JUDGMENT OF THE COURT OF FIRST INSTANCE (Second Chamber)
6 May 1997

Case T-169/95

Agustin Quijano
v
Commission of the European Communities

(Officials – Sick leave – Medical certificate – Medical examination – Findings at variance with the medical certificate)

Application for: annulment of the Commission's decision of 21 September 1994 finding the applicant's absence between 8 and 23 August 1994 unauthorized and deducting 10 days from his annual leave.

Decision: Annulment.

Abstract of the Judgment

During 1994 the applicant, who is a Commission official in grade LA 4 assigned to the translation service in Luxembourg, underwent medical treatment for which he was authorized to visit his doctor in Brussels twice weekly (Mondays and Fridays). In July 1994 the applicant sent the Commission a certificate from that doctor, dated Monday 18 July 1994, stating that he was incapable of working for the period from Monday 25 July 1994 to Friday 19 August 1994 inclusive, together with a request for authorization to spend that time elsewhere than at his place of employment.

By registered letter of 1 August 1994, the Commission's medical officer in Luxembourg summoned the applicant for a medical examination. This took place at the Commission's Medical Service in Luxembourg on Friday 5 August 1994. On the same day, the medical officer sent a report to the Head of the Commission's Medical Service in Luxembourg stating that the period of rest from work prescribed by the applicant's doctor was not justified, and that he had called on the applicant to resume his duties. The applicant returned to work on Tuesday 23 August 1994.

By note dated 21 September 1994, the appointing authority informed the applicant of its decision to treat his absence between 8 and 23 August as unauthorized and to deduct 10 days from his annual leave, in accordance with Article 60 of the Regulations applicable to Officials of the European Communities (Staff Regulations).

Substance

The first plea in law alleging infringement of Article 25 of the Staff Regulations and of the rights of the defence

Under the first paragraph of Article 60 of the Staff Regulations, 'except in case of sickness or accident, an official may not be absent without prior permission from his immediate superior' and 'any unauthorized absence which is duly established shall be deducted from the annual leave of the official concerned' (paragraph 37).

Under the first subparagraph of Article 59(1) of the Staff Regulations, 'an official who provides evidence of incapacity to perform his duties because of sickness or accident shall automatically be entitled to sick leave'. It is therefore the responsibility of the official concerned to provide proof of such incapacity, although production of a medical certificate raises a presumption that the absence is authorized (paragraph 38).

See: 271/87 *Fedeli* v *Parliament* [1989] ECR 993, summary publication

The administration cannot refuse to accept the validity of such a medical certificate and conclude that the absence of the official concerned was unauthorized unless it has previously required him, in accordance with the second subparagraph of Article 59(1) of the Staff Regulations, to undergo a medical examination, the findings of which take effect for administrative purposes only from the date on which the examination is carried out (paragraph 39).

See: C-18/91 P *V* v *Parliament* [1992] ECR I-3997, para. 34; T-527/93 *O* v *Commission* [1995] ECR-SC II-29, para. 36; T-135/95 *Z* v *Commission* [1996] ECR-SC II-1413, para. 32

If the results of the medical examination rebut the presumption that the medical certificate was valid, the official concerned must return to work unless he challenges those findings (paragraph 40).

Consequently, there is no obligation on the Commission to adopt, after the medical examination, a decision requiring the official concerned to return to work (paragraph 41).

Nevertheless, the official's absence after the medical examination cannot be regarded as unauthorized unless he was duly apprised of the medical officer's findings and given an opportunity to challenge them. If it were otherwise, he would have no way of knowing that the validity of his medical certificate had been called in question – with the implications which that entails regarding the obligation to return to work – or of exercising the rights of the defence. In view of the presumption that medical certificates are valid, it is for the institution concerned to prove the truth of the medical findings made in the event of a challenge (paragraph 43).

As applied to the procedure for medical examinations laid down by Article 59 of the Staff Regulations, the principle of respect for the rights of the defence – which constitutes a fundamental principle of Community law in any proceeding initiated against a person which may culminate in an act adversely affecting him, and must be guaranteed even in the absence of rules governing the procedure in question – requires that the official concerned (assisted, if necessary, by his doctor) should be placed in a position in which he may effectively make known his views regarding the findings of the medical examination and, where appropriate, challenge the merits thereof (paragraph 44).

See: C-135/92 *Fiskano* v *Commission* [1994] ECR I-2885, para. 39; C-32/95 P *Commission* v *Lisrestal and Others* [1996] ECR I-5373, para. 21

Since review, in the final instance, by the Community judicature does not extend to medical assessments properly so-called, it is for the appointing authority to establish, in compliance with the Staff Regulations, the procedure to be followed if the official concerned or his doctor challenges any findings of a medical nature, on the understanding that, if the irregularity of the medical certificate drawn up by the latter were to be confirmed, the effects of the medical examination for administrative purposes would start to run from the date when that examination was carried out (paragraph 45).

See: *V* v *Parliament*, cited above; T-94/92 *X* v *Commission* [1994] ECR-SC II-481, para. 40; T-535/93 *F* v *Council* [1995] ECR-SC II-163, para. 50; T-376/94 *Otten* v *Commission* [1996] ECR-SC II-401, para. 47

Where the validity of the medical certificate is called in question by the medical officer, the principle of sound administration also requires that the official concerned should be given a clear direction to return to work, primarily to avoid any misunderstanding as to the possible application of Article 60, second and third sentences, of the Staff Regulations (paragraph 46).

In the present case, it must be held that insufficient evidence has been adduced to show that, on conclusion of the medical examination of 5 August 1994, the defendant institution's medical officer duly informed the applicant of his findings and called on him to resume his duties forthwith (paragraph 53).

In any event, even on the assumption that the applicant had actually been apprised of the findings of the medical examination and called on to return to work, it is clear from the statements made by the Commission at the hearing on 21 November 1996, which the medical officer confirmed in answer to a question from the Court,

that the applicant was not advised after the medical examination of his right to contest the medical officer's findings or, *a fortiori*, of the relevant procedure to follow in order to do so. It is also common ground that those findings were not the subject of any written communication to the applicant or to his doctor before the contested decision was adopted (paragraph 54).

Operative part:

The Commission's decision of 21 September 1994 finding the applicant's absence between 8 August and 23 August 1994 unauthorized and deducting 10 days from his annual leave is annulled.