JUDGMENT OF THE COURT (FIRST CHAMBER)
OF 12 JULY 1973 [1]

Anna Di Blasi
v Commission of the European Communities

Case 74/72

Summary

Officials — Personal file — Documents not previously communicated — Insertion — Admissibility — Conditions
(Staff Regulation, Art. 26, second paragraph)

Documents may be placed in an official's personal file notwithstanding that they have not been previously communicated to him, so long as they are not used or cited against him, and it has not been proved that the material contained in them is substantially erroneous.

In Case 74/72

ANNA DI BLASI, official of the EEC resident at 14 Via Antonio Mordini, Rome, her representative ad litem being Luciano Jaconis, Rome (Italy), 62 Via Lucrezio Caro, and having chosen her address for service in Luxembourg c/o Me Ernest Arendt, 34 rue Phillippe-II,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its legal adviser Giorgio Pincherle, acting as agent, having chosen its address for service in Luxembourg at the office of its legal adviser Emile Reuter, 4 boulevard Royal,

defendant,

(a) Application for annulment of

1. the decision notified by a letter dated 15 March 1972, by which the Commission of the European Communities recognized, under Article

1 — Language of the Case: Italian.

73 of the Staff Regulations, the partial permanent invalidity of the interested party to an extent of 9 % as the result of an accident she sustained on 3 January 1968;

2. the implied decision of rejection by the Administration of the appeal throught official channels which the applicant lodged against the said decision by a document dated 12 June 1972, in which she asked that the said decision be annulled and that her partial permanent invalidity be fixed at 70 % or thereabouts, or at least 45 %;

(b) the partial permanent invalidity subsequent to the accident to be fixed at 70 %, or at least 45 % or between one third and one half;

(c) an order that there should be removed from the applicant's personal file a confidential report from the medical service of the EEC made by Dr Jean Francois Elens in so far as that report contained a diagnosis, prognosis and a medico-legal opinion, all of which were erroneous, and was based on premises which seriously impaired her reputation and dignity;

THE COURT (First Chamber)

composed of: R. Monaco, President of Chamber, A. M. Donner and C. Ó Dálaigh (Rapporteur), (Judges),

Advocate-General: K. Roemer
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:

Miss Anna Di Blasi is an official of the Communities with the Directorate-General of Regional Policy of the EEC. Before being established she was employed by the High Authority of the ECSC in Luxembourg. On the morning of 3 January 1968, after the merger of the Communities, the applicant was still in the process of being transferred to

Brussels and in the Course of her employment was in the offices at the Place de Metz at Luxembourg, when she fell in a corridor because too much wax polish had been applied to the floor. She was admitted to hospital as the result of a diagnosis which established that she had a 'serious triple malleolar fracture with extensive bone fragmentation and a dislocation of the right foot' and she underwent surgery in order to reduce the fracture.

It was apparent from the extent of traumatism and of the progress of the injuries that therapeutic treatment was going to be long and complicated and that the danger of an incomplete recovery was beginning to emerge.

The principal events which marked the history of the applicants injuries may be summarized chronologically as follows: hospital treatment continued for four months; the injured limb was immobilized in plaster; in May 1968, when the patient left the hospital, a mobile plaster was applied; in August 1968, the patient could walk again without plaster, although needing the aid of crutches which she has never abandoned; since 1968, medical treatment has continued and has not yet terminated.

The patient complains of the following ailments:

— until March 1970, stiffness of the joints, oedema, atrophy, arthritis osteoporosis, haematoma, tendinitis, fibrositis, falling of the plantar arch, change in body weight distribution, inflammation of the ligaments, swelling, hypothrophy of the leg, neuro-dystrophy, vasomotor disturbance, sharp pains, locomotor dystonia, general dystonia, insomnia, psycho-neurotic syndrome of the depressive-reactive type accompanied by hypochondriac personality changes;

— after March 1970, aggravation of the patient's condition; pathological manifestations in the other leg owing to the bad positioning of the right leg and to the uneven distribution of body weight; in particular, aggravation of arthritis osteoporosis, tendinitis, fibrositis, falling of plantar arch, inflammation of ligaments, neuro-dystrophy process, vasomotor disturbance, locomotor dystonia, and in general, insomnia, psycho-neurotic syndrome; also, the appearance of 'allux valgus' on both feet and of bursitis on the left foot.

Miss Di Blasi was examined several times by the EEC medical service both during the time she was in Burssels and, when requested to attend for this purpose, during her sick leave in Italy. It is apparant from the file that as from 3 January 1968, the applicant never carried out full-time duties even during her brief periods of working.

In July 1970, the applicant's brother, Dr Giovanni Di Blasi, who had travelled to Brussels and found that the applicant's physical and mental condition had considerably deteriorated since her reinstatement, went to the Bureau Liquidateur d'Assurance Maladie IX/B/3 and there had a talk with Mr J. Giraudon concerning the payment of partial permanent invalidity benefit due in accident cases. On 22 October 1970, the Bureau Liquidateur d'Assurance Maladie sent Miss Di Blasi the appropriate claim form and expressly reminded her that she must send a medical report stating the degree of invalidity claimed within a period of three years from the date of the accident, in order that she should not be barred by the three years time-limit laid down in Article 10 (c) of the insurance policy.

Still following the same procedure the applicant submitted, by registered letter dated 16 December 1970, the clinical and medico-legal statement prepared by Dr G. de Masi with regard to her state of health, in which he had concluded there was a 50 % permanent incapacity for work attributable to physiological disorders and 20 % to psychological disorders, making a total of 70 %.

Furthermore, by a letter dated 22 December 1970, the applicant submitted an additional medico-legal opinion from Dr de Masi dated 21 December, which declared that his assessment of her loss of capacity to work and of her physical capacities did not take into account, *inter alia,* a possible deterioration of her condition.

The applicant was summoned to Brussels by telegram for 6 April 1971, and went to the medical service of the Commission to see Dr Jean Francois Elens, Dr Olmechette, a neuropsychiatrist, and the medical adviser to the Insurers.

On 20 March 1972, the applicant received a letter, signed by the Director-General of Personnel and Administration and dated 15 March 1972, which informed her that 'as a result of the various medical examinations which you have undergone for the purposes of the provisions of the regulations relating to accident insurance cover, you have been recognized as suffering from a partial permanent invalidity of 9 %'.

By registered letter dated 27 March 1972, the applicant notified the Directorate-General of Personnel and Administration that she did not intend to accept the said decision, that she was unable to assess the implications of the decision in dispute without first knowing the criteria on which it was based, and she therefore requested the Administration to provide her with the information which she considered would be appropriate and helpful in enabling her to obtain the clarification which she desired.

Since she received no reply to her request, and in order to comply with the time limit laid down in Article 91 (2) of the Staff Regulations for appealing against the decision of 15 March 1972, the applicant lodged an appeal through official channels with the Commission by a letter dated 23 June 1972.

After she had lodged her appeal the applicant received from the Directorate-General of Personnel and Administration a letter dated 23 June 1972, which informed her that, to enable her to be given 'the additional criteria for a proper appraisal of the subject matter of the letter of 15 March' the medical service of the Commission had requested to be relieved of the duty of medical secrecy both as regards the Administration and the 'doctor treating' her. The letter of 23 June 1972 was answered by a letter dated 10 July 1972 from the applicant's legal adviser stating that the applicant had always sent all medical documents to the Directorate-General and that consequently, the Community service was not faced with any problem of secrecy.

Following an exchange of correspondence between the applicant and the Commission, the applicant's legal adviser, and Dr Giovanni Di Blasi, her brother, were granted permission by Dr de Angelis on 5 September 1972, at the seat of the Community at Brussels, to inspect the personal file of the applicant but no document of a medical nature was to be found in it.

The two parties concerned were later seen by Dr H. A. Semiller, head of the medical service, who gave them certain medical reports to read, one of which was a report from Dr Jean Francois Elens dated 27 May 1971. During this interview (according to the applicant's statement) Dr Semiller stated that the applicant's psychological disorders existed prior to the accident and were attributable 'to age', and moreover that, as would be seen if one referred to the judgment of the Court of 16 June 1971 in Case 18/70 disorders of a psychological nature did not come within Article 73 of the Staff Regulations insofar as they were not mentioned in the accident insurance policy.

The applicant contends that her psycho-neurotic condition before the accident on 3 January 1968 was excellent.

The appeal was entered in the Court Register on 11 October 1972.

Subsequently, by a letter dated 17 October 1972, which the applicant received on 20 October, the Commission informed her that, following her appeal through official channels of 12 June 1972, 'it had been decided to have the degree of partial permanent invalidity established by a doctor, not belonging to the institution, to be appointed by mutual agreement between the medical adviser of the said institution and . . ., the 'doctor treating' the applicant. By her letter in reply dated 24 October 1972, the applicant consented to this procedure 'but bearing in mind that a case concerning the same matter is now pending before the Court' and in this connection referred to the contents of a statement, which was drawn up on the same day by her legal adviser and annexed to her original heading, and in which he set out the conditions which should be attached to the arbitration procedure.

In the last fortnight of November 1972, the Commission's agent telephoned the applicant's adviser and suggested that either the proceedings should be discontinued or that the applicant's adviser should not oppose the request for an extension of time for lodging the statement of defence which the agent proposed to make to the President of the Court, and that in order to expedite an amicable settlement of the dispute, preliminary proceedings should be commenced for the appointment of an arbitrator. By a letter dated 23 November 1972, the applicant's adviser, refering to the suggestions made by the Commission's agent, informed the President of the Court that he consented to the extension of the time limit which had been sought in the interests of the other party, but that he did not consider that at the time the conditions for discontinuance of the proceedings were fulfilled, eventhough he naturally hoped for an amicable settlement of the dispute, he therefore sought, in turn, an appropriate period of time within which to lodge a further pleading.

In another letter, also dated 23 November, 1972, the applicant's adviser sent to the Commission's agent

(a) a copy of his letter of 23 November 1972, addressed to the President of the Court,

(b) a declaration by the applicant dated 22 November 1970, confirming the above mentioned conditions and entrusting Professor D. Tognazzi, the doctor treating her, with the election of an arbitrator and

(c) a declaration by Professor Tognazzi dated 23 November 1972 suggesting the appointment of a panel of three medico-legal experts so that a choice might be mady by the institution's doctor.

By a letter dated 29 November, 1972, the Directorate-General of Personnel and Administration informed the applicant that 'by virtue of the opinion which the Commission delivered on 17 October 1972, concerning appeals through official channels' the decision notified by the letter of 15 March, 1972, 'must be recognized as revoked'.

Between 10 and 20 December, 1972, the head of the medical service of the Commission, Dr Semiller, unknown to the applicant, personally contacted Professor Tognazzi in Rome in order to ask him to alter the list of candidates for the arbitration panel which he had already proposed.

By a telegram dated 21 December 1972, Professor Tognazzi cancelled the nominations which he had submitted directly to Dr Semiller and confirmed the cancellation by a letter dated 22 December 1972, in which he stated: 'that he had been led to reconsider the nomination of Professors Muller and Boeler which he had made following Dr Semiller's recent visit to him in Rome, since he had put forward these names for the purposes of an opinion of a medical specialist and not of a medico-legal judgment, as had been expressly laid down in a note dated 17

October 1972, from the Vice-President of the Commission of the European Communities.

By a letter dated 21 December 1972, addressed to the Commission's agent, the applicant's adviser again insisted that only the nominations originally proposed by Professor Tognazzi were to be considered valid, and he added: 'Apart from this choice of names, it is clear that it will always be possible to consider any alternative suggestions with an open mind and in a spirit of willingness to cooperate, provided that they are made through the respective advisers of the two parties for the reasons stated above, which are fully and conclusively born out by the difficulties pointed out in this letter. Failing this, there will be no alternative but to refer the entire matter to the Court of Justice of the European Communities.'

The President of the First Chamber of the Court extended the time limit for lodging the statement of defence until 1 December 1972; the Commission's agent lodged the statement of defence on 23 November 1972, i.e. within the abovementioned time limit and, the President having given the applicant until 15 January 1973, to lodge her reply, her reply was entered in the Court Registry on that date.

With regard to Dr Semiller's visit to Rome to see Dr Tognazzi, the defendant states that on 15 December 1972, Dr Semiller, the Commission's doctor, went to Rome in order to come to an agreement with Dr Tognazzi, the doctor treating the applicant, on the appointment of an arbitrator; that the list of three names previously supplied by Dr Tognazzi was declared to be unacceptable by Dr Semiller, after Dr Tognazzi had told him that in fact it had been dictated to him by the applicant's brother and that the two doctors then decided to propose that the task of arbitrator be entrusted to an Austrian or a Swiss doctor who spoke Italian and who would be chosen by Dr Tognazzi himself.

The written procedure was carried out in due form. The Court (First Chamber) decided, on the basis of the report of the Judge-Rapporteur, and having heard the Advocate-General, to open the oral procedure without any preparatory inquiry.

II — Submissions of the parties

The *applicant* asks the Court:

(a) to declare the application admissible;

(b) to accept it on the merits;

and therefore

(c) to annul the decision of the Administration notified by the letter of 15 March 1972, for infringement of the rules of procedure, that is to say, *inaudita altera parte*, and for failure to provide grounds of decision,

(d) to annul the implied decision of rejection of the appeal through official channels dated 12 June 1972,

(e) to declare that the degree of partial permanent invalidity is 70 % and not, in any event, less than 45 %, or is between one third and one half of the total physical capacity of the applicant,

(f) to order the defendant to produce the personal file of the applicant, including all medical documents relating to her connected with the accident,

(g) to order the removal from the applicant's personal file of the confidential report prepared by Dr J. F. Elens for failure to communicate it to her contrary to Article 26 of the Staff Regulations,

(h) to order the defendant to pay the costs and all interest by way of compensation accrued since the accident.

The *defendant* asks the Court:

(a) to dismiss the application as having no valid subject matter, or on the grounds that the applicant has no legal interest, or as unfounded;

(b) to rule that the defendant's decision (of 9 October 1972), notified to the applicant by a letter dated 17 October 1972, annulled by implication any previous measure with regard to the degree of invalidity and that the applicant's conduct was indicative of her full compliance with that decision and with the procedure for determining the degree of invalidity;

(c) to rule that the implied decision of rejection was also annulled by the reply to the applicant of 17 October 1972;

(d) to rule that the request relating to the determination of the degree of invalidity by the Court is no longer of any concern to the applicant and lost all foundation when the applicant accepted the procedure established for that purpose;

(e) to rule that it is necessary for the Commission to accede to the applicant's request that the report of Dr Elens be removed from her personal file;

(f) to rule that the interest by way of compensation sought by the applicant is unknown to Community law in that no legal rate of interest has even been established, interest being due only on a liquidated sum, that is to say, on a determined sum;

(g) the defendant leaves the question of costs to the discretion of the Court.

III — Pleas and arguments of the parties

The pleas and arguments of the parties may be summarized as follows:

As to the admissibility of the application, no objection is raised by the defendant.

As to the merits

The *applicant* maintains that the decision of 15 March 1972 appears to be unlawful:

(a) in that the Administration made a decision *inaudita altera parte,* that is to say, infringing the rules of procedure;

(b) for failure to supply any grounds of decision.

Furthermore, the applicant maintains that the decision is unlawful on the ground of mistake of fact and because the medical service failed to take account of the psychological disorders due to the accident.

She also claims that the confidential report prepared by Dr J. F. Elens must be removed from her personal file for failure to communicate it to her contrary to Article 26 of the Staff Regulations.

The *defendant* replies that the application for annulment no longer has any basis. It maintains that the Commission's decision (of 9 October 1972), which was conveyed to the applicant by letter of 17 October, by implication annulled any previous measure concerning the degree of invalidity and that the applicant's conduct was indicative of her full compliance with the said decision and with the procedure established to determine the degree of invalidity and that therefore the applicant has clearly no interest in pursuing the action.

The *applicant* replies that her compliance with the decision conveyed to her on 17 October 1972 was *conditional* and that she had expressly refused to discontinue the proceedings.

In its rejoinder the *defendant* states that the applicant's argument in her reply constitutes an element of 'bargaining' and that the Commission had no area of discretion within which it could effectively 'bargain'. The defendant

further maintains that the procedure laid down by the Commission following the appeal through official channels was sufficient, appropriate and legally correct for the purpose of achieving the common aims of the parties. Lastly the defendant objects that the interest by way of damages sought by the applicant is unknown to Community law in that no legal rate has even been established.

Grounds of judgment

1 By an application filed on 11 October 1972, the applicant brought before the Court of Justice an action against the Commission's decision of 15 March 1972, recognizing her as having a permanent partial invalidity of 9 % following an accident she sustained on 3 January 1968, and against the Commission's implied decision of rejection of her administrative appeal of 12 June 1972;

By this action the applicant further submits that she should be recognized as having a permanent partial invalidity of 70 % or alternatively of no less than 45 % and that the Commission should be ordered to pay her interest to which she is entitled as from the date of her accident;

The request for annulment of the decision of 15 March 1972

2 In the first head of the submissions the action seeks the annulment of the decision of 15 March 1972 by which the Commission recognized the party concerned, under Article 73 of the Staff Regulations, as having a permanent partial invalidity of 9 % following the accident she sustained on 3 January 1968;

3 It is established that by a decision dated 9 October 1973, which was communicated to the applicant on 17 October 1972, the Commission decided to have the degree of permanent partial invalidity suffered by the party concerned fixed by a doctor not belonging to the institution, to be appointed by mutual agreement between the Commission's medical adviser and the doctor treating the applicant;

Furthermore, the Director-General of Personnel and Administration expressly informed the applicant by letter dated 29 November 1972, that the decision of 15 March 1972 'was to be regarded as revoked';

In these circumstances it must be concluded that, since the decision of 15 March 1972 had been revoked by the Commission, the subject matter of the appeal on this issue ceased to exist.

4 For the same reasons the subject matter of the appeal against the implied refusal to withdraw the decision of 15 March 1972 also ceased to exist;

The request for the degree of invalidity to be fixed

5 It is further submitted in the action that the degree of permanent partial invalidity suffered by the applicant should be fixed at 70 % or at least at 45 %;

6 Article 13 of the policy taken out by the Commission with an insurance company provides for an arbitration procedure in cases of disputes on medical matters;

As stated previously, the Commission decided to have the degree of permanent partial invalidity suffered by the party concerned fixed by a doctor not belonging to the institution, to be appointed by mutual agreement between the Commission's medical adviser and the doctor treating the party concerned;

The Commission's said decision which established the new procedure contains nothing which would justify a restrictive interpretation of the authority to be vested in the doctor acting as arbitrator;

In these circumstances the Court cannot intervene before the arbitration procedure has been exhausted;

7 The said request is therefore inadmissible;

The request for interest account of delay

8 The applicant submits that the Commission should be ordered to pay interest from the date of her accident;

The amount of interest cannot be determined unless the degree of permanent partial invalidity has first been established;

The establishment of the said degree of invalidity is now the subject of the above-mentioned arbitration procedure;

9 The said request is therefore inadmissible;

Infringement of paragraph 2 of Article 26 of the Staff Regulations

10 Lastly, the applicant submits that an order should be made for the removal from her personal file of a confidential report prepared by Dr G. F. Elens and which in her opinion was erroneous in content, or whose value as a medical document was affected by bias;

In support of this request she argues that the Commission has in the circumstances failed to fulfil the obligations imposed on it by paragraph 2 of Article 26 of the Staff Regulations;

11 Paragraph 2 of Article 26 of the Staff Regulations provides that: 'the documents referred to in sub-paragraph (a) may not be used or cited by the institution against an official unless they were communicated to him before they were filed'.

It does not follow from this prohibition that the personale file of an official may only contain documents which were previously communicated to him;

As long as such documents are not used or cited against her, and provided that it has not been proved that the material contained in them is substantially erroneous, there can be no objection to their being placed in the personal file of the party concerned;

12 In these circumstances, this head of the submissions in the action must be dismissed.

Costs

13 Article 69 (3), first sub-paragraph, provides: 'The Court may order even a successful party to pay costs which the Court considers that party to have unreasonably or vexatiously caused the opposite party to incur';

14 The decision of 15 March 1972 was only revoked after the action had been commenced.

Moreover, when the action was brought, no rules had been drawn up governing the application of Article 73, whereby all the conditions concerning its application could be clarified;

In these circumstances and having regard to Article 70 of the Rules of Procedure, it is appropriate that the costs incurred by the applicant in these proceedings should be borne by the defendant;

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the oral observations of the parties;
Upon hearing the opinion of the Advocate-General;
Having regard to the Staff Regulations of the European Communities, especially Articles 26 and 73;
Having regard to the Protocols 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)

hereby:

1. **Dismisses the action;**
2. **Orders the Commission of the European Communities to pay the costs of the proceedings.**

Monaco Donner Ó Dálaigh

Delivered in open court in Luxembourg on 12 July 1973.

A. Van Houtte
Registrar

R. Monaco
President of the First Chamber