Reports of Cases

JUDGMENT OF THE GENERAL COURT (Fourth Chamber)

16 June 2021 *

(Public service – Officials – Social security – Article 73 of the Staff Regulations – Common rules on insurance against the risk of accident and of occupational disease – Occupational disease – Article 9 – Claim for reimbursement of medical costs – Article 23 – Consulting another doctor – Refusal to refer the case to the Medical Committee on the basis of Article 22 – Failure to apply, by analogy, the second subparagraph of Article 22(1) – Rule of consistency between the application and the claim – Temporal application of the law)

In Case T-316/19,

Arnaldo Lucaccioni, residing in San Benedetto del Tronto (Italy), represented by E. Bonanni, lawyer,

applicant,

v

European Commission, represented by T. Bohr and L. Vernier, acting as Agents, assisted by A. Dal Ferro, lawyer,

defendant,

APPLICATION under Article 270 TFEU for annulment of the decision of the Commission of 2 August 2018 rejecting the applicant's requests of 23 March and 8 June 2018 for the case to be referred to the Medical Committee in accordance with Article 22 of the Common rules on the insurance of officials of the European Communities against the risk of accident and of occupational disease, and for compensation for the loss allegedly suffered by the applicant as a result of that decision,

THE GENERAL COURT (Fourth Chamber),

composed of S. Gervasoni, President, R. Frendo and J. Martín y Pérez de Nanclares (Rapporteur), Judges,

Registrar: E. Coulon,

gives the following

* Language of the case: Italian.

Judgment [1]

Legal framework and background to the dispute

Legal framework

…

3 Article 18 of the Rules on insurance, headed 'Decisions', provides:

'Decisions recognising the accidental cause of an occurrence, be it an occurrence attributed to occupational or non-occupational risks, and decisions linked thereto, recognising the occupational nature of a disease or assessing the degree of permanent invalidity shall be taken by the appointing authority in accordance with the procedure laid out in Article 20:

– on the basis of the findings of the doctor(s) appointed by the institutions; and

– where the insured party so requests, after consulting the Medical Committee referred to in Article 22.'

4 As regards the composition and work of the Medical Committee, the first and second subparagraphs of Article 22(1) of the Rules on insurance, headed 'Medical Committee', provide as follows:

'1. The Medical Committee shall consist of three doctors:

– one appointed by the insured party or those entitled under him/her;

– one appointed by the appointing authority;

– one appointed by agreement between the first two doctors.

Where agreement cannot be reached on the appointment of the third doctor within a period of two months following the appointment of the second doctor, the President of the Court of Justice [of the European Union] shall appoint the third doctor at the request of either party.'

5 The first subparagraph of Article 23(1) of the Rules on insurance, headed 'Consulting another doctor', provides:

'1. In cases other than those referred to in Article 18, where a decision is to be taken after consulting the doctor appointed by the appointing authority, the latter shall, before taking such a decision, notify the insured party or those entitled under him/her of the draft decision and also of the doctor's findings. Within a period 30 days the insured party or those entitled under him/her may request consultation of another doctor, to be chosen by agreement between the doctor appointed by the appointing authority and the doctor appointed by the insured party or those entitled under him/her. If, on the expiry of that period, no request for such consultation has been

[1] Only the paragraphs of this judgment publication of which the General Court considers useful are reproduced.

made, the appointing authority shall take a decision in accordance with the draft previously notified.

…'

Procedure and forms of order sought by the parties

28 By application lodged at the Registry of the General Court on 23 May 2019, the applicant brought the present action.

29 On 6 August 2019, the Commission lodged the statement in defence.

30 On 3 October 2019, the applicant lodged the reply.

31 By decision adopted on 25 October 2019, pursuant to Article 27(3) of the Rules of Procedure of the General Court, the President of the General Court reassigned the case to a new Judge-Rapporteur, attached to the Fourth Chamber.

32 On 18 November 2019, the Commission lodged the rejoinder.

33 By letter of 19 November 2019, the parties were informed that the written part of the procedure had closed and that they could request a hearing under the conditions laid down in Article 106 of the Rules of Procedure. By letter of 13 December 2019, the applicant requested a hearing within the time limit imposed.

34 By way of measures of organisation of procedure provided for in Article 89(3)(a) and (d) of the Rules of Procedure, the General Court, on 15 June 2020, asked the parties to reply to a series of questions and to produce a readable version of certain documents. The parties replied to the questions and the applicant complied with the request to produce documents within the prescribed period.

35 After reading the proposal of the Judge-Rapporteur, the General Court (Fourth Chamber) decided to open the oral part of the procedure. However, since the applicant, following a request from the General Court, in essence indicated, by letter of 16 July 2020, that he would not, after all, be present at the hearing, the General Court (Fourth Chamber) decided, pursuant to Article 108(2) of the Rules of Procedure, to close the oral part of the procedure.

36 By a separate document lodged at the Court Registry on 16 July 2020, the applicant, on the basis of Article 86 of the Rules of Procedure, modified the application so that the action includes, in essence, consideration, after the applicant became aware of it, 'of a document, constituting a new factor, which automatically reduces the initial claims of the application, in order to "take account of that new factor" with a view to the annulment of the Commission's decision of 2 August 2018'. By document lodged at the Court Registry on 18 September 2020, the Commission contended that the applicant's statement of modification should be rejected as inadmissible.

37 On 14 September 2020, the applicant lodged a statement containing a new plea. The Commission submitted its observations on that statement on 30 September 2020.

38 In the application, the applicant claims, in essence, that the General Court should:

– '[annul] the Commission's decision contained in the email of 2 August 2018, in the first paragraph on the second page, by which "in order to move the matter forward, [the appointing authority] has decided to use the rule expressly laid down in Article 22[(1), second subparagraph,] of the Rules on insurance for cases in which no agreement is reached, as regards the appointment of the third doctor, between the doctor representing the insured party and the doctor representing the institution and to apply it, by analogy, for the purposes of appointing another doctor in [this] case";

– order the Commission, if the powers of the General Court so permit, [to pay the applicant] the sum of EUR 21 440, which represents the reimbursement of the expenses … necessary to pay for "treatment required as a result of the injuries sustained and their symptoms, and also, where appropriate, of the costs incurred in respect of functional rehabilitation" needed for "emergency rehabilitation, because the open bite was likely to exacerbate a clinical situation already compromised by disease with continuous and repeated upper respiratory tract infections";

– in the alternative, impose[,] authorise or adopt any other measure to ensure that the Commission recognises that the present case, in the specific situation of the applicant and in the light of his medical history, clearly falls within the scope of the case described in Article 10 of [the previous Rules on insurance], and reimburses the sum claimed principally;

– further in the alternative, order the Commission, in accordance with the approach indicated in the [contested] decision which is to "use the rule expressly laid down in Article 22 of the Rules [on insurance]" in the applicant's specific situation and to "apply it by analogy", to ask the Medical Committee to give its opinion, in accordance with Article 20 of the Rules [on insurance];

– order the Commission to pay default interest from 23 January 2017, the date of the refusal to reimburse the costs of the treatments carried out, until payment is made, in accordance with Calculation No 238 (Annexe A.04);

– order the Commission to pay [the applicant] damages in the amount of EUR 500 000 euros or any other amount … equitably determined, on account of the voluntary or vexatious nature of the unlawful acts or omissions of the Commission, in particular for the abnormal conduct of the three doctors consulted, who inter alia refused to acknowledge basic nasal functions, claiming in practice that, in the applicant's specific situation, breathing through the mouth is as healthy as breathing through the nose;

– in any event, order the Commission to pay the costs.'

39 In the defence, the Commission contends the Court should:

– dismiss the application;

– order the applicant to pay the costs.

40 In the reply, the applicant claims, furthermore, that the General Court should 'declare that [he] is entitled, as an interim measure, including by separate order, to the sum of EUR 7 754, which is the reimbursement provided for by the [office responsible for settling claims] and was authorised at the time, on the basis of documents submitted on two occasions, which are in the Commission's possession'.

41 In the rejoinder, the Commission contends that the General Court should also dismiss the claim made by the applicant in the reply.

Law

…

Substance

98 The first head of claim seeks the annulment of the contested decision, by which, according to the applicant, the appointing authority incorrectly uses the rule expressly laid down in the second subparagraph of Article 22(1) of the Rules on insurance, applicable to cases in which 'no agreement is reached, in respect of the appointment of the third doctor, between the doctor representing the insured party and the doctor representing the institution', in order to apply it, by analogy, for the purpose of appointing 'another doctor'.

99 The fourth head of claim, raised in the further alternative, seeks, in essence, to require the Commission to use the rule expressly laid down in Article 22 of the Rules on insurance, as indicated in the contested decision, in the specific case of the applicant and to apply it by analogy, by asking the Medical Committee to give its opinion, in accordance with Article 20 of the Rules on insurance.

100 Accordingly, by the wording of the first and fourth heads of claim, the applicant seeks to challenge the Commission's approach favouring a selective application, using only the second subparagraph of Article 22(1) of the Rules on insurance in the present case, and to contest the Commission's decision not to use the whole of the procedure laid down in that article. It is therefore appropriate to analyse those two heads of claim together.

…

106 First, it must be observed that, contrary to the applicant's submissions with regard to the fourth head of claim, which is, in essence, that it is necessary to use the procedural rule for referral to the Medical Committee for a review of his claim for reimbursement of costs, the Rules on insurance clearly distinguish between two situations concerning the review of a draft decision.

107 In the first situation, if the insured party so requests, the decision is adopted following consultation of the Medical Committee in accordance with Article 18, second indent, of the Rules on insurance. In the second situation, the insured party may request that 'another doctor' be consulted for his or her opinion, in cases other than those referred to in Article 18 of those rules. Following notification of those draft decisions, the two procedures establish a period of 60 days and 30 days respectively within which the insured party may request a review of those drafts. If, on expiry of that period, no request for consultation has been made, the appointing authority adopts the decision in accordance with the draft previously notified.

108 It is apparent from those provisions that decisions adopted, as in the present case, in connection with a claim for reimbursement of costs, in accordance with Article 9(1) of the Rules on insurance, do not, as the Commission rightly points out, fall within the material scope of Article 18 of the Rules on insurance. That article relates to 'decisions recognising the accidental cause of an occurrence, be it an occurrence attributed to occupational or non-occupational risks, and decisions linked thereto, recognising the occupational nature of the disease or assessing the degree of permanent invalidity'. Since those terms are clear, they cannot be interpreted as including decisions relating to claims for reimbursement of costs within the meaning of Article 9(1) of the Rules on insurance.

109 Furthermore, contrary to the applicant's assertions, it is not a question of determining whether there is any right to use the whole of the procedure applicable to a claim for reimbursement, but rather to determine the procedure for appointing the 'other doctor', applicable in the event of disagreement between the parties concerning that appointment. In that regard, Article 23 of the Rules on insurance contains no lacuna which would justify application of the whole of the procedure laid down in Article 22 thereof.

110 Therefore, decisions adopted under Article 9(1) of the Rules on insurance concern situations which are different from those covered by Article 18 thereof and are governed by the procedure described in Article 23.

111 It follows from the conclusion reached in paragraph 110 above that the applicant cannot rely on the fact that the appointing authority decided, in the present case, to use in part and by analogy, as regards the appointment of the 'other doctor' provided for in Article 23 of the Rules on insurance, the procedure laid down in the second subparagraph of Article 22(1) of the Rules on insurance to infer that, a fortiori, the whole of the procedure laid down in Article 22 should be applied to his claim for reimbursement. Similarly, he cannot infer from the refusal of the doctor appointed by the appointing authority to reimburse costs that he has any right to refer the matter to the Medical Committee. Consequently, the first ground of the contested decision is well founded in that Article 22 of the Rules on insurance does not apply to decisions relating to reimbursement of medical costs.

112 Second, in view of the conclusion reached in paragraph 110 above, it is necessary to assess the legality of the use, by analogy, of the procedure laid down in the second subparagraph of Article 22(1) of the Rules on insurance, as contested by the applicant and defended by the Commission, for appointing the 'other doctor' within the meaning of Article 23 of those rules.

113 It is clear from the wording of Article 9(1) of the Rules on insurance, headed 'Reimbursement of expenses', that that article establishes the right to reimbursement of 'all expenses necessary … in order to pay for all care and treatment required as a result of the injuries sustained and their symptoms and also, where appropriate, of the expenses incurred in the functional and occupational rehabilitation of the victim'. On the other hand, it contains no information concerning the procedure applicable to claims for reimbursement of medical costs.

114 In that regard, reference should be made to Article 23(1) of the Rules on insurance, which, within its residual substantive scope, defines the procedure applicable to decisions relating to cases not provided for in Article 18 of the Rules on insurance, a situation which covers the contested decision.

115 It is true that, as the parties state, Article 23(1) of the Rules on insurance, headed 'Consulting another doctor', does not specify explicitly the procedure to be followed to appoint the 'other doctor' in order to rectify, if necessary, a disagreement between the doctor appointed by the appointing authority and the doctor appointed by the insured party.

116 However, the principle of legal certainty justifies an interpretation which focuses on the provisions of EU law in order to ensure a high degree of predictability (see, to that effect and by analogy, judgment of 22 May 2008, *Glaxosmithkline and Laboratoires Glaxosmithkline*, C-462/06, EU:C:2008:299, paragraphs 32 and 33). It is important, in order to ensure such predictability, to remain, as far as possible, faithful to the letter of the provisions interpreted.

117 To accept that, failing agreement between the doctor appointed by the appointing authority and the doctor appointed by the insured party in respect of the appointment of the 'other doctor', it is necessary to use the procedure laid down by the second subparagraph of Article 22(1) of the Rules on insurance would risk altering the scope of the consultation procedure as initially envisaged by its drafters. Moreover, as is apparent from the preamble to the Rules on insurance, the institutions, not the General Court, are responsible for drawing up by agreement rules on insurance and, consequently, for laying down, if appropriate, such procedure or making an explicit reference to the second subparagraph of Article 22(1) of the Rules on insurance.

118 Moreover, according to settled case-law, although an interpretation of a provision of EU law 'in the light' of its legal context or purpose is possible in principle to resolve a drafting ambiguity, such an interpretation cannot have the result of depriving the clear and precise wording of that provision of all effectiveness, otherwise it would be incompatible with the requirements of the principle of legal certainty (see, to that effect, judgments of 8 December 2005, *ECB* v *Germany*, C-220/03, EU:C:2005:748, paragraph 31; of 15 July 2010, *Commission* v *United Kingdom*, C-582/08, EU:C:2010:429, paragraphs 46, 49 and 51 and the case-law cited; and of 22 September 2016, *Parliament* v *Council*, C-14/15 and C-116/15, EU:C:2016:715, paragraph 70).

119 Since the institutions have not expressly provided for the President of the Court of Justice to appoint the 'other doctor' of his or her own motion, or indicated their agreement to that application by analogy, it is not for the General Court to impose it by judicial decision. In that regard, the General Court cannot disregard the clear and precise wording of a provision which provides only for the possibility of appointing 'another doctor' chosen by mutual agreement by the doctor appointed by the appointing authority and the doctor appointed by the insured party. Consequently, the Commission could not apply, by analogy to the situation in this case, the second subparagraph of Article 22(1) of the Rules on insurance.

120 Third, the conclusion reached in the previous paragraph cannot be called question by the Commission's arguments. The Commission justifies using the application by analogy of the rule for appointing the 'third doctor' laid down by the second subparagraph of Article 22(1) of the Rules on insurance by the need to find a solution to the deadlock caused by the impossibility of appointing 'another doctor' within the meaning of Article 23 of the Rules on insurance and the absence, in the article in question, of an express rule applicable in such a case. Moreover, according to the Commission, the decision to opt for that procedure would be balanced and facilitate a fair reconciliation between the interests of the former civil servant and those of the administration. That decision would be based on the duty to have regard for the welfare of officials and the principle of sound administration incumbent on the institution.

121 In that regard, first of all, the Commission's argument that, owing to the need to find a solution to the deadlock in this case, the provision in Article 23 of the Rules on insurance should be read, if there is disagreement concerning the appointment of 'another doctor', as providing for the use by analogy of the procedure laid down in the second subparagraph of Article 22(1) of the Rules on insurance, is incompatible with the clear wording of that provision and, moreover, is not supported in other parts of those.

122 Furthermore, it must be observed that the Commission's claim that the decision to opt for the rule for appointing a third doctor laid down by the second subparagraph of Article 22(1) of the Rules on insurance would be balanced and facilitate a fair reconciliation between the interests of the former civil servant and those of the administration is disputed by the applicant. In particular, the arguments raised concerning the uncertain content of the mandate of that 'other doctor' appointed by the President of the Court of Justice, to the documentation which would be sent to him or her without the applicant having any say in the matter and to the definitive nature of the decision in that ad hoc review procedure show, at the very least, that the applicant disputes that that decision is balanced and reconciles the interests of the parties. In an ad hoc procedure such as the one at issue, the applicant's arguments may be interpreted as claiming that the principle of legal certainty would not be respected owing to the lack of foreseeability of that procedure.

123 Moreover, the fact that other provisions in the Rules on insurance provide for a similar procedure, or that that procedure may be justified by the duty to have regard for the welfare of officials and the principle of sound administration incumbent upon the institution, cannot justify acceptance of the interpretation of the first subparagraph of Article 23(1) of the Rules on insurance contained in the decision.

124 According to settled case-law, the duty to have regard for the welfare of officials reflects the balance of the reciprocal rights and obligations which the conditions of employment and staff regulations have created in the relationship between the public authority and the civil servants, which implies in particular that when the authority takes a decision concerning the situation of an official, it must take into consideration all the factors which may affect its decision and, when doing so, should take into account not only the interests of the service but also those of the official concerned. This latter obligation is imposed on the administration by the principle of sound administration enshrined in Article 41 of the Charter of Fundamental Rights of the European Union (see judgments of 5 December 2006, *Angelidis* v *Parliament*, T-416/03, EU:T:2006:375, paragraph 117 and the case-law cited, and of 13 December 2017, *Arango Jaramillo and Others* v *EIB*, T-482/16 RENV, EU:T:2017:901, paragraph 131 (not published) and the case-law cited).

125 Furthermore, the obligations arising for the administration from the duty to have regard for the welfare of officials are substantially enhanced where the situation of an official whose physical or mental health is shown to be affected is involved (see judgment of 18 November 2014, *McCoy* v *Committee of the Regions*, F-156/12, EU:F:2014:247, paragraph 106 and the case-law cited; see also, to that effect and by analogy, judgment of 7 November 2019, *WN* v *Parliament*, T-431/18, not published, EU:T:2019:781, paragraph 106).

126 However, within the framework of the duty to have regard for the welfare of officials, the protection of the rights and interests of members of staff must always be limited by compliance with the rules in force (see judgment of 5 December 2006, *Angelidis* v *Parliament*, T-416/03, EU:T:2006:375, paragraph 117 and the case-law cited). In particular, that duty cannot lead the administration to give a Community provision an effect which would be contrary to the clear and

precise wording of that provision (judgments of 27 June 2000, *K* v *Commission*, T-67/99, EU:T:2000:169, paragraph 68, and of 26 March 2020, *Teeäär* v *ECB*, T-547/18, EU:T:2020:119, paragraphs 87 to 89).

127 In the present case, although it is true that the contested decision is part of the more general framework of a claim for reimbursement of medical costs relating to the applicant's occupational disease, the fact that the administration's obligations under the duty to have regard for the welfare of officials are substantially enhanced does not mean that the Commission may go against the clear and precise terms of the first subparagraph of Article 23(1) of the Rules on insurance. Although, under the duty to have regard for the welfare of officials, the Commission is indeed required to find a solution to the existing deadlock, that solution must comply with the regulatory framework which is binding on it.

128 Consequently, the Commission cannot invoke the duty to have regard for the welfare of officials to justify the application by analogy of the rule for appointing the third doctor laid down by the second subparagraph of Article 22(1) of the Rules on insurance since the first subparagraph of Article 23(1) of those rules precludes such application and, moreover, is not incompatible with any general legal principle (see, to that effect, judgment of 15 February 2011, *Marcuccio* v *Commission*, F-81/09, EU:F:2011:13, paragraph 55).

129 Fourth, the conclusion reached in paragraph 119 above likewise cannot be called in question by the applicant's arguments. First of all, he claims, in essence, that he is entitled to application of the procedure for consulting the Medical Committee laid down in Article 22 of the Rules on insurance since the opinion of a collegial body offers more guarantees than that of a single doctor in connection with a file and a mandate which are virtually secret. In that regard, the applicant appears to refer, in particular, to respect for his rights of defence, in connection with Article 23 of those rules, both during the investigation procedure which led to the adoption of the draft decision of 30 June 2017 and during the review procedure currently pending. More particularly, he mentions the taking into account of his personal medical file and of the background to his occupational disease and the access to documents relevant to the case granted by the insured party's doctor to the 'other doctor'.

130 In that regard, it is clear from the case-law that, in their specific and detailed examination of the situation before them, the doctors appointed by the appointing authority must rule on the basis of scientific literature, but they cannot disregard the actual overall state of health of the person concerned. Furthermore, that obligation to take into account the personal situation of the insured party is required by the duty to have regard for the welfare of officials (see, to that effect, judgments of 9 December 2009, *Commission* v *Birkhoff*, T-377/08 P, EU:T:2009:485, paragraph 88, and of 25 May 2016, *GW* v *Commission*, F-111/15, EU:F:2016:122, paragraph 40).

131 Also, the 'other doctor' responsible for reviewing the relevance of reimbursement of the medical service provided in respect of the applicant's occupational disease must be aware of the extent and consequences of that disease and have access to the content of the decisions.

132 Moreover, it is clear from the case-law that, in order to deliver a sound medical opinion, the doctor must be able to examine all the documents which may be useful for his or her assessment (see, by analogy, judgments of 15 July 1997, *R* v *Commission*, T-187/95, EU:T:1997:119, paragraph 49, and of 29 February 2012, *AM* v *Parliament*, F-100/10, EU:F:2012:24,

paragraph 92). Therefore, as the Commission rightly points out, the doctor appointed by the insured party has the opportunity to present and defend his or her point of view by submitting additional documents.

133 Furthermore, the applicant's argument seeking to show that the Commission's doctors are not impartial, in the light of the judgment of 24 October 1996, *Commission* v *Royale belge* (C-76/95, EU:C:1996:406), is irrelevant and does not affect the conclusion reached in paragraph 119 above. By that argument worded in general terms and that brief reference to legal precedents, the applicant fails to explain in what respect in the situation at issue, and with regard to which entity specifically, the doctors appointed by the institution lacked impartiality in the adoption of a decision relating to the reimbursement of the costs claimed.

134 Consequently, the investigation procedure and the review procedure, as governed by Article 23 of the Rules on insurance, provide adequate guarantees concerning respect for the applicant's rights of defence in connection with the examination of his claim for reimbursement of costs, so he cannot demand the appointment of a Medical Committee to ensure respect for those rights.

135 Therefore, the second ground of the contested decision, according to which the administration decided to use the rule laid down in the second subparagraph of Article 22(1) of the Rules on insurance in order to request the President of the Court of Justice to appoint 'another doctor' of his own motion, is wrong in law.

136 However, it is clear from the case-law that, where some of the grounds in a decision on their own provide sufficient legal basis for the decision, any errors in the other grounds of the decision have no effect on its operative part. Moreover, where the operative part of a Commission decision is based on several pillars of reasoning, each of which would in itself be sufficient to justify that operative part, that decision should, in principle, be annulled only if each of those pillars is vitiated by illegality. In such a case, an error or other illegality which affects only one of the pillars of reasoning cannot be sufficient to justify annulment of the decision at issue because that error could not have had a decisive effect on the operative part adopted by the Commission (see judgment of 10 November 2017, *Icap and Others* v *Commission*, T-180/15, EU:T:2017:795, paragraph 74 and the case-law cited).

137 In the present case, the error of law in the second ground of the contested decision is not such as to result in the annulment of that decision, since it could not have had any effect on its outcome. In accordance with the conclusion reached by the Court in paragraphs 110 and 111 above, the first ground of the contested decision, stating that the procedure laid down in Article 22 of the Rules on insurance does not apply to decisions relating to reimbursement of medical costs, is well founded and sufficient to justify to the requisite legal standard the refusal, in the contested decision, to refer the matter to the Medical Committee.

138 Therefore, the first and fourth heads of claim must be dismissed as unfounded.

…

On those grounds,

THE GENERAL COURT (Fourth Chamber)

hereby:

1. Dismisses the application;

2. Orders Mr Arnaldo Lucaccioni to pay the costs.

Gervasoni Frendo Martín y Pérez de Nanclares

Delivered in open court in Luxembourg on 16 June 2021.

E. Coulon President
Registrar