JUDGMENT OF THE COURT OF FIRST INSTANCE (First Chamber)
8 July 1998

Case T-130/96

Gaetano Aquilino
v
Council of the European Union

(Officials – Sick leave – Article 59 of the Staff Regulations – Medical certificates – Not accepted – Medical examinations organised by the institution – Article 60 of the Staff Regulations – Unauthorised absences – Recovered from the official's salary)

Application for: annulment of the Council's decision, notified to the applicant by note of 25 October 1995, to recover the equivalent of 91 working days from his salary for unjustified absences between 9 March 1994 and 15 February 1995.

Decision: Annulment in part. The Council is ordered to repay to the applicant the amounts unduly deducted from his salary equivalent to 58 working days. Remainder of application dismissed.

Abstract of the Judgment

The applicant is an official of the Council in Grade D 1 and carries out the duties of a floor messenger. For a long time he has suffered from ailments requiring extensive treatment and frequent sick leave.

On 20 April 1993, following a series of absences owing to sickness, the applicant was examined by Dr Simon, the Council's medical supervisor. Dr Simon expressed serious doubts as to whether the applicant's absences were justified on medical grounds.

The applicant was requested to attend for medical control examinations on 28 April, 8 June and 6 July 1993, but failed to do so on the grounds that he was in plaster and that his doctor had advised against making long journeys by car, in this case from the Mons region, where he lives, to Brussels. The Council therefore requested him to visit Dr Goreux, a medical referee practising near the applicant's home, on 14 July 1993. Dr Goreux advised the applicant that he should return to work on 26 July 1993. The applicant returned to work on that date.

From 20 September 1993 the applicant was again absent on medical grounds. He was requested to visit Dr Simon on 12, 20 and 27 October 1993 for control examinations but failed to do so, even though the last medical certificates issued to him indicated that he was 'allowed to go out'.

Following a medical control examination on 17 November 1993 at Dr Simon's, Dr Boussart, the Council's medical advisor, sent a memorandum to the applicant's superiors on the same day in which he informed them that the applicant would return to work on 22 November 1993 and that he was 'fit to carry out the duties of a messenger, provided that the post involved light work and did not entail carrying heavy loads or walking or remaining standing over long periods'. The applicant did not resume his duties until after 26 November 1993.

By memorandum of 9 December 1993 the administration requested the applicant's superior, Mr Anglaret, to arrange the applicant's workload in accordance with Dr Boussart's wishes.

By letter of 16 March 1994 the administration informed the applicant that since Dr Simon was in possession of no new factor capable of providing medical grounds for his absence, the last sick note, covering the period 21 February to 20 March 1994, was considered unacceptable. The applicant was therefore asked to return to work immediately.

In reply to that letter Dr Simon received a medical report on the applicant's health drawn up by Dr Thys on 8 March 1994. In an accompanying note dated 21 March 1994 Dr Stockhem, the doctor treating the applicant, observed: 'The current extension of Mr Aquilino's incapacity for work is justified by the opinion of Dr Thys, a neurosurgeon at the Reine Fabiola hospital, who considers that the working conditions currently described by Mr Aquilino, with a daily change of post and floor, do not correspond to his clinical situation.'

In response to the administration's request of 13 April 1994 the applicant's hierarchical superior drafted a note describing the normal tasks of a floor messenger. The administration, together with Dr Simon, considered Mr Anglaret's note on 20 April 1994; it concluded that those tasks were not inconsistent with the medical recommendations and informed the applicant of its conclusion. Consequently, the absences between 21 March and 8 April 1994 and between 11 and 30 April 1994 remained unjustified and the applicant was required to return to work immediately.

On 13 July 1994 the applicant filed a request within the meaning of Article 90(1) of the Staff Regulations of Officials of the European Communities (Staff Regulations). He requested the appointing authority to give instructions in writing to his immediate superiors to entrust him with tasks consistent with his health and to regard all the medical certificates for the period between 6 December 1993 and 25 June 1994 as valid.

In its reply of 27 October 1994 the administration informed the applicant that Dr Simon considered all the absences during that period to be unjustified and that it was not possible to find him less demanding work.

On 20 September 1994 the applicant was examined by Dr Simon, who found that the period of absence between 31 August and 11 September 1994 was justified; however, he still considered that a number of earlier periods of absence were unjustified.

The applicant was subsequently requested to attend medical control examinations on 25 October, 13 December and 21 December 1994 and on 5 January and 14 February 1995. He did not attend any of those examinations and provided various reasons for failing to do so.

By note of 8 February 1995 the applicant was also requested to report to Mr Tarling, the director of personnel, on 20 February 1995 so that his position could be reviewed. His failure to attend that interview was deplored by Mr Tarling in a note of 22 March 1995 in which he reminded the applicant that he taken had a total of 90 days' unjustified absence.

On 25 October 1995 the Council informed the applicant of its decision, taken under the first paragraph of Article 60 of the Staff Regulations, to recover from his salary, having regard to his total leave entitlement on 10 October 1995, the equivalent of 91 working days in respect of unjustified absences between 9 March 1994 and 15 February 1995. However, the decision took the applicant's particular financial circumstances into consideration and spread the repayment over a period of 36 months from December 1995.

By letter to the administration dated 22 November 1995 the applicant sought to have that decision annulled; he claimed that his absences were justified by duly established medical certificates. In his reply of 17 January 1996 Mr Tarling took the view that the applicant had failed to produce any new factors and maintained the position which he had adopted on 25 October 1995.

On 24 January 1996 the applicant formally lodged a complaint under Article 90(2) of the Staff Regulations against the decision notified on 25 October 1995 and the associated decisions. That complaint was expressly rejected by note of 21 May 1996.

Admissibility of the application

A purely confirmatory measure cannot be described as an act adversely affecting the applicant. It follows that an act which contains no new factors as compared with a previous measure adversely affecting the applicant cannot have the effect of setting a fresh time-limit in favour of the person to whom the earlier measure was addressed (paragraph 34).

See: 23/80 *Grasselli* v *Commission* [1980] ECR 3709, para. 18; T-82/92 *Cortes Jimenez and Others* v *Commission* [1994] ECR-SC II-237, para. 14

However, that is not the case of the decision of 25 October 1995, adopted pursuant to the first paragraph of Article 60 of the Staff Regulations and ordering that the equivalent of the number of working days lost owing to unjustified absences between 9 March 1994 and 15 February 1995 be recovered from the applicant's salary, which clearly contains new factors as compared with the decision of 16 March 1994, which merely informed the applicant of the administration's refusal to accept a medical certificate issued in respect of a period prior to that referred to above and requested the applicant to return to work immediately (paragraph 35).

In those circumstances the plea of inadmissibility whereby the Council alleges that the complaint and the action are out of time is unfounded and must be rejected (paragraph 36).

The admissibility of the claims for repayment of the amounts deducted from the applicant's salary and restitution of his days of leave for 1995

In an action for annulment the Community judicature cannot, without encroaching on the prerogatives of the administrative authority, order a Community institution to take the measures necessary for the enforcement of a judgment by which a decision is annulled. None the less, in a dispute of a financial character the Court has unlimited jurisdiction, pursuant to the second sentence of Article 91(1) of the Staff Regulations, which allow it to order the defendant institution to pay specific amounts plus interest where appropriate (paragraph 39).

See: T-73/89 *Barbi* v *Commission* [1990] ECR II-619, para. 38; T-15/93 *Vienne* v *Parliament* [1993] ECR II-1327, paras 41 and 42

In the present case the applicant claims that the Council should be ordered to reimburse the amounts deducted from his salary and that those amounts be subject to interest from the date on which they were withheld. Since his claims have a financial purpose they must be declared admissible in the context of proceedings brought under Article 91 of the Staff Regulations (paragraph 40).

On the other hand, the claims for non-financial purposes are not covered by the Court's unlimited jurisdiction. Consequently, the applicant's claims for restitution of the days of leave wrongly withheld by the Council must be declared inadmissible (paragraph 41).

Substance

Plea alleging a breach of the second paragraph of Article 25 of the Staff Regulations

The purpose of the obligation laid down in Article 25 of the Staff Regulations to state the grounds on which decisions adversely affecting officials are based is to enable the Community judicature to review the legality of the decision and to provide the person concerned with sufficient information to determine whether the decision is well founded or if it is defective, making it possible for its legality to be challenged. In order to ascertain whether a decision adversely affecting an official meets the requirement to state reasons laid down in the Staff Regulations, it is necessary to take into consideration not only the documents giving notice of the decision but also the circumstances in which it was taken and brought to the knowledge of the person concerned. In that regard, it is necessary to consider in particular whether the applicant was already in possession of the information on which the institution based its decision (paragraph 45).

See: 19/87 *Hecq* v *Commission* [1988] ECR 1681, para. 16; T-80/92 *Turner* v *Commission* [1993] ECR II-1465, para. 62

In the present case the actual text of the impugned decision refers to the notes of 8 February, 22 March and 29 May 1995, in which the administration had already drawn the applicant's attention to the considerable number of days on which he had been absent without justification. Furthermore, the decision refers to the first paragraph of Article 60 of the Staff Regulations, which provides that any unauthorised absence which is duly established is to be deducted from the annual leave of the official concerned and that if he has used up his annual leave he is to forfeit his remuneration for an equivalent period. Having regard, also, to the correspondence between the administration and the applicant as a whole concerning the refusal to accept the medical certificates, the Court considers that the applicant was generally in a position to understand the reasons which determined the decision taken against him, which therefore contained a sufficient statement of reasons (paragraph 46).

It follows that the plea alleging an infringement of the second paragraph of Article 25 of the Staff Regulations is unfounded and must be rejected (paragraph 47).

First limb of the first plea, alleging that the refusal to accept the medical certificates produced by the applicant was not justified under Articles 59 and 60 of the Staff Regulations

According to the first paragraph of Article 60 of the Staff Regulations, an official's absences can only be deducted from his annual leave and, where he has used up his annual leave, entail the forfeiture of his remuneration for an equivalent period where the institution has duly established that the absences in question are unauthorised. In that regard, submission of a medical certificate gives rise to a presumption that the absence is authorised. Accordingly, the administration can deny the validity of such a medical certificate and conclude that the absence of the official concerned is unauthorised only where 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 only from the date of the examination. The conclusions drawn by the medical supervisor at a date prior to that on which the official is first regarded as being absent without authorisation do not have the effect of precluding the possibility that the official may be unfit for work at a subsequent given time, in the present case several months after the last examination arranged by the institution (paragraphs 71, 73 and 77).

See: 271/87 *Fedeli* v *Parliament* [1989] ECR 993, summary publication; T-527/93 *O* v *Commission* [1995] ECR-SC II-29, para. 37; T-169/95 *Quijano* v *Commission* [1997] ECR-SC II-273, paras 38 and 39, and the case-law cited therein; T-36/96 *Gaspari* v *Parliament* [1997] ECR-SC II-595, para. 26

In the present case the administration first regarded the applicant's absences as unauthorised with effect from 9 March 1994, when it questioned the validity of the medical certificate which he submitted for the period 21 February to 20 March 1994 (paragraph 74).

However, the applicant's absence supported by that medical certificate could only be regarded as unauthorised as from the date of the medical examination arranged by the institution. It is common ground between the parties that during the period in issue, between 9 March 1994 and 15 February 1995, the applicant was first requested to attend for examination on 20 September 1994 (paragraph 76).

Consequently, the unauthorised absences which the applicant is alleged to have taken during the period 9 March to 20 September 1994 were not duly established by the Council. It follows that those absences, amounting to 58 working days in all, should not have been deducted from the applicant's annual leave or have entailed the forfeiture of his remuneration for an equivalent period (paragraph 78).

As regards the remaining part of the absences in issue, namely those recorded during the period 29 September 1994 to 15 February 1995, on the other hand, the Court considers that the Council was entitled to regard them as unauthorised (paragraph 79).

The duty of the Community institutions to arrange a medical examination necessarily has as its corollary a duty on the part of the officials concerned, if Articles 59 and 60 of the Staff regulations are not to be rendered ineffective, to undergo those examinations, or to submit certificates showing with sufficient clarity and beyond all argument that they are unable to travel (paragraph 83).

See: T-135/95 *Z* v *Commission* [1996] ECR-SC II-1413, para. 34

In the present case the applicant clearly failed to comply scrupulously with his duty under the second subparagraph of Article 59(1) of the Staff Regulations (paragraph 84).

It follows from all the foregoing considerations that the applicant's action is founded in part and that, accordingly, the Council's decision of 25 October 1995 must be annulled in part. It must stand only in so far as it orders recovery from the applicant's salary of the equivalent of 33 working days for unjustified absences between 29 September 1994 and 15 February 1995 (paragraph 86).

It also follows from the foregoing assessment that consideration of the two remaining limbs put forward by the applicant in the context of the present plea is superfluous. First, the complaint alleging the unjustified retroactivity of the contested decision essentially confirms the arguments considered in the context of the first limb of the plea. Second, as regards the alleged breach of the administration's duty to have regard for the applicant, it is sufficient to observe that the protection of the rights and interest of officials must always be subject to compliance with the legal rules in force.

See: T-123/89 *Chomel* v *Commission* [1990] ECR II-131, para. 32; T-33/89 and T-74/89 *Blackman* v *Parliament* [1993] ECR II-249, para. 96

Since the Court has decided that the decision is to be annulled in part, it must grant the applicant's financial claims in part and order the Council to repay the amounts improperly deducted from his salary, equivalent to 58 working days. Those sums shall be subject to interest from the date on which they were deducted, calculated at the rate of 5% per annum determined by the Court in the exercise of its discretion (paragraph 88).

Operative part:

The Council's decision of 25 October 1995 to recover the equivalent of 91 working days from the applicant's salary for unjustified absences between 9 March 1994 and 15 February 1995 is annulled in part in so far as it concerns 58 days of allegedly unauthorised absence recorded during the period 9 March to 20 September 1994.

The Council is ordered to repay to the applicant the amounts unduly deducted from his salary, equivalent to 58 working days. Those amounts shall be subject to interest at the rate of 5% per annum from the date when they were first deducted.

The remainder of the application is dismissed.