 40).

(c) Infringement of the alleged obligation of the institution to inform the applicant of the scope of Article 33 of the Staff Regulations

The Council has not failed to fulfil its duty of assistance and proper administration in relation to the applicant, since it advised him of the steps to be followed in order to protect his rights, and Article 33 of the Staff Regulations does not oblige the institution to inform a candidate of all the implications of the procedure in question (paragraph 42).

The second plea, alleging manifest error of assessment

The Community judicature cannot substitute its own assessment for that of the doctors, nor, in particular, for the assessment of the medical committee, which must therefore be considered definitive provided it was made under conditions which were not irregular. However, the Court does have jurisdiction when exercising its power of judicial review to verify whether the recruitment procedure was lawfully conducted and, more particularly, to examine whether the decision of the appointing authority refusing to recruit a candidate by reason of physical unfitness is based on a medical opinion for which reasons are given, and which establishes a comprehensible link between the medical findings it contains and the conclusion which it reaches (paragraph 50).

See: *A v Commission*, cited above; T-94/92 *X v Commission* [1994] ECR II-481

The Court finds that, in this case, the opinions of both the Council's medical officer and the medical committee establish a comprehensible link between the medical findings they contain and the conclusion they reach. In particular, the opinion of the medical committee does not contain an error of assessment simply because it

does not share the view of the doctor attending the applicant. There was a strictly medical difference of opinion, which was resolved by the committee, whose function under the Staff Regulations is to verify whether the opinion issued by the institution's medical officer is well founded (paragraphs 51 to 54).

Costs

During the administrative procedure, although the Council did not infringe any procedural rule, it played an important part in the decision of Mr F to bring the action. Moreover, during the proceedings before the Court, and following the latter's request to the Council that it produce the report of the medical committee, the Council submitted a report already produced by the applicant, and not the record of the committee's meeting, even though it was obvious that the Court desired the report indicating the reasons for the committee's opinion to be placed on the file. The existence of that record was not revealed until the first hearing. The oral procedure therefore had to be re-opened. For all those reasons, taken as a whole, the defendant is ordered to bear all the costs, including those incurred by the applicant (paragraphs 58 to 60).

Finally, since the Council's conduct also influenced the intervening party in its decision to intervene and in the attitude it adopted during these proceedings, the Council is ordered to pay one-half of the costs of that party (paragraph 61).

Operative part:

1. The application is dismissed.
2. The defendant is ordered to bear its own costs and to pay those of the applicant and one-half of the costs of the intervener.
3. The intervener is ordered to bear one-half of its own costs.