JUDGMENT OF THE COURT (Third Chamber)
20 June 1985 *

In Case 123/84

Steffen Klein, represented by Edmond Lebrun, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Tony Biever,

applicant,

v

Commission of the European Communities, represented by Raymond Baeyens, Principal Legal Adviser, acting as Agent, with an address for service in Luxembourg at the office of Manfred Beschel, a member of the Commission's Legal Department, Jean Monnet Building, Kirchberg,

defendant,

APPLICATION for the annulment of the Commission's refusal to recognize the applicant's entitlement to a pension and for an order that the Commission should, as a result, accept the pecuniary consequences of the contract concluded between the parties in accordance with the law applicable thereto,

THE COURT (Third Chamber)

composed of: C. Kakouris, President of Chamber, U. Everling and Y. Galmot, Judges,

Advocate General: P. VerLoren van Themaat
Registrar: H. A. Rühl, Principal Administrator

after hearing the Opinion of the Advocate General delivered at the sitting on 7 March 1985,

gives the following

* Language of the Case: French.

JUDGMENT

(The account of the facts and issues which is contained in the complete text of the judgment is not reproduced)

Decision

1 By application received at the Court Registry on 11 May 1984, Dr Klein, a fee-paid doctor at the Commission, brought an action seeking:

1. an order that the Commission should:

   (a) pay the applicant, as from 1 February 1984, the Community retirement pension or, in the alternative, its equivalent in an appropriate form, and hence accept the pecuniary consequences of the contract of service concluded for an indefinite period which was implied by the duties performed by the applicant in the defendant's medical branch, that contract being governed by the law applicable to officials and other servants of the European Communities;

   (b) pay interest at the rate of 12% per annum on all the sums payable as from the date on which they became due;

2. the annulment of the express decision, notified by a letter dated 2 April 1983, rejecting the complaint to that effect submitted by the applicant on 21 November 1983.

2 In his reply the applicant states that the pecuniary consequences of the employment relationship between the parties should depend on the proper law of the contract, as determined by the Court, namely either the law applicable to officials and other servants of the European Communities or, in the alternative, Belgian social law. It follows that the Court is also seized of alternative claims for the grant by the Commission of a pension equivalent to that to which the applicant could claim entitlement under Belgian law.

3 It appears from the documents before the Court that in 1958 the Commission called on Dr Klein, who had been enrolled on the register of the medical council (Conseil de l'Ordre des médecins) of Brabant, Belgium, since 1948, to provide services on an *ad hoc* basis, initially at his own surgery and, as from 1966, on the Commission's premises.

4 On the Commission's initiative the parties concluded a contract, which was signed on 17 July 1974. It provided that Dr Klein should be in attendance for 16 hours a week and laid down his hourly fees, which were subsequently adjusted by amendments to the contract. Article 3 of the contract provides that it is governed by Belgian law and that, in the event of a dispute, the Court of Justice is to have sole jurisdiction pursuant to Article 181 of the Treaty.

5 By a letter dated 21 December 1982, the Director-General for Personnel and Administration at the Commission asked Dr Klein to give up his duties as medical officer with effect from 30 June 1983 at the latest, on the ground that the Commission could no longer implicitly tolerate the exception which had been made in his case as regards the retirement age.

6 By a letter dated 11 May 1983, Dr Klein, who was then 78 years of age, argued that his position was governed by Community law and that he was therefore entitled to a retirement pension under that law. In the alternative, on the basis of the standpoint adopted by the Commission, which maintained that Belgian law was applicable, he contested both the form and the substance of the decision dismissing him.

7 On 29 June 1983 the Director-General for Personnel and Administration notified the applicant that, by way of compromise with regard to the substance, he was giving him a further six months' notice with effect from 4 July 1983.

8 By a memorandum received on 21 November 1983, the applicant lodged a complaint under Article 90 (2) of the Staff Regulations. In the complaint he expressed no criticism of his dismissal or of the period of notice that he had been given but merely claimed entitlement to a retirement pension. The Director-General for Personnel and Administration rejected that complaint on 2 April 1984.

Admissibility

9 The Commission contests the admissibility of the application in so far as it is based on Articles 90 and 91 of the Staff Regulations and on the law applicable to officials and other servants of the European Communities, since, in its view, Belgian law alone is applicable to the dispute as a result of Article 3 of the contract concluded between the parties.

10 It should be observed that, according to a consistent line of cases, provisions of the Staff Regulations may be relied on before the Court, not only by officials or other servants of the Communities, but also by persons claiming to be such.

11 The Commission's objection of inadmissibility must therefore be dismissed.

Substance

The claims relating to entitlement to a Community retirement pension

12 The applicant argues in support of those claims that the contractual provision according to which the contract is governed by Belgian law is irregular on the ground that a Community institution may employ staff pursuant only to one or the other of the two sets of rules for which provision has been made, namely the Staff Regulations of Officials or the Conditions of Employment of Other Servants of the Communities. The applicant contends that, since he could not claim to be an official, he must therefore have been subject to the Conditions of Employment of Other Servants. He maintains that, by refusing to apply the Conditions of Employment to him, the Commission was in breach of Article 1 thereof, which provides that the Conditions of Employment

'shall apply to servants engaged under contract by the Communities.

Such servants shall be:

— temporary staff,

— auxiliary staff,

— local staff,

— special advisers.'

13 The applicant discusses Articles 2 to 5 of the Conditions of Employment of Other Servants, which define the various categories of servants listed in Article 1 (quoted above), and contends that, although his position as a fee-paid doctor does not fit precisely into any of those categories, he should nevertheless be assigned to the most appropriate category, namely that of a member of the temporary staff within the meaning of Article 2 (c).

14 In contrast, the Commission considers that the parties necessarily, albeit impliedly, excluded the application of the rules applicable to officials and servants of the Communities by expressly stipulating that the contract should be governed exclusively by Belgian law. Furthermore, the Commission contests whether it is possible to assign the applicant to one of the categories provided for in the Conditions of Employment of Other Servants.

15 Article 1 of the Conditions of Employment of Other Servants provides that the Conditions are to apply to persons engaged under contract by the Community as temporary staff, auxiliary staff, local staff or special advisers.

16 It is therefore necessary to consider whether Dr Klein's position as a part-time, fee-paid doctor could or could not fall within one of those categories.

17 The applicant claims to fall within the category of a member of the temporary staff within the meaning of Article 2 (c) of the Conditions of Employment of Other Servants namely 'staff . . . engaged to assist either a person holding an office provided for in the Treaties establishing the Communities . . . or the elected President of one of the institutions or organs of the Communities or the elected Chairman of one of the political groups in the European Parliament'. Dr Klein's duties as a fee-paid doctor do not come within that definition.

18 It should also be held, as the Commission argues, that the applicant cannot be classed as a member of the temporary staff within the meaning of Article 2 (a), (b) or (d) of the Conditions of Employment of Other Servants, since such staff must be engaged to fill a post which is included in the list of posts appended to the section of the budget relating to each institution, and Dr Klein's position as a fee-paid doctor was not so listed.

19 Neither can the applicant be classed as a member of the auxiliary staff, for although, by virtue of Articles 3 and 52 of the Conditions of Employment of Other Servants, the contracts of auxiliary staff may cover part-time duties, they may not be concluded for more than one year: Dr Klein worked as a fee-paid doctor for 25 years.

20 As far as 'local staff' (Article 4) are concerned, that category covers staff engaged for manual or service duties, manifestly not the case of the duties performed by Dr Klein.

21 As regards the case of special advisers, Article 5 provides that the special adviser is paid from the total appropriations for that purpose under the sections of the budget relating to the institution which he serves; this was not true of Dr Klein.

22 It follows from the foregoing that the post of part-time, fee-paid doctor which was held by Dr Klein did not fall within the scope of the Conditions of Employment of Other Servants.

23 Finally, it should be observed that, as the Court held in particular in its judgment of 16 March 1971 in Case 48/70 (*Bernardi* v *European Parliament* [1971] ECR 184), the provisions of the Staff Regulations employ precise wording and there is no reason to extend their scope by analogy to situations to which they do not expressly refer. That is also true of the Conditions of Employment of Other Servants.

24 Accordingly, the recruitment of Dr Klein by means of a contract which expressly refers to Belgian law could not be regarded as contrary to Article 1 of the Conditions of Employment of Other Servants unless the Commission had determined Dr Klein's terms of employment, not in the light of the needs of the service, but with a view to avoiding the application of the said Conditions of Employment and so had been responsible for a misuse of procedure.

25 Neither the documents on file nor the oral proceedings have established that that was in fact the case.

26 It follows that the claims relating to the grant of a Community retirement pension or its equivalent must be dismissed.

The alternative claims relating to the grant of a retirement pension equivalent to that to which the applicant could claim entitlement under Belgian law

27 The applicant argues in support of those claims that there was a 'subordinate employment relationship' ['rapport de travail subordonné']. He refers to Belgian social law and argues that his subordination to the Commission departments is evidenced by the authority which the latter exercised in determining the scope and even the organization of the work which he performed.

28 The applicant points out in support of that contention, *inter alia*, that the head of the medical branch could require him to perform duties other than those expressly stipulated in the contract, that the contract was concluded for an indefinite period, that his sixteen hours' work per week had to be carried out on the days and at the times laid down and on the defendant's premises and using its equipment, and that he was forbidden to recruit patients for his private practice from among the officials.

29 Furthermore, the applicant stated at the hearing that since his dismissal the Commission had engaged five fee-paid doctors under ' "contrats de travail d'employé" [contracts of employment as an "employé"] within the meaning of the Belgian Law of 3 August 1978', thereby acknowledging the existence of a subordinate employment relationship.

30 The Commission denies that the duties performed by a fee-paid doctor establish the existence of a subordinate employment relationship. It contends, *inter alia*, that the timetable established by mutual agreement between the responsible official in the medical branch and the fee-paid doctors is intended solely as a means of sharing work, and cannot therefore be construed as evidence of subordination. As for the prohibition on recruiting patients from among the officials, that was the outcome not of the contract between the parties, but of Article 121 (2) of the Code de déontologie médicale [Code of Medical Practice], according to which the duties of a 'medical officer, inspector, assessor or official are incompatible with those of a practitioner attending the persons concerned'.

31 The Commission adds that the engagement of new fee-paid doctors under 'contrats de travail d'employé' was the result of a re-organization of the medical branch as a whole which had had to be carried out owing to the cost of recourse to outside doctors and to the need for tighter control over expenditure

32 It should be observed that contracts of employment are governed in Belgium by the Organic Law of 3 July 1978 repealing the laws on 'contrats de travail d'employé' which were consolidated by the Royal Decree of 20 July 1975. Article 3 of the Organic Law provides that 'a "contrat de travail d'employé" is a contract by which a worker, the "employé", undertakes for remuneration to carry out work, principally of an intellectual nature, under the authority, the direction and the supervision of an employer'.

33 It appears from the documents before the Court that, according to Belgian case-law, for such a contract to exist there must be a relationship of subordination and, since no precise definition of such a relationship is provided for in the law, the Belgian courts base their assessment on the particular facts of each case.

34 Having regard to those considerations it should be observed that, according to the very terms of the contract between the parties, it is a 'contrat de prestations de services' ['contract for services']. That description, moreover, corresponds to the terms used in the organization plan for the Commission's medical branch which was adopted at the meeting of the Commission of 18 December 1968 (COM (68) PV-61), in which the applicant is referred to as a doctor paid on the basis of services rendered.

35 That description of the contract is not invalidated by the nature of the services which the applicant was required to carry out or by the conditions in which those services were performed. The evidence adduced in that regard by the applicant does not show that, in carrying out his purely medical duties, he was in a position of subordination. They merely reflect the need of every administration to organize its departments — in this case the department responsible for staff medical services — rationally. The character of the relationship which existed between the Commission and Dr Klein is unaffected by the fact that, after the latter's dismissal, the Commission engaged doctors by contracts of employment as 'employés' governed by Belgian law.

36 It follows from the foregoing that the applicant was in fact a provider of services *vis-à-vis* the Commission, and it is common ground between the parties that as such he could not claim entitlement to any retirement pension under Belgian law.

37 Consequently, the applicant's alternative claims must also be dismissed.

Costs

38 Pursuant to Article 69 (2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. However, under Article 70 of those Rules, costs incurred by the institutions in proceedings by servants of the Communities are to be borne by the institutions themselves. Since this application sought to have the applicant recognized as a servant of the Communities, that rule should be applied in his case.

On those grounds,

THE COURT (Third Chamber)

hereby:

(1) Dismisses the application;

(2) Orders the parties to pay their own costs.

Kakouris Everling Galmot

Delivered in open court in Luxembourg on 20 June 1985.

P. Heim
Registrar

C. Kakouris
President of the Third Chamber