INTERLOCUTORY JUDGMENT OF THE COURT (FIRST CHAMBER)
OF 29 NOVEMBER 1973 [1]

Antonio Gigante
v Commission of the European Communities

Case 31/71

Summary

Officials — Invalidity — Assessment — Procedure — Committee — Members — Appointment of third doctor — Disagreement — Intervention by the Court
(Staff Regulations, Annex II, Article 7, last indentation)

If Article 7, last indentation, of Annex II of the Staff Regulations is applied by analogy, it is for the Court to undertake the appointment of the third doctor to the Invalidity Committee if the two doctors appointed by the parties cannot reach agreement upon the choice of that doctor.

In Case 31/71

ANTONIO GIGANTE, an official of the Commission of the European Communities, living at Brussels, 11 rue de la Pépinière, represented by Maître Emile Drappier, advocate at the Brussels Bar, with an address for service in Luxembourg at the chambers of Maître Ernest Arendt, 34 B IV rue Philippe II,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its legal adviser, Louis de la Fontaine, as agent, with an address for service in Luxembourg at the chambers of Emile Reuter, legal adviser to the Commission, 4 boulevard Royal,

defendant,

Application

— for the convening of an Invalidity Committee pursuant to Article 59 (1), paragraph 4, of the Staff Regulations,

1 — Language of the Case: French.

— for the repayment to the applicant of the sum of FB 90 391 being medical and pharmaceutical expenses incurred by him and not reimbursed,

THE COURT (First Chamber)

composed of: A. M. Donner, President of Chamber (Rapporteur); R. Monaco and J. Mertens de Wilmars, Judges,

Advocate-General: G. Reischl
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Facts and procedure

The facts and procedure may be summarized as follows:

The applicant took up employment with the Commission of the European Communities in 1960. He performed the duties of clerical assistant in charge of photocopying work using a Xerox 914 photocopying machine.

On 13 November 1962, while returning home from work, he suffered a motor car accident. Thereafter he had to undergo several forms of medical treatment and was very frequently absent from work. In 1967 an Invalidity Committee was convened which, after having encountered some difficulties, delivered its report on 7 January 1970. According to this report Mr Gigante 'is not suffering from any permanent invalidity which might be considered total and which makes it impossible for him to perform the duties corresponding to a post in his career bracket'. However, the doctor chosen by the applicant to be a member of the Invalidity Committee, Dr D'Avanzo, refused to sign the report, and on 12 February 1970 expressed reservations to the effect that it was his opinion that the accident, even if the invalidity caused thereby was slight, rendered him totally incapable of returning to his former work.

After the report had been filed differences of opinion arose between the Administration and the applicant as to the latter's capability of returning to work, as to the assessment of the extent of his invalidity and as to the total reimbursement of medical and pharmaceutical expenses.

On 17 February 1971 the applicant lodged a complaint within the meaning of Article 90 of the Staff Regulations in which he requested:

1. Pursuant to Article 59 of the Staff Regulations: the appointment of an Invalidity Committee;
2. Pursuant to Article 73 (2), (c) and (3):

(a) the reconition of his permanent partial invalidity,

(b) total reimbursement of his medical and pharmaceutical expenses, that is to say a sum of FB 90 391.

By a letter of 29 April 1971 the Director for Administration and Personnel informed the applicant that he was considering appointing a new Invalidity Committee, composed differently from the first, this implying that the applicant must undertake not to reappoint Dr D'Avanzo as a member of the Committee.

The applicant, being of the opinion that this letter did not constitute a reply to his complaint of 17 February 1971, filed the present application with the Registry of the Court on 16 June 1971.

After the application instituting the proceedings had been filed, the defendant decided to refer Mr Gigante's case once more to an Invalidity Committee, pursuant to Article 59 of the Staff Regulations, to which the applicant appointed Dr D'Avanco and the Commission appointed Dr R. de Marneffe.

Since the applicant considered that the convening of the new Invalidity Committee containing Dr D'Avanzo did not meet all his requirements the proceedings before the Court were continued.

The written procedure followed the normal course.

Having heard the report of the Judge-Rapporteur and the opinion of the Advocate-General, the Court (First Chamber) decided to open the oral procedure without any preparatory inquiry.

The parties made oral observations at the hearing on 14 June 1972. At the conclusion of the hearing the Court decided to stay proceedings while awaiting the Invalidity Committee's report.

Since the parties have not been able to reach agreement as to the mutual appointment, under Article 7 of Annex II to the Staff Regulations, of a third doctor, it has not been possible, up to the present time, to constitute the Committee and the proceedings before the Court have been reopened.

The parties presented their observations as to the deadlock reached, at the hearing on 24 October 1973.

The Advocate-General delivered his opinion at the hearing on 15 November 1973.

II — Observations submitted by the parties

In his application the *applicant* claims that the Court should:

— declare null and void the implicit rejection by the appointing authority of the administrative complaint of 17 February 1971, lodged on 18 February 1971;

— declare null and void the decision contained in the letter of the Director for Administration and Personnel of 29 April 1971, in so far as it sought to require the applicant not to appoint Dr D'Avanzo as a member of the Invalidity Committee, thus restricting the rights conferred on officials by Article 7 of Annex II to the Staff Regulations;

— order the defendant to institute the procedure for the convening of the Invalidity Committee laid down by Article 59 (3) of the Staff Regulations, the task of this Committee being:

1. to assess whether the applicant is suffering a total permanent invalidity, or a partial permanent invalidity such as to render him nevertheless incapable of performing the duties corresponding to a post in his career bracket,

2. to assess the extent of his invalidity, for the purposes of applying Article 73 (2) (4) of the Staff Regulations,

3. to assess what treatment the applicant should undergo;

— order the defendant to repay to the applicant, pursuant to Article 73 of the Staff Regulations, his medical and pharmaceutical expenses, and in particular to pay to the applicant the sum of FB 90 391 being the difference between the expenses incurred by him and those reimbursed, subject to adjustment during the proceedings;

— order the defendant to pay the costs.

In his rejoinder the applicant withdrew the third and fourth submissions of his application.

The *defendant* contends that the Court should:

— rule that the Invalidity Committee, constituted by the appointment of Dr Belenger by the President of the Court in August 1971, has jurisdiction to settle all the points at issue in the application;

— accordingly, rule that this Committee must deliver its report without delay;

— take formal notice that the Commission contests the validity of the claim for reimbursement of medical expenses made in the application;

— accordingly, reserve judgment on this claim until the parties have been able to formulate their attitude towards the conclusions reached by the Invalidity Committee.

At the hearing on 24 October 1973 the parties submitted that the Court should:

— order that an Invalidity Committee be convened, and reserve to itself the requisite powers to ensure the effective functioning of this Committee.

III — Submissions and arguments of the parties

The *defendant* observed that the relevant authority had decided to submit Mr Gigante's case once more to an Invalidity Committee as provided by Article 59 of the Staff Regulations. Pursuant to Article 7 of Annex II to the Staff Regulations, the President of the Court, in August 1971, appointed Dr Belenger. The applicant appointed Dr D'Avanzo as a member of this Committee.

It was the Invalidity Committee's task to ascertain the following points:

(a) whether the applicant is suffering a total permanent invalidity;

(b) if it should transpire that he is not suffering from a total permanent invalidity, whether the applicant is suffering from a partial permanent invalidity such as would render him incapable of performing the duties corresponding to a post in his career bracket;

(c) or further, whether he is suffering a partial permanent invalidity as the direct consequence of the accident which he suffered on 13 November 1962; the purpose of this is to make it possible to assess the compensation which he is entitled to claim under Article 73 (2) (c) of the Staff Regulations (it might be necessary to assess the extent of the partial permanent invalidity resulting from the accident);

(d) the date, if any, when the medical position resulting from the injuries caused by the accident of 13 November 1962 had become stabilized and whether further medical treatment is necessary thereafter;

(e) whether the medical and pharmaceutical expenses, the reimbursement of which is claimed, were incurred as a result of the accident and whether they are covered by the provisions of Article 73 (3). If it is found that they are not, the Committee is to make a separate evaluation of the expenses according to their origin.

The defendant noted that the Invalidity Committee has not yet begun its work, because the applicant has refused, up to the present time, to authorize Dr D'Avanzo to take part in the meetings of this Committee.

As regards the amount of the expenses for which the applicant claims reimbursement, the defendant maintains that this total is FB 58 109 and not FB 90 391. However, no decisions can be made as to whether the claim for reimbursement is justified until the Invalidity Committee has made its report assessing the extent to which these expenses are a direct consequence of the accident.

The defendant observes that the foregoing shows that the Commission has satisfied the claims set out in the application as fully as possible. Accordingly, the application has become devoid of purpose.

The *applicant,* while admitting that the Commission of the European Communities is willing to meet him on certain points, insists that the defendant should make an official declaration that it considers the implicit rejection of his complaint of 17 February 1971 to be null and void. He also feels that the defendant should specifically annul the decision contained in the letter dated 29 April 1971 of the Director for Administration and Personnel, to the extent that it sought to require the applicant not to appoint Dr D'Avanzo as a member of the Invalidity Committee.

According to the *defendant* it is clear that the decision to appoint a new Invalidity Committee and to accept Dr D'Avanzo as a member of this Committee in fact renders null and void the implicit rejection of the complaint of 17 February and the decision by the Director for Administration and Personnel as to the appointment of Dr D'Avanzo to be a member of the Invalidity Committee.

At the hearing on 24 October 1973 the parties discussed the deadlock caused by the disagreement between the doctor appointed by the applicant on the one hand and the doctor appointed by the Commission on the other hand as to the appointment of a third member of the Invalidity Committee.

Grounds of judgment

1 By an application lodged on 16 June 1971 the applicant requested the annulment of several implicit and express decisions of the Commission relating to the appointment of an Invalidity Committee within the meaning of Article 59 (3) of the Staff Regulations and the institution of the procedure for the convening of such a Committee.

2 By letters dated 29 September and 15 October 1971, and by two letters dated 11 January 1972, sent by the Director-General for Administration and Personnel to Doctor Belenger and Doctor D'Avanzo, the Commission instituted the procedure for convening an Invalidity Committee.

3 It was the task of this committee to assess:

(a) Whether the applicant is suffering a total permanent invalidity;

(b) If it should transpire that he is not suffering a total permanent invalidity, whether the applicant is suffering a partial permanent invalidity such as would nevertheless render him incapable of performing the duties corresponding to a post in his career bracket;

(c) Or, further, whether he is suffering a partial permanent invalidity as the direct consequence of the accident which he suffered on 13 November 1962; the purpose of this being to make it possible to assess the compensation which he is entitled to claim under Article 73 (2) (c) of the Staff Regulations (it might, if appropriate, be necessary to assess the extent of the partial permanent invalidity resulting from the accident);

(d) The date, if any, when the medical position resulting from the injuries caused by the accident of 13 November 1962, had been stabilized, as well as to assess whether continuing medical treatment is necessary thereafter;

(e) Whether medical and pharmaceutical expenses, the reimbursement of which is claimed, should be considered as the consequence of the accident and covered by Article 73 (3), and, if this is not so, to make a separate evaluation of these expenses according to their origin.

4 By these letters the Commission satisfied all the applicant's claims in so far as lay in its power.

5 However, the proceedings before the Court were suspended to await the Invalidity Committee's report, but it was inpossible to convene it, since the doctors appointed by the Commission and by the applicant respectively could not reach agreement on the choice of a third doctor.

6 During the course of the hearing at which proceedings were reopened the agent for the Commission stated that in consequence of the attitude of the applicant and of his doctor the procedure under Article 59 of the Staff Regulations was deadlocked and that, this being the case, the Commission was bound to keep the applicant in employment and pay him, in spite of repeated absences attested by certificates made out by a variety of doctors.

7 Under these circumstances the defendant, while maintaining that the initial application had become devoid of purpose, submitted that the Court should

take such measures as might be necessary in order to convene an Invalidity Committee as provided for by Article 59 of the Staff Regulations, its task being that set out above.

8 At the same hearing, the applicant, admitting that in fact the two doctors could not reach agreement as to the choice of a third, agreed that the Court should take such measures as might be necessary in order to bring to a close the procedure for the assessment of invalidity.

9 The Staff Regulations do not provide a solution to the difficulties indicated by the parties.

10 Article 7 — last indentation — of Annex II explicitly provides for the intervention by the President of the Court of Justice in the event of failure by the official concerned to appoint a doctor, but remains silent as to the hypothesis of a failure by the two appointed doctors to agree as to the appointment of the third.

11 Having regard to the joint submission of the two parties as regards the appointment of the third doctor by the Court, Article 7 — last indentation — of Annex II should be applied by analogy and measures should be taken to bring the procedure for the assessment of invalidity to a close.

12 Accordingly, before arriving at a judgment in this matter, the necessary measures must be ordered.

13 Having regard to the circumstances of the case it is ordered that if the doctors appointed by both parties have not agreed on the appointment of a third doctor before 10 December 1973 the Court of Justice, First Chamber, will undertake this appointment, the two doctors having the right to make written observations and suggestions to the Court by 17 December 1973 at the latest.

14 The Invalidity Committee shall present its report within three months following the date upon which it is constituted by the appointment of the third doctor.

15 If meanwhile fresh difficulties threaten to jeopardize the normal progress of the work of the Invalidity Committee, the parties, the Committee or its

members shall be at liberty to notify this fact to the Court, which reserves to itself the power to order the necessary measures.

Costs

16 Costs are reserved.

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the observations of the parties;
Upon hearing the opinion of the Advocate-General;
Having regard to the Staff Regulations, especially Article 7 of Annex II;
Having regard to the Protocol on the Statute of the Court of Justice;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities;

THE COURT (First Chamber)

orders, before giving judgment:

1. If the doctors appointed by both parties have not succeeded in appointing a third doctor before 10 December 1973 the Court of Justice, First Chamber, will undertake this appointment, the two doctors having a right to make written observations and suggestions to the Court by 17 December 1973 at the latest.

2. The Invalidity Committee shall present its report within three months following the date upon which it is constituted by the appointment of the third doctor.

3. If meanwhile fresh difficulties threaten to jeopardize the normal progress of the work of the Invalidity Committee, the parties, the Committee or its members shall be at liberty to notify this to the Court, which reserves to itself the power to order the necessary measures.

4. **A copy of this judgment shall be sent to each of the doctors already appointed to the Invalidity Committee.**

Donner Monaco Mertens de Wilmars

Delivered in open court in Luxembourg on 29 November 1973.

A. Van Houtte
Registrar

R. Monaco
President of the First Chamber

OPINION OF MR ADVOCATE-GENERAL REISCHL DELIVERED ON 15 NOVEMBER 1973 [1]

Mr President,
Members of the Court,

Today I have to consider a case concerning the effects of an accident suffered by Mr Gigante, an official of the Commission.

I would first like to make the following remarks about the factual situation as it has developed since the time of the accident.

Mr Gigante took up a post with the Commission of the European Communities in 1960. Pursuant to the Staff Regulations he was established as an official with effect from 1 January 1962. At first he was employed in the Roneo Department as an 'opérateur auxiliaire'. With effect from 1 June 1964 he was appointed clerical assistant, Category C 4, in the Directorate-General for Administration and Personnel, where he was apparently concerned with photo-copying work.

On 13 November 1962, on the way home from his place of work, Mr Gigante suffered a motor accident.

Following this accident Mr Gigante was unfit for work until 2 January 1963. In 1963, in account of the continuing necessity for medical treatment, he undertook half-day working. On 18 December 1963 the Commission's medical officer established that Mr Gigante was capable of performing photo-copying work, with the proviso that a chair must be available for him during rest periods. At this time, and subsequently, the medical treatment apparently continued.

Since the Commission — as we know from other cases — has instituted insurance cover for accidents suffered by its employees, the relevant insurance company also took in hand the case of Mr Gigante. This company informed the Commission, in January 1965, that its doctor had established that Mr Gigante

1 — Translated from the German.