

EUROPEAN COMMISSION OF HUMAN RIGHTS

Application No. 19006/91

Hendrik Alexander Meldrum

against

the Netherlands

REPORT OF THE COMMISSION

(adopted on 12 October 1993)

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I. INTRODUCTION

1 The following is an outline of the case as submitted to the European Commission of Human Rights and of the procedure before the Commission.

A. The application

2 The applicant is a Dutch citizen, born in 1947 and resident at Dordrecht, the Netherlands. Before the Commission the applicant is represented by Mr. P.J.A. Høvig, a lawyer practising at Zwijndrecht, the Netherlands.

3 The application is directed against the Netherlands, whose Government are represented by their Agent, Mr. Karel de Vey Mestdagh of the Netherlands Ministry of Foreign Affairs.

4 The application concerns proceedings relating to the applicant's obligation to pay social security contributions. These proceedings began on 4 December 1987, when the applicant requested the competent Industrial Insurance Board to issue a formal decision, and ended on 13 March 1991 when the Central Appeals Tribunal determined the applicant's appeal.

5 Before the Commission the applicant complains under Article 6 para. 1 of the Convention of both the unfairness and the length of the proceedings.

B. The proceedings

6 The application was introduced on 4 September 1991 and registered on 29 October 1991.

7 On 2 April 1992 the Commission decided to communicate the application to the respondent Government and invite them to submit written observations on the admissibility and merits of the application.

8 The Government's observations were submitted on 26 June 1992 and the applicant's observations in reply were submitted on 17 September 1992.

9 On 9 December 1992 the Commission declared the application admissible.

10 After declaring the case admissible, the Commission, acting in accordance with Article 28 para. 1 (b) of the Convention, also placed itself at the disposal of the parties with a view to securing a friendly settlement of the case. In the light of the parties'

reaction, the Commission now finds that there is no basis on which such a settlement can be effected.

C. The present Report

11 The present Report has been drawn up by the Commission in pursuance of Article 31 of the Convention and after deliberations and votes, the following members being present:

MM. C.A. NØRGAARD, President
S. TRECHSEL
E. BUSUTTIL
G. JÖRUNDSSON
J. C. SOYER
H.G. SCHERMERS
H. DANELIUS
Mrs. G.H. THUNE
Mr. C. L. ROZAKIS
Mrs. J. LIDDY
MM. L. LOUCAIDES
J.-C. GEUS
M.P. PELLONPÄÄ
G.F. REFFI
M. NOWICKI
I. CABRAL BARRETO
B. CONFORTI
N. BRATZA

12 The text of the Report was adopted on 12 October 1993 and is now transmitted to the Committee of Ministers of the Council of Europe, in accordance with Article 31 para. 1 of the Convention.

13 The purpose of the Report, pursuant to Article 31 para. 1 of the Convention, is

- (1) to establish the facts, and
- (2) to state an opinion as to whether the facts found disclose a breach by the State concerned of its obligations under the Convention.

14 A schedule setting out the history of the proceedings before the Commission is attached hereto as Appendix I and the Commission's decision on the admissibility of the application forms Appendix II.

15 The full text of the parties' submissions, together with the documents lodged as exhibits, are held in the archives of the Commission.

II. ESTABLISHMENT OF THE FACTS

A. Particular circumstances of the case

16 The applicant is active as an independent physiotherapist and runs a practice at Dordrecht. He also used to put his equipment at the disposal of other physiotherapists who could make use of it against payment of part of their turnover. The conditions were laid down in a standard contract between him and the other physiotherapists, and the latter were originally regarded by the taxation and social security authorities as independent professionals.

17 The implementation of the social insurance schemes for employed physiotherapists is entrusted to the Industrial Insurance Board for Health, Mental and Social Well-Being (Bedrijfsvereniging voor de Gezondheid, Geestelijke en Maatschappelijke Belangen, abbreviated

"B.V.G."). Until August 1984, the B.V.G. considered that, where there was a contract of the kind the applicant had concluded with the other physiotherapists, there was no obligation to insure the latter under the various social insurance schemes applicable to employees. However, in August 1984 the B.V.G. changed its view and considered that the said physiotherapists should be compulsorily insured retroactively from 1 January 1984.

18 In accordance with its new practice, the B.V.G. invited the applicant to pay social security contributions in respect of the Sickness Benefits Act (Ziektewet, ZW), the Health Insurance Act (Ziekenfondswet, ZFW), the Unemployment Insurance Act (Werkloosheidswet, WW) and the Labour Disablement Insurance Act (Wet op de Arbeidsongeschiktheidsverzekering, WAO) for the years 1984, 1985 and 1986. By letter of 4 December 1987, the applicant objected to the payment of contributions and asked for a formal decision (voor beroep vatbare beslissing) against which he could lodge an appeal. The B.V.G. issued such a decision on 1 May 1989.

19 On 18 May 1989 the applicant appealed to the Appeals Tribunal (Raad van Beroep) in Rotterdam. At the same time he asked the Appeals Tribunal for an adjournment of its examination until 15 September 1989 in order to amplify the grounds of appeal. His request was granted and on 11 September 1989 the applicant submitted his further grounds of appeal. On 2 July 1990 the Appeals Tribunal rejected the appeal. A further appeal lodged by the applicant was rejected on 13 March 1991 by the Central Appeals Tribunal (Centrale Raad van Beroep) in Utrecht.

B. Relevant domestic law

a. General Features

20 As regards unemployment, health and disability insurance, social security in the Netherlands is managed jointly by the State, which in general confines itself to establishing the legal framework of the scheme and to ensuring co-ordination, by employers and by employees.

21 The branches of the economy are divided into sectors, each with an Industrial Insurance Board (bedrijfsvereniging) responsible for the implementation of the social security legislation.

22 These Boards are legal persons within the meaning of Article 1 of Book 2 of the Civil Code (Burgerlijk Wetboek). The method of their establishment, their structure and their powers are laid down in the Social Security Organisation Act 1952 (Organisatiewet Sociale Verzekeringen). They are subject to approval by the Minister for Social Affairs and Employment (Minister van Sociale Zaken en Werkgelegenheid) on the basis of their representative character. They are semi-public institutions and operate like private insurance companies.

23 They may entrust the administrative work resulting from the application of social security schemes to a common administrative office (Gemeenschappelijk Administratiekantoor), recognised by the Minister.

24 A Social Insurance Council (Sociale Verzekeringsraad), set up by the Government and comprising representatives of the State (/), employers (/) and employees (/), supervises the proper implementation of the legislation in question.

25 The statutory social insurances can be divided into two main groups, on the one hand the general insurances (volksverzekeringen), covering all persons residing in the Netherlands, and on the other hand the employees' insurances (werknemersverzekeringen), covering persons

bound by an employment contract with a private or public employer or who can be assimilated to this category.

26 The decisions of the Industrial Insurance Boards as regards contributions to the social security schemes and benefits from those schemes can be appealed to an Appeals Tribunal. An appeal cannot be lodged until a formal decision has been issued by the Industrial Insurance Board concerned. Against the decision of an Appeals Tribunal there is a further appeal to the Central Appeals Tribunal.

b. The Sickness Benefits Act

27 Under the Sickness Benefits Act (ZW) insurance against sickness is compulsory for persons under 65, who are bound by a contract of employment with a public or private employer or who can be assimilated to this category.

28 The ZW premiums are fixed by the Industrial Insurance Board and differ per economic sector. The premiums are calculated on the basis of an employee's salary by, and are collected by, the Industrial Insurance Board. The premiums are paid in part by the employees themselves and in part by their employers.

29 Benefits awarded under the ZW are paid by the Industrial Insurance Board. These benefits are calculated on the basis of the insured's salary. ZW benefits are paid for a maximum period of one year, but not beyond the age of 65, as from that age a person becomes eligible for a statutory old-age pension.

c. The Health Insurance Act

30 Under the Health Insurance Act (ZFW) insurance against medical expenses is compulsory for persons under 65, who are bound by a contract of employment with a public or private employer or who can be assimilated to this category and whose income does not exceed a certain amount. This amount is fixed by law yearly. Under certain conditions also persons having reached the age of 65 and unemployed persons can be insured.

31 The ZFW premiums for compulsorily insured employed persons are fixed by the Minister of Welfare, Health and Cultural Affairs (Minister van Welzijn, Volksgezondheid en Cultuur) and the Minister of Social Affairs and Employment together. The premiums are calculated on the basis of an employee's salary by, and are collected by, the Industrial Insurance Board, which transfers the funds thus received to the General Account (Algemene Kas) of one of the National Health Service Funds (Ziekenfonds). The premiums are paid in part by the employees themselves and in part by their employers.

32 Under the ZFW, insured medical expenses are paid directly to the providers of medical care by the National Health Service.

d. The Unemployment Insurance Act

33 Under the Unemployment Insurance Act (WW) insurance against involuntary unemployment is compulsory for persons under 65, who are bound by a contract of employment with a public or private employer or who can be assimilated to this category.

34 The WW premiums are fixed by Order in Council (Algemene Maatregel van Bestuur). The premiums are calculated on the basis of an employee's salary by, and are collected by, the Industrial Insurance Board. The premiums are paid in part by the employees themselves and in part by their employers. By Order in Council it can also be decided that the State pays a part of the WW premiums.

35 Benefits awarded under the WW are paid by the Industrial Insurance Board. These benefits are calculated on the basis of the period the insured has worked and the salary earned before becoming unemployed. The duration of the benefits differs in each case as it depends on a number of elements, but does not exceed five years, and benefits are not paid to persons having reached the age of 65.

e. The Labour Disablement Insurance Act

36 Under the Labour Disablement Insurance Act (WAO) insurance against incapacity to work lasting more than one year is compulsory for persons under 65, who are bound by a contract of employment with a public or private employer or who can be assimilated to this category.

37 The WAO premiums are fixed by the Board of the Disablement Insurance Fund (Arbeidsongeschiktheidsfonds) subject to the approval of the Minister of Social Affairs and Employment following consultation with the Social Insurance Council. The premiums are calculated on the basis of an employee's salary by, and are collected by, the Industrial Insurance Board. The premiums are paid in part by the employees themselves and in part by their employers.

38 Benefits awarded by the Industrial Insurance Board under the WAO are charged to the Disablement Insurance Fund. The benefits are calculated on the basis of the income earned before disablement and the degree of disability. WAO benefits are paid as long as the person concerned is incapacitated for work but not beyond the age of 65.

III. OPINION OF THE COMMISSION

A. Complaint declared admissible

39 The Commission has declared admissible the applicant's complaint that in the determination of his civil rights and obligations he did not receive a fair hearing within a reasonable time.

B. Points at issue

40 Accordingly, the issues to be determined are:

- whether the applicant's civil obligations were determined within a reasonable time, and
- whether the applicant has had a fair hearing in the determination of his civil obligations.

C. The applicability of Article 6 para. 1 (Art. 6-1) of the Convention

41 Article 6 para.1 (Art. 6-1) of the Convention, insofar as relevant, reads as follows:

"In the determination of his civil rights and obligations (...) everyone is entitled to a fair (...) hearing within a reasonable time by a (...) tribunal (...)."

42 The Commission notes that the proceedings at issue concerned the applicant's obligation as an employer to pay contributions under four different social security schemes.

43 The applicant submits that Article 6 para. 1 (Art. 6-1) of the Convention applies not only to proceedings relating to the Sickness Benefits Act but also to proceedings concerning the other social security schemes at issue. The payment of contributions is closely

connected with the right to receive benefits and both aspects of the schemes come within the scope of this Article.

44 The Government submit that Article 6 para. 1 (Art. 6-1) does not apply to the proceedings concerned, since they did not concern the determination of a civil right. They concerned the obligation to pay contributions under the Sickness Benefits Act, the Unemployment Insurance Act, the Health Insurance Act and the Labour Disablement Insurance Act. As regards the Sickness Benefits Act, the European Court of Human Rights has found Article 6 (Art. 6) to be applicable to proceedings regarding the entitlement to benefits, whereas there is no such decision in regard to the benefits under the other Acts.

45 In the Government's opinion, proceedings regarding the payment of contributions under the said social security schemes are excluded from the scope of Article 6 (Art. 6), in the same way as taxation proceedings. The obligation to contribute to the social security schemes at issue is laid down in law, rests not only on the insured but also on the insured's employer, an employer's failure to contribute does not affect an insured's right to receive benefits, and the rules relating to the deduction of contributions and transfers by the employer and regarding the records to be kept in this respect are in line with those relating to the levying of taxes.

46 The Commission recalls that the Court in the case of *Schuler-Zraggen v. Switzerland* (Eur. Court H.R., judgment of 24 June 1993, Series A no. 263) stated in para. 46 of its judgment:

"The Court is here once again confronted with the issue of the applicability of Article 6 § 1 (Art. 6-1) to social-security disputes. The question arose earlier in the cases of *Feldbrugge v. the Netherlands* and *Deumeland v. Germany*, in which it gave judgment on 29 May 1986 (Series A nos. 99 and 100). At that time the Court noted that there was great diversity in the legislation and practice of the member States of the Council of Europe as regards the nature of the entitlement to insurance benefits under social-security schemes. Nevertheless, the development in the law that was initiated by those judgments and the principle of equality of treatment warrant taking the view that Article 6 § 1 (Art. 6-1) does apply in the field of social insurance, including even welfare assistance (see the *Salesi v. Italy* judgment of 26 February 1993, Series A no. 257-E, pp. 59-60, § 19).

As in the two cases decided in 1986, State intervention is not sufficient to establish that Article 6 § 1 (Art. 6-1) is inapplicable; other considerations argue in favour of the applicability of Article 6 § 1 (Art. 6-1) in the instant case. The most important of these lies in the fact that despite the public-law features pointed out by the Government, the applicant was not only affected in her relations with the administrative authorities as such but also suffered an interference with her means of subsistence; she was claiming an individual, economic right following from specific rules laid down in a federal statute (...).

In sum, the Court sees no convincing reason for distinguishing between Mrs Schuler-Zraggen's right to an invalidity pension and the rights to social-insurance benefits asserted by Mrs Feldbrugge and Mr Deumeland.

Article 6 § 1 (Art. 6-1) therefore applies in the present case."

47 Having regard to the Court's above findings, namely that Article 6 para. 1 (Art. 6-1) of the Convention applies in the field of social insurance, including welfare assistance - which is a unilateral benefit granted by the State (Eur. Court H.R., Salesi judgment of 26 February 1993, Series A no. 257-E) -, the Commission considers that Article 6 para. 1 (Art. 6-1) of the Convention is applicable to proceedings concerning the right to benefits under the social security schemes at issue in the present case.

48 It is true that the proceedings at issue in the present case did not concern the right to benefits under these social security schemes, but the obligation to pay contributions under those schemes.

49 However, unlike the Government, the Commission finds no basis for distinguishing, as regards the applicability of Article 6 para. 1 (Art. 6-1), between a right to benefits and the obligation to contribute under the same social security schemes. It notes that Article 6 para. 1 (Art. 6-1) covers civil "rights" and "obligations" alike.

50 In support of this view the Commission notes that all the private law elements the European Court found in the Feldbrugge case (loc.cit.) to characterise the right to benefits under the Sickness Benefits Act - the personal and economic nature of the benefits, their connection with a contract of employment and the affinities of the scheme with private insurance - are mutatis mutandis also present in respect of the obligation to pay contributions. Contributions to the social security schemes are of the same individual and economic nature as the benefits and are equally connected with a contract of employment or a contract regarded as such. Moreover the schemes under which contributions are paid are the same as those under which benefits are awarded and their affinities with private insurances are the same.

51 Furthermore, recalling the Court's statements that it is sufficient for the applicability of Article 6 para. 1 (Art. 6-1) of the Convention that proceedings are "pecuniary" in nature and that the action is founded on an alleged infringement of rights which were likewise pecuniary rights (cf. Eur. Court H.R., Editions Périscope judgment of 26 March 1992, Series A no. 234-B, p. 66, para. 40) or that the outcome is "decisive for private rights and obligations" (cf. Eur. Court H.R., H. v. France judgment of 24 October 1989, Series A no. 162-A, p. 20 para. 47 with further references), the Commission notes that the outcome of the proceedings at issue determined, inter alia, whether or not the relation between the applicant and the physiotherapists concerned could be assimilated to a contract of employment and consequently whether or not the applicant was under an obligation to pay social security contributions. The Commission finds that the proceedings at issue were therefore "pecuniary" in nature and were decisive for the applicant's private obligations.

52 The Commission consequently finds that the proceedings at issue involved a determination of civil obligations within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention, which is thus applicable to the present case.

D. Alleged violations of Article 6 para. 1 (Art. 6-1) of the Convention

1. Length of the proceedings

53 The applicant considers that the delay in the issue of a formal decision should be taken into account in the assessment of the total length of the proceedings. He submits that his legal counsel, in view of experiences in other similar cases in which he had acted as counsel

and where requests to expedite the proceedings had remained without result, refrained from requesting the B.V.G. to expedite the issue of the formal decision, considering that this would be of no avail.

54 The Government consider that the reasonable time requirement contained in Article 6 para. 1 (Art. 6-1) of the Convention does not apply to the stage preceding appeal proceedings under the Social Security Appeals Act (Beroepswet). If one would include the delay in the issuing of the formal decision by the B.V.G. in the total length of the proceedings, the Government admit that the issue of the formal decision by the B.V.G. took too long, but they do not find that the applicant has urged the B.V.G. to issue its formal decision speedily although he was informed that this could take some time.

55 The Government finally argue that the matter was complex, that the applicant delayed the hearing of his case by at least four months and that, during the period in question, the B.V.G. was confronted with a great number of applications for formal decisions in similar cases. In view of these circumstances it cannot be said that the proceedings at issue violated the reasonable time requirement of Article 6 para. 1 (Art. 6-1).

56 The Commission recalls that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of each case and having regard to the following criteria: the complexity of the case, the conduct of the applicant and that of the authorities dealing with the case (cf. Eur. Court H.R., Vernillo judgment of 20 February 1991, Series A no. 198, p. 12, para. 30).

57 As regards the period to be considered, the Commission notes that the applicant could not obtain any examination by a tribunal until he had obtained a formal decision from the B.V.G. and finds that the proceedings began on 4 December 1987, when the applicant requested the B.V.G. to issue a formal decision against which he could lodge an appeal, and ended on 13 March 1991, when the Central Appeals Tribunal rejected the applicant's appeal. The period to be examined thus lasted three years and over three months.

58 The Commission notes that the proceedings at issue concerned matters of a certain complexity and that apart from the adjournment before the Appeals Tribunal, which was granted at the applicant's request, no delay in the proceedings is imputable to the applicant.

59 Concerning the applicant's failure to request the B.V.G. to expedite the issue of a formal decision, the Commission does not find it established that such a request would have been effective in the circumstances of the present case.

60 Concerning the conduct of the administrative authorities, the Commission finds that the period between 4 December 1987, when the applicant requested the B.V.G. to issue a formal decision, and 1 May 1989, when the B.V.G. issued the formal decision, was unreasonably long and unduly delayed the proceedings.

61 As for the argument relating to the numerous other applications for a formal decision pending before the B.V.G., the Commission recalls that it is for Contracting States to organise their legal systems in such a way that the requirement under Article 6 para. 1 (Art. 6-1) of the Convention, that everyone has the right to a final decision within a reasonable time in the determination of his civil rights and obligations, can be met (cf. Eur. Court H.R. Vocaturo judgment of 24 May 1991, Series A no. 206-C, p. 32, para. 17).

62 The Commission therefore considers that the length of the proceedings complained of was excessive and failed to satisfy the

"reasonable time" requirement contained in Article 6 para. 1 (Art. 6-1) of the Convention.

Conclusion

63 The Commission concludes, unanimously, that there has been a violation of Article 6 para. 1 (Art. 6-1) of the Convention in that the applicant's civil obligations were not determined within a reasonable time.

2. Fair hearing

64 The applicant complains that he did not have a fair hearing in that the B.V.G., which was the opposite party in the proceedings, prevented him for a long time from appealing by not issuing a formal decision.

65 The Government do not find that the delay in the issue of a formal decision by the B.V.G. affected the fairness of the proceedings in that it was not to the applicant's detriment. The Government do not accept that in case of an earlier recourse to the Appeals Tribunal the outcome would or could have been different, since in a similar case in which the applicant's counsel also acted as counsel, the Central Appeals Tribunal had already concluded that insurance was compulsory. Furthermore, the Government find no indication that the applicant had insufficient opportunity to argue his case during the B.V.G.'s preparations for the formal decision or during the appeal proceedings.

66 The Commission recalls that the right to a fair hearing implies that the interested party must be able to present his case under conditions which do not place him at a substantial disadvantage vis-à-vis his opponent (cf. No. 9938/82, Dec. 15.7.86, D.R. 48, p. 21).

67 The Commission notes that in the proceedings concerned the B.V.G. played the double role of the body which issued the first decision against which an appeal was lodged and as a party to the appeal proceedings. In these circumstances, the fact that the B.V.G., by failing for a considerable time to issue a formal decision, could delay the introduction of an appeal means that there was a lack of equality between the applicant and his opponent in the appeal proceedings.

68 The Commission, therefore, considers that the applicant did not have a fair hearing in the determination of his civil obligations as required by Article 6 para. 1 (Art. 6-1) of the Convention.

Conclusion

69 The Commission concludes, by eleven votes to seven, that there has been a violation of Article 6 para. 1 (Art. 6-1) of the Convention in that the applicant did not have a fair hearing in the determination of his civil obligations.

E. Recapitulation

70 The Commission concludes, unanimously, that there has been a violation of Article 6 para. 1 (Art. 6-1) of the Convention in that the applicant's civil obligations were not determined within a reasonable time (para. 63).

71 The Commission concludes, by eleven votes to seven, that there has been a violation of Article 6 para. 1 (Art. 6-1) of the Convention in that the applicant did not have a fair hearing in the determination of his civil obligations (para. 69).

Secretary to the Commission

President of the Commission

(H.C. Krüger)

(C.A. Nørgaard)

(Or. English)

PARTLY DISSENTING OPINION OF MM. S. TRECHSEL, H.G. SCHERMERS
MRS. G.H. THUNE, J. LIDDY, MM. I. CABRAL BARRETO, B. CONFORTI
AND N. BRATZA

We share the view of the majority of the Commission that there has been a breach of Article 6 para. 1 of the Convention in the present case by reason of the length of the proceedings, but we are unable to agree with the conclusion of the majority that there has been a separate breach of this provision by reason of the lack of fairness of the proceedings.

In so concluding the majority rely on what is described as the double role of the BVG, which both rendered the decision against which the applicant's appeal to the Appeals Tribunal was lodged and participated as a party before the Tribunal. It is the view of the majority that, in these circumstances, the BVG, by failing for a considerable time to arrive at a formal decision could delay the introduction of an appeal and that this meant that there was a lack of equality between the applicant and his opponent in the appeal proceedings.

We do not consider that the "double role" of the BVG, a role which is by no means unusual in litigation between administrative agencies and private parties, has been shown to have affected the fairness of the proceedings before the Tribunal. Moreover, insofar as the fairness of the proceedings may be said to have been affected by the delay of the BVG in issuing its decision, this complaint is in our view subsumed in the Commission's finding of a violation in relation to the length of proceedings.

APPENDIX I

HISTORY OF PROCEEDINGS

Date	Item
4 September 1991	Introduction of application
29 October 1991	Registration of application
Examination of admissibility	
4 April 1992	Commission's decision to invite the Government to submit their observations on the admissibility and merits of the application
26 June 1992	Government's observations
17 September 1992	Applicant's observations in reply
9 December 1992	Commission's decision to declare the application admissible and to invite the parties, if they so wish, to submit further observations on the merits

Examination of the merits

12 October 1993

Commission's deliberations on
the merits final vote and
adoption of the Report