JUDGMENT OF THE COURT OF FIRST INSTANCE (Second Chamber)
14 May 1998

Case T-165/95

Arnaldo Lucaccioni
v
Commission of the European Communities

(Officials – Action for damages – Occupational disease – Damage – Taking into account of benefits received under Article 73 of the Staff Regulations – Duration of the procedure for recognising an occupational disease – Fault)

Application for: damages for the material and non-material loss allegedly sustained as a result of his disease and interest on the lump sum awarded under Article 73 of the Staff Regulations of Officials of the European Communities.

Decision: Application dismissed.

Abstract of the Judgment

The applicant took up a post with the Commission in 1962 and between 1967 and 1987 worked for approximately 16 years in the Berlaymont Building in Brussels.

On 15 January 1990 the applicant suffered a haemoptysis. He was examined at the university hospital of Saint-Luc in Brussels and diagnosed as having bronchial cancer.

On 12 March 1990 the applicant underwent a left upper lobectomy of the lung. The surgeon expressed the view that the applicant presented sequelae of tuberculosis of the left upper lobe. Despite the initial diagnosis of cancer no tumour could be detected on the section removed. At the surgeon's request a sample of the tissue removed from the lung was tested by the mineralogical laboratory at the Hôpital Erasme. In a report dated 30 August 1990 signed by Professor De Vuyst a rate of 680 asbestotic bodies was declared.

On 26 November 1990 the applicant sent the administration and the appointing authority a note in which he stated, in accordance with Article 73 of the Staff Regulations of Officials of the European Communities (Staff Regulations) and Article 17 of the Rules on the insurance of officials of the European Communities against the risk of accident and of occupational disease (Insurance Rules), that he had contracted lung cancer in the form of epidermoid carcinoma which had entailed his having a left upper lobectomy, and chronic asthmatiform bronchitis (asthma). He requested that a decision be taken recognising his occupational disease and that a rate of permanent invalidity be determined, in accordance with Article 19 of the Insurance Rules.

By letter of 18 January 1991 the director of Directorate DO 'Personnel – Rights and Obligations' of the Directorate-General for Personnel and Administration (DG IX) (personnel director) informed the applicant that in view of his state of health his case would be referred to the Invalidity Committee provided for in Article 78 of the Staff Regulations.

At the applicant's request the Laboratorio di Ultrastrutture of the Istituto Superiore di Sanità in Rome tested a tissue sample taken from the applicant's lung on 12 March 1990. A report by Dr Donelli dated 22 April 1991 declared the presence of 6 000 000 fibres of chrysolite (white asbestos) per gramme of dry tissue.

In a report of 6 June 1991 the mineralogical laboratory at the Hôpital Erasme declared the presence of 595 asbestic bodies per gramme of dry tissue (and also, apparently, the presence of 34 600 fibres per gramme of dry tissue) and concluded that amosite (brown asbestos) and tremolite were present in a tissue sample taken from the applicant's lung.

The Invalidity Committee met on 10 June 1991. It concluded that the applicant was suffering from total permanent invalidity preventing him from performing the duties corresponding to a post in his career bracket and that he was therefore required to terminate his service with the Commission.

On 16 July 1991 the personnel director, in his capacity as appointing authority, took a decision retiring the applicant, in accordance with Article 53 of the Staff Regulations, and granted him an invalidity pension determined in accordance with the third paragraph of Article 78 of the Staff Regulations, with effect from 1 August 1991. The pension was equal to 70% of the applicant's basis salary.

By letter of 15 October 1991 the applicant submitted a complaint within the meaning of Article 90(2) of the Staff Regulations against the decision of 16 June 1991 retiring him. By letter of 3 March 1992 the Commission informed the applicant that his complaint against the decision retiring him had been rejected. The applicant did not appeal to the Court of First Instance against the decision rejecting his complaint.

In the context of the procedure then being conducted pursuant to Article 73 of the Staff Regulations, the Commission appointed Dr Dalem, of the University of Liège, to draw up the medical report provided for in Article 19 of the Insurance Rules. Dr Dalem sought the assistance of Dr Bartsch, a specialist in pneumology at the Institut Provincial Ernest Malvoz in Liège.

On the basis of an examination of the applicant, an analysis of the documents in the file and further correspondence with various doctors, Dr Bartsch drew up a report in which he concluded that no occupational disease was present. On the basis of Dr Bartsch's report Dr Dalem submitted his medical report to the Commission and concluded that no occupational disease was present. The applicant was not suffering from bronchial cancer and although his lungs actually contained asbestos fibres there was no evidence of fibrosis in reaction to the asbestos, so that the applicant was not suffering from asbestosis either.

By note of 17 February 1992 the head of the unit 'Insurance against Accidents and Occupational Disease' informed the applicant of Dr Dalem's findings and notified him of a draft decision rejecting his request to be recognised as suffering from an occupational disease, in accordance with Article 21 of the Insurance Rules.

The applicant continued to follow the procedure laid down in Article 73 of the Staff Regulations and requested that the Medical Committee provided for in Article 23 of the Insurance Rules be convened.

At its first meeting the Medical Committee was not unanimous, having regard in particular to the different results obtained by the various laboratories. It therefore decided to request Dr De Vuyst and Dr Donelli to carry out further tests and to ask Dr Woitowitz to carry out a third test. Dr De Vuyst found 235 000 fibres of crocidolite (blue asbestos), amosite, anthophyllite and chrysolite per gramme of dry tissue. Dr Donelli confirmed the presence of chrysolite. Dr Woitowitz found 350 000 fibres of crocidolite per gramme of dry tissue and 300 000 fibres of chrysolite per gramme of dry tissue.

Following a second meeting on 25 February 1994 the Medical Committee filed its report on 1 March 1994. It adopted its findings by a majority, since Dr Brochard disagreed. The Medical Committee found that the applicant's pulmonary carcinoma was to be regarded as an occupational disease and stated that his permanent total invalidity was 100% and must be backdated to the date on which it was diagnosed (January 1990). 'Having regard to the permanent signs (scars, deformation of the left breast, reduced muscle strength in his left arm) and the serious psychological disturbances which Mr Lucaccioni [was] experiencing', he was awarded an extra 30% compensation on the basis of Article 14 of the Insurance Rules.

By letter of 15 April 1994 the director-general of DG IX informed the applicant of the Medical Committee's findings in the following terms: 'I am in a position to award you a rate of total permanent invalidity of 130%, but I must point out that at this stage the medical questions raised in connection with the recognition of your occupational disease are subject to final arbitration.' The director-general informed the applicant that, in accordance with Article 73 of the Staff Regulations, he would

be paid a lump sum of BFR 25 794 194. The lump sum of BFR 25 794 194 was paid to the applicant on 28 April 1994.

On 15 May 1994 the applicant requested the Commission, *inter alia*, to communicate the findings of the Medical Committee to the Invalidity Committee so that the Invalidity Committee might amend its opinion and declare that his invalidity was the consequence of an occupational disease, to provide him with a statement for the BFR 25 794 194 and to pay him interest on the lump sum, plus the difference between his salary and his pension since August 1991, and to pay him ECU 3 000 000 damages for non-material harm. He relied, *inter alia*, on the faults committed by the Commission in exposing him to asbestos dust and in the way it had dealt with his case.

By letter of 22 September 1994 the director of Directorate B 'Rights and Obligations' of DG IX provided the figures requested but rejected the applicant's other requests.

On 15 December 1994 the applicant submitted a complaint within the meaning of Article 90(2) of the Staff Regulations against the decision contained in the letter of 22 September 1994. By decision of 3 May 1995, which was notified to the applicant on 29 May 1995, the Commission rejected the applicant's complaint.

By application lodged at the registry of the Court of First Instance on 29 August 1995 the applicant initiated the present action.

Substance

1. *Compensation for the material and non-material harm resulting from the applicant's occupational disease*

In a claim for damages brought by an official the Community can be held liable for damages only if a number of conditions are satisfied as regards the illegality of the allegedly wrongful conduct of the institutions, actual harm and the existence of a causal link between the conduct and the harm alleged to have been suffered (paragraph 56).

See: C-136/92 P *Commission* v *Brazzelli Lualdi and Others* [1994] ECR I-1981, para. 42; T-36/93 *Ojha* v *Commission* [1995] ECR-SC II-497, para. 13

Material harm consisting in the difference between the applicant's invalidity pension and his salary as an official

The purpose of the system established by Article 73 of the Staff Regulations is to provide compensation at a standard rate to an official who is the victim of an accident or suffers from an occupational disease, without its being necessary for the official to establish fault of such a kind as to render the institution liable. That being the case, the Court considers that it is only where the system established by the Staff Regulations does not permit adequate compensation to be made that the official is entitled to claim additional compensation. Otherwise the objective of the Staff Regulations incorporated in Article 73 would be distorted and the official would be unduly enriched.

In that regard, the benefits received under Article 73 of the Staff Regulations following an accident or an occupational disease must be taken into account in the

assessment of the harm in an action for damages by an official based on a fault susceptible of rendering the institution by which he was employed liable.

That principle applies not only to the physical and psychological consequences of an accident but also to the financial consequences of an accident or occupational disease (paragraphs 72 to 74).

See: 152/77 *B.* v *Commission* [1979] ECR 2819, para. 14; 169/83 and 136/84 *Leussink and Others* v *Commission* [1986] ECR 2801, paras 13 and 14

Even supposing it were established that the material damage suffered by the applicant as a result of the difference between his invalidity pension and his salary as an official up to the age of retirement was BFR 8 400 000 rather than BFR 5 780 000 (based on retirement at age 60) or BFR 8 050 000 (based on retirement at age 65), it must be considered to have been made good by the lump sum of BFR 25 800 000 already paid to the applicant pursuant to Article 73 of the Staff Regulations. It follows that the applicant's claim for compensation for the damage resulting from the difference between his invalidity pension and his salary as an official must be rejected (paragraphs 76 and 78).

Non-material damage

The non-material damage suffered by the applicant, when assessed on an equitable basis, cannot be put at more than BFR 5 950 000. The Court observes, in particular, that the applicant has not relied on any reduction in his life expectancy and that he has provided no evidence that an amount of that order might be awarded by way of compensation for comparable non-material damage by the courts of the Member States. Since the applicant has already received the sum of BFR 5 950 000, which was paid to him pursuant to Article 14 of the Insurance

Rules, the non-material damage must be considered as having been made good (paragraphs 83 to 89).

The material damage resulting from the sale of certain real property

The claim for compensation for the material damage resulting from the sale of certain real property belonging to the applicant must be rejected on the ground that neither the alleged damage nor the causal link between the alleged damage and his occupational disease has been sufficiently proved; accordingly, there is no need to ascertain whether the damage in question constitutes part of the harm for which the Commission may be held liable in its capacity as employer (paragraph 104).

See: *Leussink and Others* v *Commission*, cited above, para. 22

2. *Interest on the lump sum paid to the applicant pursuant to Article 73 of the Staff Regulations by way of compensation for the delay in dealing with his case*

The delays in dealing with the case and the irregularities affecting the procedure

The applicant's complaint alleging failure to state the grounds on which the Invalidity Committee's opinion was based

The applicant has already submitted a complaint against the decision of 16 July 1991 to retire him, which was based on the Invalidity Committee's report of 10 June 1991. That complaint was rejected by decision of the appointing authority of 3 March 1992 and the applicant failed to appeal to the Court against that decision. This complaint must therefore be rejected as out of time and thus inadmissible (paragraphs 129 and 130).

See: T-547/93 *Lopes* v *Court of Justice* [1996] ECR-SC II-185, para. 174; T-361/94 *Weir* v *Commission* [1996] ECR-SC II-381, para. 48

The complaints alleging a breach of the second paragraph of Article 78 of the Staff Regulations

The applicant claims in essence that the Commission has infringed the second paragraph of Article 78 of the Staff Regulations by not opening the procedure provided for therein until the procedure provided for in Article 73 of the Staff Regulations had been closed. If the Invalidity Committee had been asked to determine whether his disease was occupational in origin, in accordance with the second paragraph of Article 78 of the Staff Regulations, and not merely whether he was unfit for work, in accordance with the third paragraph of Article 78 of the Staff Regulations, the occupational origin of his disease would in all probability have been recognised by the Invalidity Committee in 1991 (paragraph 133).

A comparison between Articles 73 and 78 of the Staff Regulations reveals that the benefits provided for in those provisions are different and independent of each other, although they may be paid concurrently. Similarly, those provisions provide for two different procedures which may lead to different decisions that are independent of one another.

Although it is desirable that, where appropriate, the two procedures should be conducted in concert and that the same medical authorities should be invited to give an opinion on the different aspects of the official's invalidity, the legality of either procedure is not conditional upon such a requirement and in that regard the appointing authority has, according to the circumstances, a discretionary power (paragraphs 136 and 137).

See: 731/79 *B.* v *Parliament* [1981] ECR 107, paras 8 and 10; 257/81 *K.* v *Council* [1983] ECR 1, para. 10

The Commission is not to be criticised for the way in which it used its discretion when it failed to invite the Invalidity Committee constituted on the basis of Article 78 of the Staff Regulations to give an opinion on the occupational origin of the applicant's disease during the course of the procedure provided for in Article 73 of the Staff Regulations.

Following the applicant's request of 26 November 1990 the Commission was required to initiate the procedure provided for in Article 73 of the Staff Regulations. On the other hand, there was no pressing reason for it to put the same question to the Invalidity Committee in the context of the second paragraph of Article 78 of the Staff Regulations, since the rate of the applicant's pension (70% of his basic salary) was the same whether it was calculated on the basis of the second paragraph of Article 78 or on the basis of the third paragraph of Article 78 of the Staff Regulations. Moreover, the procedure followed in this case enabled the Invalidity Committee to ascertain as quickly as possible whether the applicant was suffering from total permanent invalidity preventing him from performing the duties corresponding to a post in his career bracket so that he could be awarded an invalidity pension without delay (paragraphs 144 and 145).

The complaints relating to the outside experts

Since the applicant's case entailed a complex medical evaluation, the Commission was justified in calling upon outside experts. The applicant has not established that the Commission had at its disposal all the evidence necessary to establish the occupational origin of his disease after it received the Invalidity Committee's report of 10 June 1990 (paragraphs 153 and 154).

The appointment of Dr Dalem was not irregular merely because he had already delivered an opinion in the procedure prior to the summoning of the Medical Committee (paragraph 156).

See: 186/80 *Suss* v *Commission* [1981] ECR 2041, para. 10; 2/87 *Biedermann* v *Court of Auditors* [1988] ECR 143, para. 11; T-1/92 *Tallarico* v *Parliament* [1993] ECR II-107, para. 32

The alleged misuse of powers

The concept of misuse of powers has a precisely defined scope and refers to cases where an administrative authority has used its powers for a purpose other than that for which they were conferred on it. A decision may amount to a misuse of powers only if it appears, on the basis of objective, relevant and consistent evidence, to have been taken for purposes other than those stated (paragraph 166).

See: T-104/96 *Krämer* v *Commission* [1997] ECR-SC II-463, para. 67

Operative part:

The application is dismissed.