ORDER OF THE CIVIL SERVICE TRIBUNAL
(First Chamber)
1 February 2008 *

'Staff cases — Officials — Social security — Insurance against the risk of accident and occupational disease — Occupational disease — Lung cancer — Passive smoking — No need to adjudicate'

In Case F-77/07,

ACTION under Articles 236 EC and 152 EA,

Kay Labate, widow of Mr Mario Labate, a former official of the Commission of the European Communities, residing in Tarquinia (Italy), represented by I. Forrester, QC,

applicant,

v

Commission of the European Communities, represented by D. Martin and K. Herrmann, acting as Agents,

defendant,

* Language of the case: English.

THE TRIBUNAL (First Chamber),

composed of H. Kreppel, President, H. Tagaras and S. Gervasoni (Rapporteur), Judges,

Registrar: W. Hakenberg,

makes the following

Order

1 By application received by fax at the Tribunal Registry on 31 July 2007 (the original being lodged on 1 August 2007), Mrs Labate claims that the Tribunal should:

— annul the decisions of 18 October 2004 and 6 October 2006 by which the Commission of the European Communities rejected the request for recognition of the occupational origin of her husband's lung cancer, which caused his death;

— order the Commission to pay her all the compensation to which she is entitled under Article 73 of the Staff Regulations of Officials of the European Communities ('the Staff Regulations') and to reimburse her for the travel expenses incurred for Mr Labate's frequent trips to consult his doctor in Brussels, pursuant to Article 9 of the Common Rules on the Insurance of Officials of the European Communities against the Risk of Accident and Occupational Disease ('the Insurance Rules').

— prescribe such other or further relief as justice may require;

— order the Commission to pay the costs.

2 By a letter of 19 October 2007 received at the Registry of the Tribunal on the same day by fax (the original being lodged on 22 October 2007), the Commission informed the Tribunal that it had decided to withdraw the decision of 6 October 2006 and to grant the Medical Committee a new mandate. In that letter, the Commission states that the applicant had been informed of that withdrawal. Declaring that it was prepared to pay the reasonable costs incurred by the applicant in submitting her application, the Commission asks the Tribunal not to adjudicate on the present case. A copy of a letter of 17 October 2007 was attached to that letter, in which the Head of the accidents and occupational diseases section of the 'Office for the Administration and Payment of Individual Entitlements' (PMO) informed the applicant that 'an obligation to give a more detailed statement of reasons [for the findings of the Medical Committee] was certainly justified on some aspects' and that it had therefore 'decided to annul the decision of 6 October 2006' and to 'establish a supplementary mandate for the members of the Medical Committee, asking them to review, supplement and justify their fresh findings, whatever those findings should be'.

3 By a letter of 22 October 2007 received at the Registry of the Tribunal on the same day by fax, one day before expiry of the time-limit set for lodging the defence, the Commission informed the Tribunal that, in sending the letter of 19 October 2007, it had assumed that, pursuant to Article 114 of the Rules of Procedure of the Court of First Instance of the European Communities, which were still applicable to the Tribunal at that date, the period prescribed for lodging its defence would be stayed. In any event, in its letter of 22 October 2007, the Commission requested the Tribunal to extend that time-limit to 14 December 2007.

4 By a letter of 25 October 2007 received at the Registry of the Tribunal on the same day by fax (the original being lodged on 29 October 2007), the applicant, first, objected that the letter of 19 October 2007 from the Commission did not constitute an application made by a separate document on the basis of

Article 114 of the Rules of Procedure of the Court of First Instance. She then requested the Tribunal to give judgment on her action, putting forward a number of arguments and, lastly, requested the Tribunal to order compensation for non-material damage linked to the unreasonable duration of the procedure before the Medical Committee.

5 By a letter of 23 November 2007, lodged at the Registry of the Tribunal on the same day, the Commission submitted its observations on the applicant's letter of 25 October 2007, maintaining its request for an order that there was no need to adjudicate in the case and requesting the Tribunal to dismiss as inadmissible and unfounded the claim for compensation for non-material damage put forward by the applicant.

Law

The pleas in law contained in the application

6 Under Article 75 of the Rules of Procedure, if the Tribunal finds that an action has become devoid of purpose and that there is no longer any need to adjudicate on it, it may at any time, of its own motion, after hearing the parties, adopt a reasoned order.

7 First, as was stated in paragraph 2 of this order, the Commission has formally withdrawn the decision of 6 October 2006. That withdrawal was not accompanied by the concomitant adoption of another decision with the same subject-matter, since the Commission has decided to re-open the procedure before the Medical Committee with a view to adopting a fresh decision, whatever that decision should be. The withdrawal thus decided upon by the Commission, which retroactively deprives the decision of 6 October 2006 of its existence in law, produces effects equivalent to those which might have resulted from the

annulment of that decision by a court judgment (see, to that effect, order of the Court of First Instance in Case T-22/96 *Langdon* v *Commission* [1996] ECR II-1009, paragraphs 12 to 14).

8 The applicant cannot, in such a context, draw an argument from the judgment given by the Court in Case 14/81 *Alpha Steel* v *Commission* [1982] ECR 749. In that case, unlike the present case, the contested decision had been replaced during the proceedings by a decision with the same subject-matter. That particular circumstance was treated by the Court as a new factor allowing the applicant, in the interest of equity and proper administration of justice, to amend its pleadings.

9 Secondly, the decision of 6 October 2006 was withdrawn on account of the insufficient reasons given by the Medical Committee for its findings, in order for it to be replaced by a measure the legality of which was not vitiated, and the Commission did not preclude a decision favourable to the applicant ultimately being adopted. The applicant cannot therefore claim still to have an interest in requesting the annulment of that decision for the purpose of remedying the illegalities by which that decision was allegedly vitiated (see, *a contrario*, Case C-362/05 P *Wunenberger* v *Commission* [2007] ECR I-4333, paragraphs 48 to 52).

10 Thirdly, the applicant is wrong to contend that the Tribunal remains seised of the issue of the legality of the decision of 18 October 2004 which she also claims should be annulled and which was not withdrawn by the Commission. In fact, on 18 October 2004, the Commission had only adopted a draft decision which could be the subject of an application by the official concerned, within a time-limit of 60 days, for a referral for the purpose of obtaining an opinion from the Medical Committee, in accordance with the provisions of Article 21 of the insurance rules. The decision by which the Commission refused to recognise the professional origin of the applicant's husband's disease is exclusively the

decision of 6 October 2006, taken after the Medical Committee gave its opinion. The withdrawal of that decision therefore leaves no other decision the legality of which the Tribunal could still examine in this case.

11 Fourthly, the applicant's argument that the Commission withdrew the decision of 6 October 2006 in order to forestall judicial review does not establish that this case still has a purpose. The Commission cannot be criticised for considering it desirable, after examining the application and all the facts of the dispute, to remedy certain inadequacies or irregularities affecting that decision by re-opening the proceedings before the Medical Committee. Furthermore, the belated nature of the withdrawal decided upon on 17 October 2007, although regrettable, does not affect the finding that the decision of 6 October 2006 no longer exists in law.

12 Lastly, the claims that the Commission should be ordered to pay the applicant the sums provided for in Article 73 of the Staff Regulations and Article 9 of the insurance rules are closely linked to the application for annulment of the decision of 6 October 2006. Contrary to the applicant's assertion, those claims do not have an independent content which would, despite the withdrawal of that decision, warrant the Tribunal ruling on whether they are well-founded or not. The sums of money referred to in those provisions are due only in the event that the administration recognises a disease as being occupational in nature. The Tribunal could not therefore uphold those claims unless it considered that the administration had wrongly refused such recognition and decided to annul that decision on the merits. Furthermore, it is not for the Tribunal to substitute its assessment for that of the institution concerned and of the Medical Committee, and to determine itself, before the procedure relating to Article 73 of the Staff Regulations is concluded, whether the disease in question was occupational or not.

13 It follows from the foregoing, without there being any need to examine whether the Commission's letter of 19 October 2007 constitutes an objection submitted under Article 114 of the Rules of Procedure of the Court of First Instance, that the forms of order sought by the applicant in her application have become devoid of purpose. Therefore, there is no longer any need to adjudicate on the case.

The claims for compensation submitted in the letter of 25 October 2007

14 As the Tribunal has held, applications lodged before 1 November 2007, when its rules of procedure entered into force, are governed by the rules of admissibility referred to in Article 111 of the Rules of Procedure of the Court of First Instance, which was then applicable (order of the Civil Service Tribunal in Case F-60/07 *Martin Bermejo* v *Commission* [2007] ECR-SC I-A-1-407 and II-A-2-2259, paragraphs 26 and 27).

15 Under Article 111, as under the corresponding Article 76 of the Tribunal's Rules of Procedure, where an action is manifestly inadmissible or manifestly lacking any foundation in law, the Tribunal may, by reasoned order, and without taking further steps in the proceedings, give a decision on the action.

16 The applicant is requesting the Tribunal to make use of its unlimited jurisdiction and to order the Commission to pay her compensation for the damage resulting from the unreasonable delay in the procedure for recognition of the occupational origin of her husband's disease. In her view, the withdrawal of the decision of 6 October 2006 and consecutive re-opening of the procedure before the Medical Committee considerably prolongs the duration of that procedure and causes her non-material damage for which the Commission should be ordered to pay compensation.

17 In this respect, it is true that the Tribunal has unlimited jurisdiction in disputes of a financial character under Article 91(1) of the Staff Regulations, and it may

order, even of its own motion, an institution to pay compensation for non-material damage caused by the unreasonable duration of a procedure for the recognition of the occupational origin of a disease, including where the decision refusing such recognition is not held to be unlawful (see, to that effect, Case T-394/03 *Angeletti* v *Commission* [2006] ECR-SC II-A-2-441, paragraphs 163 to 167, and the case-law cited). As regards any order for payment of compensation that the Tribunal may make of its own motion, the fact that the applicant did not, in her application, formulate a claim to that effect does not render such a claim inadmissible.

18 However, in the present case, unlike in *Angeletti* v *Commission*, the Tribunal is not in a position to issue such an order to the defendant institution.

19 First, as the Commission points out, the Court of First Instance in *Angeletti* v *Commission* ordered the defendant institution to pay compensation for the non-material damage suffered by the applicant only after having examined the legality of the act referred for it to review. In this case, however, the Tribunal cannot carry out such an examination, since the decision of 6 October 2006 has been withdrawn by the Commission.

20 Next, the question of whether the time taken over a procedure is unreasonable or not must be examined taking into consideration all the relevant factual and legal aspects, such as the complexity of the matter concerned, the conduct of the official or the diligence of the institution or the members of the Medical Committee. This being so, the Tribunal is not at present able to undertake an examination of a procedure in relation to which neither all its stages nor all the circumstances pertaining to its conduct are susceptible of review, since the procedure for recognition of the disease of the applicant's spouse is still in progress. The Tribunal cannot therefore prejudge, at the date of adoption of this order, the total duration of that procedure.

21 Lastly, the actual content of the decision that will ultimately be adopted by the Commission is, by definition, unknown to the parties and to the Tribunal. The existence and extent of the non-material damage for which the applicant is claiming compensation will depend, at least in part, on the Commission's final decision on the request for recognition of the occupational origin of the disease of the applicant's spouse. The claims for compensation which the applicant could ultimately put forward – which have principally been presented, at this stage of the proceedings, as the consequence of the withdrawal of the decision of 6 October 2006 and the reopening of the procedure before the Medical Committee – will necessarily depend on the decision taken by the Commission at the end of that procedure.

22 In those circumstances, in so far as the Tribunal is not in a position to examine the legality of the measure referred to it for review or assess whether there has been actual damage, as claimed, and its extent, the Commission cannot be regarded as having already incurred liability (see, to that effect, Case T-99/95 *Stott* v *Commission* [1996] ECR II-2227, paragraph 72, and Case T-402/03 *Katalagarianakis* v *Commission* [2007] ECR-SC I-A-2-79 and II-A-2-591, paragraph 104).

23 The applicant's claims for damages submitted in her letter of 25 October 2007, which are furthermore for unspecified amounts, must therefore be dismissed as manifestly unfounded.

Costs

24 Under Article 122 of the Rules of Procedure, the provisions of Title 2, Chapter 8, on costs shall apply only to cases brought before the Tribunal from the date on which those Rules of Procedure enter into force, namely 1 November 2007. The provisions of the Rules of Procedure of the Court of First Instance relevant to this case continue to apply mutatis mutandis to cases pending before the Tribunal before that date.

25 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. However, under Article 88 of those rules, in proceedings between the institutions and their servants, the institutions are to bear their own costs. In addition, under Article 87(6) of the Rules of Procedure of the Court of First Instance, where a case does not proceed to judgment, the costs are to be in the discretion of the Court of First Instance.

26 In this case, the fact that the Commission did not respond to the complaint brought by the applicant against the decision of 6 October 2007 should be taken into consideration.

27 In order to justify that failure to respond, the Commission originally merely informed the applicant in the abovementioned letter of 17 October 2007 that the complaint had been received in the institution's central mail department but that it had never reached the Head of the accidents and occupational diseases section of the PMO. In its letter submitting observations of 23 November 2007, the Commission added that the applicant should have contacted its staff and obtained information about the procedure for sending a complaint, set out in the *Administrative Notice* of 10 September 2004. The Commission states that the applicant did not seek any information from its departments about the conditions for the receipt and treatment of her complaint.

28 Although it is true that the applicant did not inquire about the exact procedure for receipt of her complaint, it is nevertheless understandable that a person in her situation, who is not within the Commission and whose husband, a Commission official, died before the conclusion of the procedure before the Medical Committee, might not be fully aware of the exact procedure for the sending and treatment of a complaint, as set out in the *Administrative Notice* published on the Commission's intranet site. By failing to response to the applicant's complaint, although that complaint had been duly registered by the central mail department of the institution and should therefore have been transmitted at least to the department responsible for accidents and occupational diseases

of the PMO, the Commission did not comply with the requirements of proper administration and, in the situation in the present case, inevitably prompted the applicant to apply to the Tribunal.

29 Secondly, by withdrawing its decision of 6 October 2006, the Commission has admitted by implication that the procedure for the adoption of that decision was indeed open to criticism.

30 It follows from both of the foregoing considerations that the Commission has directly contributed to the case being brought before the Community courts. It is therefore fair that the costs of the case should be borne by the Commission in their entirety. That order for the Commission to pay the costs also covers the costs incurred by the applicant after the letter of 19 October 2007, by which the Commission informed the Tribunal of the withdrawal of the decision of 6 October 2007. Contrary to the Commission's contention in its letter of 23 November 2007, the costs incurred by the applicant after 19 October 2007 in submitting her letter of 25 October 2007 to the Tribunal, which are absolutely necessary for the purposes of the proceedings, were incurred solely in order to respond to the Commission's application for a ruling that there was no need to adjudicate in the case, and are thus the direct consequence of the Commission's decision to withdraw its decision of 6 October 2006 rather than the applicant's own free choice.

31 In the assessment of whether the costs for which the applicant seeks reimbursement are reasonable, the Commission will have to take duly into account the nature of the proceedings, their importance for the applicant and for the administration and the unprecedented nature of the question submitted to the Tribunal, which warranted an unusual volume of work and investment on the part of the applicant's lawyer for this type of case.

On those grounds,

THE TRIBUNAL (First Chamber)

hereby orders:

1. **There is no further need to adjudicate on the form of order sought by Mrs Labate in her application.**

2. **The claims for compensation submitted in the letter of 25 October 2007 by Mrs Labate are dismissed as manifestly unfounded.**

3. **The Commission of the European Communities is ordered to pay the costs.**

Luxembourg, 1 February 2008.

W. Hakenberg
Registrar

H. Kreppel
President