JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber)
25 September 1991 *

In Case T-36/89,

Henricus Nijman, an official of the Commission of the European Communities, residing in Ispra (Italy), represented by Giuseppe Marchesini, advocate having the right of audience before the Corte di Cassazione (Court of Cassation), with an address for service in Luxembourg at the Chambers of Ernest Arendt, 4 Avenue Marie-Thérèse,

applicant,

v

Commission of the European Communities, represented initially by Sergio Fabro, a member of its Legal Service, and subsequently by Lucio Gussetti and Sean van Raepenbusch, also members of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Guido Berardis, a member of the Commission's Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for compensation for damage allegedly suffered by the applicant by reason of the failure of the Commission's Medical Service to inform him in good time of the illness revealed by his medical file,

THE COURT OF FIRST INSTANCE (Fourth Chamber),

composed of: R. Schintgen, President, D. A. O. Edward and R. García-Valdecasas, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 23 April 1991,

* Language of the case: Italian.

gives the following

Judgment

The facts giving rise to the action

1 The applicant, Mr Nijman, an official of the Commission of the European Communities, has for many years been assigned to the Joint Research Centre (hereinafter referred to as 'the JRC') in Ispra. During the course of his employment he has regularly undergone the annual medical examination provided for in Article 59(4) of the Staff Regulations of officials of the European Communities (hereinafter referred to as 'the Staff Regulations') in the JRC's Medical Service.

2 In January 1985 the new medical officer at the JRC (the successor to the medical officer consulted between 1973 and 1983, who had retired) notified the applicant of the existence of a pulmonary emphysema which had reached an advanced stage of development.

3 Following an exchange of correspondence with the administration and consultation of his medical file by his own doctor, the applicant requested the appointing authority on 9 June 1987 for a decision under Article 90(1) of the Staff Regulations. He claimed compensation for the damage which he considered himself to have suffered by reason of a deterioration in his state of health owing to lack of information from the Medical Service which had prevented him from taking in good time the appropriate preventive measures. He claimed that the X-rays which he had undergone as part of his annual medical examinations in 1973 and 1974 already revealed the existence of an incipient pulmonary emphysema and that a spirometric examination carried out in 1976 revealed that his respiratory functions were impaired; similar examinations carried out in 1978, 1981 and 1983 confirmed that there had been a deterioration. The applicant pointed out that the Institution's medical officer, whilst aware of the results of these various examinations, had not informed him of his state of health and had failed, over a period of some 10 years, to advise him about appropriate therapeutic measures.

4 No reply to his request having been received, the applicant lodged an administrative complaint on 1 December 1987 under Article 90(2) of the Staff Regulations.

5 On 26 April 1988 the Director-General for Personnel and Administration sent the applicant a letter informing him that 'the appointing authority [did not consider itself] to be in possession of all the information needed to arrive at a decision on [his] complaint'. He proposed that an ad hoc medical board be set up to 'provide the appointing authority with an opinion on the question whether the lack of information on his state of health was likely to have caused Mr Nijman any damage, and in particular whether he could possibly have taken preventive measures in order to prevent his state of health from deteriorating'. The applicant did not oppose this initiative, but stated that he would file an application as a precautionary measure in the Court of Justice in order to obviate any objection of inadmissibility.

6 The question set out in the wording of the aforementioned letter of 26 April 1988 was referred to the medical board, consisting of three doctors, the first of whom was appointed by the institution, the second by the applicant and the third by agreement between those two doctors. After considering the matter on 28 October 1988, the medical board gave a negative opinion on the question posed and proposed that the complaint should be dismissed, without stating any reasons for its opinion. In view of the dissenting opinion expressed by the doctor nominated by the applicant, Professor Ghiringhelli, director of the independent respiratory physiopathology department of the Ospedale Fatebenefratelli of Milan, the board's opinion was adopted by a majority vote.

7 By memorandum of 16 November 1988, the Commission expressly rejected the complaint.

8 By letter dated 21 November 1988, Professor Ghiringhelli confirmed to the applicant that he had expressed a dissenting opinion at the time when the negative opinion given by the medical board was signed and that the question referred to the said board — as it was worded and had to be understood — could not have prompted any response from a doctor other than a categorically affirmative one.

Procedure

9 It was in those circumstances that, by an application lodged at the Registry of the Court of Justice on 24 June 1988, Mr Nijman brought this action, which was registered under number 172/88.

10 Pursuant to Article 14 of the Council's decision of 24 October 1988 establishing a Court of First Instance of the European Communities, the Court of Justice, by order of 15 November 1989, referred the case to the Court of First Instance, where it was registered under number T-36/89.

11 The Court of First Instance, having noted the parties' agreement in principle in the course of the proceedings to the commissioning of an expert's report, invited them by letter dated 2 February 1990 to indicate any proposals which they might have on the wording of the questions which might be submitted to an expert and to the person who might be responsible for obtaining the expert's report. The parties reached agreement on the name of one of the persons proposed by the Commission, Professor Scotti of the respiratory physiotherapy laboratory in the occupational medicine clinic of the University of Milan, and on the reference to him of the same question as that which had previously been put to the ad hoc medical board.

12 By order of 28 March 1990, the Court of First Instance ordered that an expert's report be obtained on the question 'whether the failure to inform the applicant of his state of health may have caused him damage, and, in particular, on the fact that he was unable, in the circumstances, to take preventive measures to obviate a deterioration in his state of health'. At the same time the Court of First Instance appointed Professor Scotti as expert.

13 The expert submitted his report on 30 October 1990. In it, after setting out in chronological order, on the basis of the medical file submitted to him, the pathological signs suffered by Mr Nijman between 1961 and 1990, he finds that:

'Between 1961 and 1972, the medical file describes numerous attacks of chronic rhinosinusitis; it further indicates repeated instances of acute bronchitis, often accompanied by a raised temperature;

... Mr Nijman seems to have been a heavy smoker (20 to 25 cigarettes per day) ... In 1971, an X-ray examination carried out in the context of the periodic examinations showed ... the presence of traces of bronchitis at the base of the lungs and the subsequent X-ray examinations carried out annually until 1977 confirm this finding, showing it to have remained unchanged.'

On the basis of those findings, the expert considers that:

'There are thus grounds for thinking that by 1971 a process of chronic bronchitis had already set in.'

Continuing with his examination of the applicant's medical file, the expert observes that:

'The spirometric examinations carried out at the periodic medical check-ups from 1976 onwards already revealed in that year an impairment of the ventilatory function of an obstructive nature, which was still moderate at that time but which showed a significant deterioration at the subsequent check-up carried out in 1978, which was confirmed in 1981.'

The expert considers that those factors show

'the existence of a chronic obstructive broncho-pneumonopathy'.

Further on the basis of the medical file, the expert goes on to note that:

'A report of an X-ray examination carried out on 16 January 1990 mentions ... an unmistakable sign of the presence of a pulmonary emphysema, being a complication arising from the obstructive bronchitis syndrome.'

Notwithstanding this, the expert observes that:

'It is not until one reads the report of the periodic examination on 27 April 1983 that one finds the first clearly expressed diagnosis of a "pulmonary emphysema"; that diagnosis is repeated in the subsequent reports, by a reference to "spirometric deficiency".'

Lastly, the expert states that:

'The functional examinations carried out in 1983 and 1985 showed a continuing deterioration in the ventilation of the lungs, together with a reduction of approximately 50% in the perviousness of the bronchi.'

14 With regard to the duties owed by the Medical Service, the expert maintains that:

'The doctor handling the examinations would have been under a duty to inform the patient . . . of the onset of chronic bronchitis, which . . . was at that time just developing into the emphysematous complication, and also to inform him of the risks of a deterioration in the pathological situation as a result of bad habits in his everyday life, and of the appropriate prophylactic measures . . . Giving up smoking could in itself have led, if not to an improvement, at least to a halt in the further development of the obstructive broncho-pneumonopathy.'

15 Finally, the expert states that:

'1) Taking into account its preventive role, the employees' Medical Service should have informed Mr Nijman of his state of health regarding his respiratory organs, as revealed by the X-rays and functional examinations which were carried out;

2) As a result of the absence of this information, Mr Nijman was unable to take in good time those measures (giving up smoking, prevention and early

treatment of the attacks of acute bronchitis) which could at least have retarded the development of the pathological condition shown in the documents.'

16 On 5 December 1990 the Commission lodged its observations on the expert's report. It put forward in those observations new arguments relating to the substance of the dispute.

17 The applicant for his part indicated on 10 December 1990 that he had no observations to make regarding the expert's report.

18 Following the submission of the Commission's observations, the Court invited the applicant, pursuant to Article 42 of the Rules of Procedure of the Court of Justice, applicable *mutatis mutandis* to the procedure in the Court of First Instance, to reply to the defendant's observations concerning Professor Scotti's expert's report.

19 The applicant lodged his observations on 7 February 1991.

20 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Fourth Chamber) decided to open the oral procedure.

21 The hearing took place on 23 April 1991. The representatives of the parties presented oral argument and answered questions put by the Court of First Instance.

22 During the hearing the applicant lodged a document in which he quantified in the sum of BFR 8 734 792 the amount of the damage which he considered himself to have suffered. The defendant lodged a document, taken from the applicant's

medical file, which reproduced a questionnaire filled in at the time of various medical examinations carried out between 1981 and 1984 and which related in particular to the amount of tobacco smoked by him.

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

(1) annul the refusal by the defendant to make good the damage resulting from the failure of the Commission's Medical Service to inform him of his state of health;

(2) declare that the Commission is required to make good that damage by virtue of Article 188 of the EAEC Treaty and under its duty to provide assistance for its officials, to the extent of BFR 8 734 792;

(3) order the defendant to pay the costs.

24 The Commission contends that the Court should dismiss the application and asks the Court to make such order as to costs as the Court sees fit.

25 The defendant was also invited by the Court of First Instance during the oral procedure to lodge those documents in the applicant's medical file which might establish whether the applicant underwent any X-ray tests carried out by other doctors. By letter dated 6 May 1991, the Commission replied that between 1960 and 1985 the JRC's Medical Department registered only three certificates — drawn up on 15 January 1963, 18 December 1964 and 6 June 1969 respectively — indicating a diagnosis connected with the health problems to which this dispute relates, each of which certified incapacity for work for a period of 10 days.

Admissibility

Admissibility of the evidence offered in support by the Commission in its observations on the expert's report

26 The Commission contended in its observations on the expert's report that it had obtained the testimony of the JRC's medical officer who carried out the regular medical examinations on Mr Nijman at the material time. The medical officer stated that during the medical examinations — which were carried out each year in a manner which could not be described as hurried — the applicant was informed of his state of health and advised to give up smoking.

27 In his observations in reply, the applicant argued that the evidence which, in his view, the defendant was seeking surreptitiously to introduce at that stage of the proceedings was inadmissible. He maintains that, if the Commission obtained testimony in support of its case from the institution's medical officer, it should have introduced it in good time. Furthermore, the applicant claims that indirect testimony is inadmissible under Article 42 of the Rules of Procedure of the Court of Justice, which prohibits the introduction of a new plea in law in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the written procedure. Lastly, the applicant asserts that the claim that he was informed of his state of health in the course of the medical examinations carried out each year by the JRC's medical officer is entirely false.

28 It should be noted that, under Article 38(1)(e) and Article 40(1)(d) of the Rules of Procedure of the Court of Justice, the parties are to state, in the application and the defence respectively, the nature of any evidence offered in support. Under Article 42(1), they may offer further evidence in the reply or the rejoinder, although they must in those circumstances give reasons for the delay in offering it. In this case, the defendant did not mention the testimony of its medical officer until the procedure had reached an even more advanced stage; and it has, moreover, provided no justification whatever for the delay in offering it. In addition, the Commission had not until then at any stage in the pre-litigation procedure or in the proceedings before the Court contested in any way the claim that the applicant was not informed of his state of health by the JRC's Medical Service prior to 1985.

29 Consequently, the evidence offered in support by the Commission in its observations on the expert's report must be regarded as having been offered out of time and must therefore be rejected as inadmissible.

The admissibility of the objection by the Commission that the expert's report is partially invalid

30 The defendant raised at the hearing an objection that the expert's report was partially invalid, in so far as the first conclusion contained in it fell outside the ambit of the question expressly posed by the Court. The Commission maintains that the expert has assumed the right to draw conclusions which may only be drawn by the Court.

31 It should first be noted in this regard that since the Commission failed to raise this objection in its written observations on the expert's report it must be regarded as being out of time. Furthermore, the Court considers, first, that all the views set forth in the report constitute a necessary and sufficient statement of the reasons for the conclusions reached by the expert and, secondly, that the conclusions in question fall within the scope of the question put to the expert.

32 It follows from the foregoing that this objection must be rejected.

Substance

33 The applicant essentially argues that the failure by the Medical Service, over a period exceeding ten years, to mention the illness affecting him has caused him damage, inasmuch as he has been unable in good time to take specific prudent measures in his work and in his daily life. He acknowledges that he was suffering from 'a very slight but habitual cough, a slightly husky voice and slight shortness of breath when swimming', which manifested themselves in the course of his habitual activities. He maintains that the conduct of the Medical Service constitutes a service-related fault for which the Commission must be held liable, under the general principles of non-contractual liability referred to in Article 188

of the EAEC Treaty and the principle, with which the administration has a specific duty to comply, that it must have regard to the welfare of officials and provide them with assistance.

34 The Commission, for its part, contends that there is no causal link between the alleged service-related fault — namely, the absence of information — and any damage caused to the applicant's health. It observes that notwithstanding the natural progression of the illness, the first signs of which appeared some 20 years ago, Mr Nijman is still working at the age of 63 and his absences from work have been extremely few (46 days in the period from 1985 to 1990). It contends that the facts referred to above, namely the slow rate of progression of the illness and his slight temporary invalidity, show that Mr Nijman's case involves the natural development of the disease from which he is suffering.

35 It should first be noted that the Court of Justice has consistently held that 'where a dispute between an official and the institution by which he is or was employed concerning compensation for damage originates in the relationship of employment between that person and the institution, it falls under Article 179 of the EEC Treaty and Articles 90 and 91 of the Staff Regulations and accordingly not under Articles 178 and 215 of the EEC Treaty' (judgments of the Court of Justice in Case 9/75 *Meyer-Burckhardt* v *Commission* [1975] ECR 1171, paragraph 7; Case 48/76 *Reinarz* v *Commission and Council* [1977] ECR 291, paragraph 10; order in Case 317/85 *Pomar* v *Commission* [1987] ECR 2467, paragraph 7; judgment in Case 401/85 *Schina* v *Commission* [1987] ECR 3911, paragraph 9). This case-law must be regarded as being also applicable in the context of Article 152 of the EAEC Treaty.

36 It should also be borne in mind that in order for liability to attach to the Community a set of conditions must be satisfied as regards the fault committed by the institution, the unquestionable existence of quantifiable damage and a causal link between the fault and the alleged damage (judgment of the Court of First Instance in Case T-20/89 *Moritz* v *Commission* [1990] ECR II-769, paragraph 19). It is therefore necessary to consider first whether the conduct of the institution was such as to render it liable.

37 With regard to the conduct of the institution, the Court considers that the expert's report and the statements made by the applicant, which were at no time contested by the defendant in the course of the written procedure, establish to the requisite legal standard that the JRC's Medical Service did not inform Mr Nijman of the process of chronic bronchitis affecting him precisely at the time when, in the words of the expert, that process was 'developing into the emphysematous complication' and that the Medical Service failed to give the applicant the therapeutic information and advice appropriate to his condition. That lack of information constitutes an infringement of the duties owed by the medical services of the Community institutions having regard to the objectives for which they were set up. Those objectives include *inter alia* the provision of adequate medical assistance to the institutions' staff in order to ensure, to an extent consistent with scientific knowledge, not only the early detection of any illness but also the identification of risk factors which may cause an illness to appear. Under Article 59(4) of the Staff Regulations, officials are to undergo 'a medical check-up' every year. The medical service for its part is under a duty to warn an official of the existence of any illness revealed by his file and to alert him to behaviour posing a threat to his health, which presupposes that all pertinent data and information in that regard are communicated to him. In this case, therefore, it must be held that the conduct of the JRC's Medical Service towards the applicant, which was characterized by its failure to inform him of his state of health in good time, constitutes a service-related fault such as to cause the defendant to incur liability.

38 With regard to the damage suffered by the applicant, it should be noted that the expert pointed out that 'an impairment of the ventilatory function of an obstructive nature', revealed in 1976, showed over the subsequent years 'a significant deterioration . . . testifying to the existence of a chronic obstructive broncho-pneumonopathy', that a report drawn up in 1980 mentioned 'a pulmonary emphysema, being a complication arising from the obstructive bronchitis syndrome' and that the most recent examinations 'showed a continuing deterioration in the ventilation of the lungs, together with a reduction of approximately 50% in the perviousness of the bronchi.' The Court therefore considers that the applicant has unquestionably suffered damage, in the form of an aggravation of his illness.

39 The final condition to be satisfied in order for the institution to incur liability is the existence of a causal link between the fault which has been established and the

damage which has been suffered. The Court considers in this regard that the expert's conclusions leave no room for doubt as to the existence of such a link. The expert in fact found that:

'As a result of the absence of this information, Mr Nijman was unable to take in good time those measures (giving up smoking, prevention and early treatment of the attacks of acute bronchitis) which could at least have retarded the development of the pathological condition shown in the documents.'

However, it is necessary to point out, as appears from the expert's report, that the adoption by Mr Nijman of the measures referred to would not have resulted in the total disappearance of his illness but in a slowing down in the development of his pathological condition; for this reason, the lack of information and the failure to adopt preventive measures merely caused the illness to become worse.

40 As to the quantification of the compensation, the applicant considers that although what is involved is compensation pursuant to the rules of ordinary law rather than an insurance payment it is reasonable to seek a concrete analogy in the Rules on the Insurance of Officials of the European Communities against the Risk of Accident and Occupational Disease (hereinafter referred to as 'the Insurance Rules'). He points out that Article 14 of those Rules provides that an official is to be granted an allowance in respect of any injury or permanent disfigurement which, although not affecting his capacity for work, constitutes a physical defect and has an adverse effect on his social relations. He additionally states that under the same article the allowance is to be determined by analogy with the rates laid down in the invalidity scale referred to in Article 12. In this case, the damage suffered by him is said by him to manifest itself on the personal level (lifespan and quality of life, limited movement and activity, strict self-monitoring, periodic subjection to treatment and medicines, risk of death in the event of illnesses or incidents which are easily borne by other individuals, and so forth). On the basis of the foregoing, the applicant maintains that a permanent and irreversible

impairment of his respiratory organs, such as his emphysema, objectively involves permanent partial invalidity of at least 50% and he claims that the Court should order the payment to him of compensation of BFR 8 734 792, calculated by reference to his basic salary over the last 12 months.

41 For its part, the Commission considers that the method used by the applicant to calculate the compensation is erroneous, since the Insurance Rules do not apply to this case. Furthermore, it considers that even if it were to admit liability — which it does not — it should not be wholly but only minimally liable. The Commission further contends that that liability should be shared between the JRC's Medical Service and the various attending practitioners Mr Nijman may have consulted over a period of 30 years.

42 The Court considers that the reference to the Insurance Rules is of no relevance to this case because the damage suffered by the applicant, albeit of a physical nature, was caused neither by an accident nor by an occupational disease.

43 The Court further considers that the Commission is not wholly liable for the damage suffered by Mr Nijman, in view of the fact that he was suffering at the time, as he stated in his application, from 'a very slight but habitual cough, a slightly husky voice and slight shortness of breath when swimming', which manifested themselves in the course of his habitual activities. The Court considers that, in these circumstances, since the applicant received no satisfactory explanation from the JRC's medical officer about the source of those problems, he should have shown greater diligence in seeking to establish the root cause of his health problems, in particular by seeking the opinion of specialists. Given that that negligence contributed to the damage suffered by the applicant, the Commission cannot be under an obligation to make it good in full.

44 In view of the combination of instances of fault established in this case, namely, on the one hand, the service-related fault committed by the Commission and, on the

other hand, the negligence shown by the applicant, the Court considers *ex aequo et bono* that an award of the sum of one million Belgian francs constitutes adequate compensation for the applicant.

Costs

45 Under Article 69(2) of the Rules of Procedure of the Court of Justice, applicable *mutatis mutandis* to the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been asked for in the successful party's pleadings. Since the Commission 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's decision refusing to make good the damage suffered by the applicant;**

2. **Orders the Commission to pay the applicant compensation of one million Belgian francs;**

3. **Orders the Commission to pay the costs.**

Schintgen Edward García-Valdecasas

Delivered in open court in Luxembourg on 25 September 1991.

H. Jung
Registrar

R. García-Valdecasas
President