

JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber)
6 April 1990*

In Case T-43/89

Walter Gill, a former official of the Commission of the European Communities, residing at Stoke-by-Clare, Suffolk, United Kingdom, represented by Aloyse May, of the Luxembourg Bar, with an address for service in Luxembourg at the latter's Chambers, 31 Grand-rue,

applicant,

v

Commission of the European Communities, represented by Sean van Raepenbusch, a member of its Legal Department, acting as Agent, with an address for service in Luxembourg at the office of Georgios Kremlis, a member of its Legal Department, Wagner Centre, Kirchberg,

defendant,

APPLICATION for the annulment of the Commission's decision of 20 May 1988 refusing to apply in the applicant's case the second paragraph of Article 78 of the Staff Regulations and fixing his invalidity pension on the basis of the third paragraph of Article 78 of those regulations,

THE COURT OF FIRST INSTANCE (Fourth Chamber)

composed of: D A O Edward, President of Chamber, R Schintgen and R Garcia-Valdecasas, Judges,

Registrar: H Jung

having regard to the written procedure and further to the hearing on 14 March 1990,

gives the following

* Language of the case: French

Judgment

The facts

- 1 In the written procedure the Commission put forward an objection of inadmissibility. Since the Commission's agent formally waived that objection at the beginning of the hearing, only matters relating to the substance of the case are mentioned or discussed hereinafter.

- 2 In 1948, after eight years' service in the Royal Air Force as a pilot, the applicant, who was born in 1924, began working in the coal-mines in England. He was successively a miner, shot-firer, mine director, mines inspector, regional mines inspector and finally a principal mines inspector attached to the ministry in London. Between 1948 and 1971 he went down the mines five to seven times a week. At the same time, from 1949 to 1952, he studied mining engineering and in 1952 obtained a BSc Honours degree in Engineering and Mining from the University of London. Between 1971 and 1972 he went down the mines several times a month. Until about 1961 he smoked.

- 3 In view of his wide professional experience, the applicant was recruited by the Commission in 1974 as a Principal Administrator and assigned to the Division 'Safety Matters in the Coal and Steel Industries' of the Directorate 'Industrial Safety and Medicine' in the Directorate-General for Social Affairs in Luxembourg. More precisely, he was recruited in order to perform advisory and inspection duties in relation to:
 - (i) the promotion of research in the field of occupational health in mines, the coordination of such research and the dissemination of the results;
 - (ii) the preparation of a new programme in the field of mining safety by contacts with interested parties in the ECSC.

- 4 The applicant gave complete satisfaction in the performance of those tasks and his duties were extended to other managerial work. Between 1974 and 1979 he was called upon to inspect various mines in the countries of the Community and to go down mines some 20 to 30 times. As a result of an accident which occurred at the beginning of 1979 he went down the mines only once or twice between 1979 and 1981.

- 5 The x-ray examination of his chest, carried out during the medical examination which he underwent before he took up his duties, revealed chronic bronchial pneumonopathy (disease of the lungs) The Commission did not inform the applicant of it nor did it invoke the provisions of Article 1 of Annex VIII to the Staff Regulations of the European Communities (hereinafter referred to as 'the Staff Regulations')
- 6 On 11 June 1981, the applicant, claiming to be suffering from an occupational disease within the meaning of the second paragraph of Article 78 of the Staff Regulations, submitted an application to be declared to be suffering from invalidity The medical certificate which he enclosed certified that his incapacity for work was 'due to obstructive bronchial pneumonopathy probably connected with the inhalation of dust (minework)' Very soon it was established that he was suffering from permanent and total invalidity and he claimed that he was entitled to a pension calculated pursuant to the second paragraph of Article 78
- 7 After many delays and misunderstandings, none of which was due to the applicant, the Invalidity Committee finally met on 27 March 1987 In the mean time, on 21 October 1983, the Commission's appointing authority had adopted a provisional decision granting the applicant an invalidity pension calculated on the basis of the third paragraph of Article 78 of the Staff Regulations The Invalidity Committee drew up its report on 31 March 1987 Its main conclusions were as follows:

'Mr Walter Gill continues to suffer from permanent invalidity which is regarded as total and as preventing him from performing the duties corresponding to a post in his career bracket

The invalidity does not arise from an accident in the course of or in connection with the performance of his duties, from an occupational disease, from a public-spirited act or from risking his life to save another human being

The invalidity has not been deliberately brought about by the official Mr Gill is not suffering from one of the diseases referred to in the European Communities' list of industrial diseases However, the Invalidity Committee is of the opinion that there is a probable relationship of cause and effect and a sufficiently direct relationship with a specific and normal risk inherent in the duties performed between 1948 and 1971 On the other hand, there is little likelihood of any relationship of cause and effect as regards the period from 1974 to 1981 when Mr Gill was an official of the Commission of the European Communities in Luxembourg'

- 8 On 4 November 1987, the Director-General of the Directorate-General for Personnel and Administration sent the applicant the following letter:

‘In the absence of a sufficient probability of a causal relationship between your duties as a Community official and your invalidity, this cannot be regarded as an occupational disease within the meaning of the second paragraph of Article 78 of the Staff Regulations

I therefore regret to inform you that your invalidity pension will continue to be determined in accordance with the third paragraph of Article 78 ’

- 9 The applicant immediately lodged a complaint, which was rejected by decision of the Commission of 20 May 1988

The procedure

- 10 Those were the circumstances in which the applicant, by an application lodged at the Registry of the Court of Justice on 18 August 1988, brought the present action against the Commission for the annulment of the decision of 20 May 1988

- 11 The applicant claims that the Court should:

- (i) annul the decision of 20 May 1988;
- (ii) declare that the applicant is suffering total permanent invalidity arising from an occupational disease within the meaning of the second paragraph of Article 78 of the Staff Regulations;
- (iii) declare that the applicant is entitled to an invalidity pension equal to 70% of his basic salary, commencing on the day on which he was invalided out of the service, namely 1 November 1983;
- (iv) order the defendant to pay the costs

- 12 The Commission contends that the Court should:
- (i) declare the application inadmissible or at least unfounded;
 - (ii) make an order for costs in accordance with the law
- 13 The written procedure took place entirely before the Court of Justice Pursuant to Article 3(1) of the Council Decision of 24 October 1988 establishing a Court of First Instance of the European Communities, the Court of Justice (First Chamber), by order of 15 November 1989, referred the case to the Court of First Instance
- 14 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Fourth Chamber) decided to open the oral procedure without any preparatory inquiry The Court of First Instance did, however, request the Commission to complete the case-file by producing certain documents
- 15 The hearing took place on 14 March 1990 As mentioned above, the Commission's agent formally waived, at the beginning of the hearing, the objection of inadmissibility which had been raised in the written pleadings The representatives of the parties presented oral argument and answered questions put by the Court of First Instance
- 16 In support of his claims, the applicant submits that:
- (i) the second paragraph of Article 78 of the Staff Regulations does not require a causal relationship between the occupational disease and the duties performed at the Communities;
 - (ii) in any event, his disease was aggravated by the conditions under which he performed his duties at the Communities, in particular by the various times he went underground;

- (iii) he was not made aware of the signs of disease apparent from the x-rays taken when he took up his duties and so he was not able to undergo medical treatment and thus avoid total invalidity;
- (iv) the Invalidity Committee's terms of reference were imprecise and incorrect;
- (v) in so far as it finds no causal link between the disease and the duties performed subsequent to 1974, the Invalidity Committee's report is insufficiently reasoned

17 The Commission, disregarding the identity of his employer at any particular time, does not deny that the applicant's invalidity is due to an occupational disease in so far as that disease has its origin in the applicant's mining occupation. Nor does it deny that the disease became worse after 1974. However, as regards the interpretation given by the applicant to the second paragraph of Article 78 of the Staff Regulations, it maintains that the term 'occupational disease' must be interpreted in accordance with Article 3 of the Rules on the Occupational Insurance of Officials of the European Communities against the Risk of Accident and of Occupational Disease (hereinafter referred to as 'the Insurance Rules') adopted in implementation of Article 73 of the Staff Regulations. Article 3 provides:

'1 The diseases contained in the "European List of Occupational Diseases" shall be considered occupational diseases

2 Any disease or aggravation of a pre-existing disease not included in the list referred to in paragraph 1 shall also be considered an occupational disease if it is sufficiently established that such disease or aggravation arose in the course of or in connection with the performance by the official of his duties with the Communities'

18 Since the disease from which the applicant suffers is not included in the European List of Occupational Diseases, the Commission maintains that Article 3(2) of the Insurance Rules, which requires a causal link to be proved, must be applied. The Commission also considers that the applicant's standpoint is contrary to the

elementary principle underlying any insurance cover against a social risk regardless of the branch of social security concerned, according to which such social security rules apply only if the causal event or circumstance in question arose under them. In its view, the grant of benefits to the applicant as a result of his chronic bronchial pneumonopathy, which he undoubtedly contracted when he was working in the coalmines in the United Kingdom and which continued to develop after he ceased to be exposed to the risk, must be examined with reference to United Kingdom legislation alone, by which he was covered during that period. It is common ground, moreover, that the applicant is afforded no entitlement under that legislation. In support of those arguments, the Commission's Agent also referred in his oral argument to the principles laid down in Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community.

- 19 If the premise is accepted that the sets of rules established by Articles 73 and 78 of the Staff Regulations are different and independent of one another, as the Court has already held (judgments of 12 January 1983 in Case 257/81 *K v Council* [1983] ECR 1 and of 20 May 1987 in Case 242/85 *Geist v Commission* [1987] ECR 2181), it is necessary to consider whether the definition of 'occupational disease' in Article 3 of the Insurance Rules may be adopted for the purposes of interpreting the second paragraph of Article 78 of the Staff Regulations. First of all, it should be noted that (in the French version) the articles in question both start in the same way ('Dans les conditions fixées', 'Dans les conditions prévues'). Whereas, however, Article 73(1) of the Staff Regulations entrusts the institutions with the task of drawing up, by common agreement, rules governing the award of the benefits provided for in Article 73(2) and (3), the first paragraph of Article 78 of the Staff Regulations refers to Articles 13 to 16 of Annex VIII for the conditions under which an official shall be entitled to an invalidity pension under Article 78. Thus, it is by virtue of the express power contained in Article 73 of the Staff Regulations that 'occupational disease' is defined in Article 3 of the Insurance Rules. However, since Article 78 of the Staff Regulations does not give the institutions a similar power, the application of its provisions is subject only to the conditions provided for in Articles 13 to 16 of Annex VIII to the Staff Regulations, which contain neither a definition of 'occupational disease' nor a reference to the provisions of Article 73 of the Staff Regulations or to the rules implementing that article. It would therefore be contrary to the scheme of the provisions concerned to refer, for the purposes of applying the second paragraph of Article 78 of the Staff Regulations, to a definition laid down in the Insurance Rules under an express power conferred by the Staff Regulations, especially if such a reference were to limit the rights of those concerned.

- 20 Similarly, the argument based on Regulation No 1408/71 of the Council cannot be accepted. Since that regulation is confined to coordinating the national laws on social security, it cannot be referred to for the purpose of interpreting the Staff Regulations, which, being an independent instrument of the Communities, must be interpreted in their own context and according to their own aims.
- 21 After relating the history of the provisions on the invalidity pension, the Court of Justice held that the object of the amendment made in 1972 to Article 78 of the Staff Regulations was to avoid unjustified benefits and that the present rules must be interpreted as excluding from the scope of the second paragraph facts which occurred exclusively prior to the official's entry into the service (judgment of 24 November 1983 in Case 342/82 *Cohen v Commission* [1983] ECR 3829, paragraphs 13 to 17). The official's pathological condition must have a sufficiently direct relationship with a specific and normal risk inherent in the duties which he performed for the Communities (judgment of 12 January 1983 in Case 257/81 *K v Council* [1983] ECR 1, paragraph 20).
- 22 The special circumstances of the present case must be considered in the light of those considerations. The applicant was recruited by the Commission because of his very wide professional experience. His recruitment to the service of the Communities was the extension, even the peak, of a homogenous professional career which began with manual work down the mines, progressing to managerial responsibilities, then to supervision and inspection at local, regional and national levels and finally at the Community level. His experience down the mines was an integral part and an essential feature of that career. The risks of lung disease resulting from the inhalation of dust in mines were well known and also an integral part of that career.
- 23 The Commission thus engaged the applicant in the full knowledge that he could suffer from a disease connected with his work. That possibility was confirmed when the x-ray examination of his chest carried out when he took up his duties revealed the existence of chronic lung disease. That examination was carried out in the interests of the institution pursuant to Article 33 of the Staff Regulations and the result of the examination could not therefore be covered by medical secrecy, as the Commission's Agent maintained at the hearing. Article 28(e) of the Staff Regulations provides that an official may be appointed only on condition that he is

physically fit to perform his duties. The precise purpose of the medical examination is to enable the institution not to proceed with the appointment of an applicant who is unfit for the intended duties or to appoint him and assign him to duties compatible with his state of health. At the very least, the institution may rely on the provisions of Article 1 of Annex VIII to the Staff Regulations and, in so far as risks arising from sickness from which he is suffering are concerned, decide to admit him to guaranteed benefits in respect of invalidity only after a period of five years.

24 The Commission chose none of the three possibilities opened to it. On the contrary, it appointed the applicant to duties requiring him to continue to go down mines, with all the risks which ensued for his future state of health. It is self-evident that the Commission could thus profit to the maximum from the applicant's experience and knowledge and thereby from his professional activity undertaken at the risk of contracting a lung disease. It would be manifestly unjust for the Commission to be able to benefit in that way from the applicant's professional experience acquired before and after he entered the Commission's employment without bearing the disadvantages. The Commission must be presumed to have accepted the financial responsibility arising from the risk that the applicant's lung disease, which was already established, would result in invalidity making it impossible for him to perform his duties.

25 It follows that the applicant's claim satisfies the conditions of the second paragraph of Article 78 of the Staff Regulations, as that article must, in the view of the Court of First Instance, be interpreted.

26 Even if the Commission's argument that Article 78 of the Staff Regulations must be interpreted in the light of Article 3 of the Insurance Rules is accepted as well founded, the causal link, connection and continuity required by Article 3(2) have clearly been established. The Commission does not deny that when the applicant took up his duties he was suffering from a 'pre-existing disease' nor that there was an 'aggravation' of that disease during the period of his employment. The fact that the existence of the disease was known to the Commission from the beginning and the fact that its aggravation was entirely foreseeable constitute a set of concordant presumptions which are sufficient to enable the Court to conclude that the aggravation which occurred arose 'in the course of or in connection with the performance of duties in the service of the Communities'.

- 27 Since the factors necessary for justifying the applicant's claim are met, there is no need to deal with the other submissions and arguments. The contested decision must be annulled. The Commission must take the necessary measures to comply with this judgment.

Costs

- 28 According to Article 69(2) of the Rules of Procedure, applicable *mutatis mutandis* to the Court of First Instance pursuant to Article 11 of the Council Decision of 24 October 1988, the unsuccessful party is to be ordered to pay the costs if they have been asked for in the successful party's pleading. Since the defendant has failed in its submissions, it must be ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber)

hereby:

- (1) **Annuls the Commission Decision of 20 May 1988 refusing to apply in the applicant's case the second paragraph of Article 78 of the Staff Regulations and fixing his invalidity pension on the basis of the third paragraph of Article 78 of the Regulations;**
- (2) **Orders the Commission to pay the costs**

Edward

Schintgen

Garcia-Valdecasas

Delivered in open court in Luxembourg on 6 April 1990

H Jung

Registrar

D A O Edward

President