JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)
9 June 1994 *

(Officials – Recruitment – Refusal to appoint on medical grounds)

In Case T-94/92,

X, represented by Pieter Bergkamp, of the Arnhem Bar, with an address for service in Luxembourg at the Netherlands Embassy, 5 Rue C.M. Spoo,

applicant,

v

Commission of the European Communities, represented by John Forman, Legal Adviser, acting as Agent, with an address for service in Luxembourg at the office of Georgios Kremlis, of the Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for the annulment of the Commission's decision declaring that the applicant does not fulfil the requirements of physical fitness for appointment as an official,

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Fifth Chamber),

composed of: A. Kalogeropoulos, President, D.P.M. Barrington and K. Lenaerts, Judges,

* Language of the case: English

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 11 January 1994,

gives the following

Judgment

Facts and procedure

1 The applicant was a successful candidate in an open competition organized by the Commission. In September 1990, at the medical examination which, in accordance with the first paragraph of Article 33 of the Staff Regulations of officials of the European Communities (hereinafter 'the Staff Regulations') must precede appointment, he informed the Commission's medical service that a liver biopsy carried out in 1986 had given a positive result for the presence of hepatitis C antigens.

2 The Commission's medical officer requested the opinion of a hepatology specialist who in November 1990 performed a second biopsy on the applicant in order to assess the progression of the disease. The applicant contracted biliary peritonitis as a result of complications attributable to the biopsy.

3 By letter of 14 November 1990 the specialist consulted by the Commission reported his provisional conclusions. He stated that the second liver biopsy confirmed that the applicant had chronic hepatitis C with minor signs of activity, but that there had been no progression in his condition since the biopsy performed in 1986. Taking account of the fact that the disease had not progressed and that the applicant remained asymptomatic, the specialist did not think that the applicant was likely to be prevented from performing his duties in the short or medium term. He added, however, that long-term complications (over a period of 10 to 20 years) could not be excluded.

4 By letter of 21 November 1990 the applicant was informed that the Commission's medical officer considered that he was not physically fit to be appointed as an official.

5 By letter of 3 December 1990 the specialist consulted by the Commission confirmed his provisional conclusions. He explained that the latest studies of the progression of a condition such as the applicant's showed a risk of cirrhosis of the liver in 25% of cases over a period of 20 years.

6 By letter of 4 December 1990 the applicant requested that his case be reheard by a medical committee in accordance with the second paragraph of Article 33 of the Staff Regulations.

7 By letter of 9 January 1991 the applicant was informed that the medical committee had confirmed the opinion of the medical officer. However, in order to take account of some arguments relating to the procedure followed, which had been put forward by the applicant in a complaint submitted on 16 April 1991 contesting that decision, it was decided that the medical committee would meet for a second time and re-examine his case.

8 In a letter dated 16 August 1991 the specialist consulted by the Commission repeated his prognosis in the following terms:

'Generally speaking, it can be said that there is a risk of developing cirrhosis and that that risk can be put at about 20 to 25 over a 15 to 20 year period. However, the natural progression of the disease in any particular patient cannot be foreseen; and it must also be noted that the natural progression of the disease is not yet fully known.'

9 The medical committee met for the second time on 28 August 1991. It concluded that 'there was a definite and calculable risk that in the medium term the candidate might suffer health problems making it impossible for him to perform his duties' and that 'a decision as to fitness should take account, *inter alia,* of considerations based on prognosis'. That decision, finding the applicant unfit, was notified to him on 24 September 1991.

10 That decision formed the subject of a second complaint, which was submitted on 20 December 1991 and rejected on 3 July 1992.

11 Those were the circumstances in which, by application lodged on 6 November 1992 at the Registry of the Court of First Instance, the applicant brought the present action.

12 By order of 4 February 1993 the Court of First Instance (Fifth Chamber) granted the applicant legal aid.

13 At the applicant's request the Court (Fifth Chamber) decided that his name would be replaced by the letter X in all public documents and that the case would be heard *in camera*.

14 Upon hearing the report of the Judge-Rapporteur, the Court (Fifth Chamber) decided to open the oral procedure without any preparatory inquiry. The parties presented oral argument and replied to questions asked by the Court at the hearing on 11 January 1994.

Forms of order sought

15 The applicant claims that the Court of First Instance should:

- annul the Commission's decision, signed by the Director-General of Personnel and Administration and dated 3 July 1992, confirming the decision signed by the head of unit responsible for B, C, and D personnel on 24 September 1991;

- declare the applicant fit to work and order the defendant to appoint the applicant immediately and without further undue delay to the post for which he has been selected;

- order the defendant to make good all material and non-material damages caused by (1) the defendant's wrongful decision referred to above, and (2) the defendant's wrongful, improper, medically unnecessary and arbitrary requirement that the applicant should undergo a liver biopsy, that is to say an invasive medical procedure involving substantial risk, and (3) the defendant's breach of its obligation to maintain the confidentiality of the applicant's medical and personal data;

- order the defendant immediately to make available to the applicant or his lawyer copies of all documents in the defendant's possession relating to the applicant;

- order the defendant to pay the costs of (1) the proceedings and (2) the applicant's lawyer's fees, in accordance with the applicable law.

16 The defendant contends that the Court of First Instance should:

- dismiss the application;

- order the applicant to pay the costs.

Admissibility

17 The Commission challenges the admissibility of the claims for annulment on the ground that they were submitted out of time. Alternatively, it challenges the admissibility of the claim for compensation for the damage allegedly suffered by the applicant as a result of undergoing a liver biopsy, on the ground that that claim was not made in the pre-litigation procedure.

18 Furthermore, the Court must raise of its own motion the question of the admissibility of the claim for compensation for the damage allegedly caused to the applicant by the way in which the Commission treated his medical data, and also of the claims for a declaration and an injunction.

Admissibility of the claims for annulment

Arguments of the parties

19 The Commission submits that the action was not brought within the period of three months prescribed by Article 91(3) of the Staff Regulations. It points out that the application was lodged at the Registry of the Court on 6 November 1992, whereas the decision of 3 July 1992 rejecting the complaint was sent to the applicant and to the lawyer who represented him during the administrative procedure by registered post on 8 July 1992. A copy of that decision was, moreover, sent by fax to the lawyer on 9 July 1992 with the remark 'Please treat this communication as official notification'. The defendant observes that the applicant claims to have received the registered letter only on 10 August 1992. Although it admits it is unable to prove the date on which the letter was received, the Commission finds it surprising that the notification of its decision should have taken nearly four weeks.

20 The applicant replies that, in the absence of express authority to accept service, notification of the decision to the lawyer who represented him in the administrative procedure is irrelevant, since only notification of the decision to the applicant in

person could cause time to start running for the purposes of bringing the action before the Court.

21 With regard to the communication sent to his address, the applicant states that in the evening of 9 July 1992, he found a notice from the postal authorities informing him that a registered letter with form of acknowledgment of receipt, sent by 'CEE, 1040 BXL', had been brought to his address and was being held for collection at the post office. However, he was unable to go to the post office before Monday 10 August 1992 because he was away on a study trip to Moscow from Sunday 12 July to Friday 7 August 1992 and had to travel outside Brussels on Friday 10 July, for reasons connected with that study trip. He had drawn up a power of attorney in favour of another person, but it transpired that under the relevant rules she was not entitled to receive the letter. The applicant considers that notification did not, therefore, take place until he was able to collect the letter concerned from the post office, that is to say on 10 August 1992.

Findings of the Court

22 The Court points out that it is the responsibility of the party alleging that an action is out of time, having regard to the time-limit laid down in Article 91 of the Staff Regulations, to prove on what date the contested decision was notified (judgment of the Court of First Instance in Case T-1/90 *Pérez-Mínguez Casariego* v *Commission* [1991] ECR II-143). In the present case, the Commission has not proved that the decision had been notified to the lawyer who represented the applicant during the administrative procedure. In particular, the document which appears in Annex 9 to the defence – a copy of the text of the decision at issue preceded by a fax cover sheet containing the address of the applicant's lawyer at the time – does not prove that a fax message was transmitted. There is therefore no need to consider whether the notification to a complainant's representative of a decision rejecting the complaint can cause time to start running for the purposes of bringing an action before the Court, or whether such notification can be effected by fax.

23 Consequently, the only question of relevance is at what point in time the applicant was personally notified of the decision at issue.

24 According to the case-law of the Court of Justice and the Court of First Instance, a decision is duly notified within the meaning of Article 91 of the Staff Regulations where it has been communicated to its addressee and the latter is in a position to have effective knowledge of it (judgment of the Court of Justice in Case 5/76 *Jänsch* v *Commission* [1976] ECR 1027; judgment of the Court of First Instance in Case T-50/92 *Fiorani* v *Parliament* [1993] ECR II-555). In this case it is evident from the documents before the Court of First Instance and from the explanations given at the oral hearing that the applicant cannot be criticized for not having gone to the post office to collect the registered letter until 10 August 1992. It follows that the decision must be considered to have been notified on 10 August 1992.

25 It follows that the action must be held to be admissible in so far as it seeks the annulment of the decision of 3 July 1992.

Admissibility of the claims for compensation

26 The Commission contests the admissibility of the claims for compensation for the damage allegedly suffered as a result of the performance of the liver biopsy on the ground that that matter was not raised during the administrative procedure.

27 The applicant replies that, although the question of the wrongful nature of the biopsy was not raised in his second complaint, it had been raised in the first and must in any case be considered by the Court, since it concerns his fundamental rights. He adds that it was because of a mistake by his former lawyer that the question was not raised in his second complaint. For that reason the Court should agree to consider this question in the present proceedings.

28 In addition to the question of admissibility specifically raised by the Commission, the Court considers that it must also raise of its own motion the question of the admissibility of the claims for compensation for the damage allegedly caused to the applicant by the way in which the Commission treated his medical data.

29 The Court points out that for actions brought by officials to be admissible, the prior administrative procedure laid down in Articles 90 and 91 of the Staff Regulations must have been properly conducted (see, most recently, the judgment in *Fiorani* v *Parliament*, cited above). The pre-litigation procedure required under the Staff Regulations where the damage for which compensation is sought has been caused by an act adversely affecting an official within the meaning of Article 90(2) of the Staff Regulations differs from that required where the damage has been caused by conduct that is not in the nature of a decision. In the first case, the admissibility of the action for compensation is subject to the condition that the person concerned should have submitted to the appointing authority, within the prescribed period, a complaint against the act which caused the damage and to the condition that he should have brought the action within three months of the rejection of his complaint. In the second case, on the other hand, the administrative procedure involves two stages. The person concerned must first submit a request for compensation to the appointing authority. Not until that request has been expressly or implicitly rejected is there an act adversely affecting an official, against which a complaint may be lodged, and only after a decision has expressly or impliedly rejected that complaint may an action be brought before the Court of First Instance (see the judgment of the Court of First Instance in Case T-59/92 *Caronna* v *Commission* [1993] ECR II-1129).

30 In this case, the damage which the applicant considers he has suffered was caused by conduct not in the nature of a decision. Consequently, it was the two-stage administrative procedure described above which was required to precede the bringing of the present action. The applicant submitted no request pursuant to Article 90 of the Staff Regulations for compensation for the damage caused by his undergoing a liver biopsy or by the way in which the Commission treated his medical data.

31 It follows that the claims for compensation for the damage caused to the applicant by the performance of the liver biopsy or by the way in which the Commission treated his medical data must be held to be inadmissible.

Admissibility of the claims for a declaration and an order

32 The applicant requests the Court to declare him fit for work and to order the defendant to appoint him immediately to the post for which he had been chosen.

33 It is not for this Court, in an action for annulment, to issue declarations or to address orders to the Community institutions. On the one hand, the Community judicature clearly has no jurisdiction to address orders to the Community institutions (see, most recently, the order of the Court of First Instance in Case T-56/92 *Koelman* v *Commission* [1993] ECR II-1267). On the other hand, where an act is annulled, the institution concerned is required, pursuant to Article 176 of the EEC Treaty, to take the measures necessary in order to comply with the judgment.

34 The claims for an order addressed to the Commission and for a declaration must, therefore, be held to be inadmissible.

Substance

Arguments of the parties

35 In support of his claims for the annulment of the decisions declaring that he was not physically fit, the applicant puts forward eight pleas in law, including a plea alleging misinterpretation of Article 28(e) of the Staff Regulations.

36 In that plea the applicant maintains essentially that neither his present condition nor the prognosis as to how it might progress justifies the adoption of a decision finding

him to be physically unfit. According to the specialist consulted by the Commission, the risk of his developing cirrhosis of the liver is only in the order of 20 to 25% over a period of 20 years. That risk is too slight to constitute the 'prognosis of future disorders' required by the case-law in order for a candidate in good health at the time of the pre-engagement medical examination to declared unfit for work.

37 Without questioning the validity of the specialist's opinion, the Commission draws attention to the seriousness of the applicant's condition and considers that it is not for the Court to call in question the medical findings of the medical committee. According to the committee, there is a certain and quantifiable risk that the candidate will, in the medium term, suffer health problems which could make it impossible for him to perform his duties.

Findings of the Court

38 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. According to the first subparagraph of Article 33 of the Staff Regulations, a successful candidate is, before appointment, to be medically examined by one of the institution's medical officers in order that the institution may be satisfied that he fulfils the requirements of Article 28(e).

39 It is not in dispute that, where the determination of a candidate's physical fitness to perform duties in the Community administration is concerned, the Staff Regulations confer upon the medical officers and, as the case may be, the medical committee the task of definitively appraising all medical questions.

40 Review by the Court may not, therefore, extend to medical findings properly so-called, which must be considered definitive provided that the conditions in which they are made are not irregular.

41 The purpose of judicial review is to verify that the procedure followed at the medical examination, especially where the medical committee is involved, was correct and also to verify the regularity of opinions issued, in order to examine whether they contain reasons enabling the reader to assess the considerations on which the conclusions which they contain were based and also whether they have established a comprehensible link between the medical findings which they contain and the conclusions which they reach (judgment of the Court of First Instance in Case T-165/89 *Plug* v *Commission* [1992] ECR II-367).

42 The purpose of the examination provided for in Article 33 of the Staff Regulations is to enable the institution concerned to determine whether, from the point of view of his health, the candidate is capable of fulfilling all the obligations which are likely to be his having regard to the nature of his duties (judgment of the Court of Justice in Case 155/178 *M.* v *Commission* [1980] ECR 1797, paragraph 10).

43 In the present case, it is apparent from the documents before the Court that the applicant is ill since he still suffers from chronic hepatitis C with minor signs of activity. None the less, the parties agree that the disease from which the applicant suffers causes him no distress and does not at present in any way prevent him from fulfilling the obligations which are likely to be his in carrying out his duties.

44 The medical committee nevertheless decided that the applicant was unfit to perform his duties on the sole ground that there was 'a definite and calculable risk that in the medium term the candidate's health will be affected in such a way that he would be unable to perform his duties normally' (see the conclusions of the medical committee of 2 September 1991 and the Commission's decision of 3 July 1992). In its rejoinder the Commission stated that it does not dispute the prognosis made by the specialist as to the likely progression of the applicant's condition.

45 In so far as a finding of unfitness may be based on a medically justified prognosis of future disorders capable of jeopardizing in the foreseeable future the normal

performance of the duties in question (judgment in *M.* v *Commission*, cited above, paragraphs 10 and 11), the Court considers that, in the present case, the various prognoses as to the progression of the applicant's condition made by the specialist, in his three letters of 14 November and 3 December 1990 and 16 August 1991, do not satisfy that test.

46 The most pessimistic interpretation that can be made of those prognoses shows that, statistically, there is a 75% chance that the applicant will not develop cirrhosis of the liver in the next 20 years and that, beyond those 20 years, no prognosis is possible.

47 Such a prognosis as to the possible progression of a disease affecting a successful candidate but not causing him any distress of such a nature as to jeopardize the performance of his duties cannot justify a decision declaring him unfit to perform his duties.

48 It follows that the Commission's decisions of 24 September 1991 and 3 July 1992 declaring that the applicant is not physically fit to be appointed as an official must be annulled.

The claims for compensation for the loss allegedly suffered by the applicant as a result of the decision declaring him physically unfit

49 The applicant claims that, if he had been declared fit to perform the duties envisaged, he would have been appointed as an official immediately. He therefore considers himself entitled, by way of compensation, to a sum equivalent to the remuneration that he would have received if he had been appointed in November 1990.

50 He adds that, having been declared unfit to work, he was unable to find other employment and had, therefore, enrolled in a vocational training course in Brussels. He therefore seeks the reimbursement of the costs of that enrolment.

51 Finally, the applicant seeks compensation for the non-material damage, in particular psychological distress and loss of enjoyment of life, caused to him by the adoption of the decision at issue.

52 The Court points out that, for an action for damages to succeed, it must be established that the defendant has committed a service-related fault causing the applicant actual injury. As a rule, the adoption of an incorrect interpretation of a provision of the Staff Regulations does not in itself constitute a service-related fault (judgment of the Court of Justice in Case 79/71 *Heinemann* v *Commission* [1972] ECR 579).

53 In this case, the interpretation of the Staff Regulations adopted by the Commission is indeed incorrect but the mistake is not so serious as to constitute a service-related fault and the applicant submits no evidence to show that the Commission committed such a fault, other than that incorrect interpretation.

54 The applicant's claims for compensation for the damage allegedly suffered as a result of the decision declaring him physically unfit must therefore be dismissed.

Costs

55 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since in this case the Commission has been unsuccessful and the applicant has applied for costs, the Commission must be ordered to pay all the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

1. **Annuls the Commission's decisions of 24 September 1991 and 3 July 1992 declaring that the applicant does not satisfy the requirement of physical fitness laid down in Article 28(e) of the Staff Regulations;**

2. **Dismisses the remainder of the application;**

3. **Orders the defendant to pay all the costs.**

Kalogeropoulos Barrington Lenaerts

Delivered in open court in Luxembourg on 9 June 1994.

H. Jung
Registrar

A. Kalogeropoulos
President