EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

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Occupational health: employer's right to adversarial examination of employee's medical files must be reconciled with right to medical confidentiality

In its decision in the case of **Eternit v. France** (application no. 20041/10) the European Court of Human Rights has by a majority declared the application inadmissible. The decision is final.

The case concerned the fairness of the proceedings in a dispute between a company and a Health Insurance Office over the occupational nature of a disease contracted by a former employee. In particular it focused on the failure of the Health Insurance Office to give the employer access to the former employee's medical records.

Principal facts

The applicant, Eternit, is a company incorporated under French law whose registered office is in Vernouillet (France). P. was employed by the applicant company from 10 September 1951 to 31 July 1990 in various capacities, including as a "pipe cutter".

On 29 November 2005, based on a medical certificate drawn up on that day, P. reported that he had contracted an occupational disease, in the form of "calcified pleural plaque and cancer of the right lung".

On 7 December 2005 the North Finistère Health Insurance Office forwarded P.'s occupational disease declaration to Eternit together with a questionnaire on working conditions in the company. On 3 February 2006 the Health Insurance Office notified Eternit of its decision to acknowledge the occupational origin of P.'s condition.

Eternit appealed to the Friendly Settlements Board of the Health Insurance Office, then, when it received no reply, referred the matter to the social-security appeal tribunal in Brest.

By a judgment of 26 March 2007 the tribunal found that the decision of the Health Insurance Office could not be relied on against the employer because the Office had not carried out an administrative investigation before deciding to acknowledge P.'s occupational disease, and the opinion of its consulting doctor which it had communicated to Eternit did not include any reasoning.

The Health Insurance Office lodged an appeal against that judgment, arguing that it was under no legal obligation to carry out an investigation, that the questionnaires it had sent to Eternit and their former employee sufficed and that it had been established that employees at Eternit had been exposed to asbestos hazards. It claimed that it had respected the adversarial principle by informing Eternit of all the evidence in the file before deciding to acknowledge the occupational nature of P.'s condition.

On 4 June 2008 the Rennes Court of Appeal set aside the judgment of 26 March 2007 and upheld the decision of the Health Insurance Office to cover P.'s medical condition in accordance with labour law.

Eternit appealed on points of law. In a judgment of 10 September 2009 the Court of Cassation rejected the appeal. It found that the Rennes Court of Appeal, after assessing

in its unfettered discretion the evidence adduced before it and submitting it to the parties for comment, had been able to reach the informed conclusion that P.'s illness was occupation-related. It further found that the former employee's scan results were not something the Health Insurance Office was required to communicate to the employer and that access to them could be demanded only for the purposes of an expert examination.

Complaints, procedure and composition of the Court

The application was lodged with the European Court of Human Rights on 9 March 2010.

Relying on Article 6 § 1 (right to a fair hearing), the applicant company complained that it had not had access to the medical evidence on which the diagnosis of its former employee's occupational disease had been based, and had thus been deprived of any possibility of effectively challenging the decision that the disease was occupation-related.

The decision was given by a Chamber of seven, composed as follows:

Dean **Spielmann** (Luxembourg), *President*,
Karel **Jungwiert** (Czech Republic),
Boštjan M. **Zupančič** (Slovenia),
Mark **Villiger** (Liechtenstein),
Ann **Power-Forde** (Ireland),
Angelika **Nußberger** (Germany),
André **Potocki** (France)*, Judges*,

and also Claudia **Westerdiek**, *Section Registrar.*

Decision of the Court

Article 6 § 1

Occupational accidents and diseases are occupational hazards covered by the French social security system in the form of an insurance scheme paid for by the employers. Because of the impact on employers' contributions of the official acknowledgment of the occupational nature of a disease, a large number of disputes involving companies are brought before the social security tribunals.

The Court considered first of all that the civil limb of Article 6 § 1 of the Convention was applicable where an employer challenged the Health Insurance Office's decision that a disease was occupation-related, because the relationship between an employer and the Health Insurance Office was comparable in many respects to that between the insured and the insurer.

Regarding the right to an adversarial procedure, the Court pointed out that it had already found that an expert medical opinion, in so far as it pertained to a technical field that was outside the judges' field of knowledge, was likely to have a preponderant influence on the assessment of the facts by the courts, and was an essential part of the evidence on which the parties to the dispute should be allowed to comment.

However, the special nature of the dispute between the employer and the Health Insurance Office over the occupational character of the disease led the Court to express reservations regarding the principle of adversarial discussion by the parties of an employee's medical records.

In this case the applicant company, which disputed the occupational origin of P.'s ailment, had asked to see the medical evidence and observations concerning the former employee's health.

The Court reiterated in this connection that a balance had to be struck between the employer's right to an adversarial procedure on the one hand, and the employee's right to medical confidentiality on the other. Such a balance was struck, in the Court's opinion, where the employer could ask the court to appoint an independent medical expert to review the employee's medical records and draw up a report – respecting the confidentiality of the medical records – to guide the court and the parties.

The Court emphasised that the fact that an expert report was not commissioned every time an employer requested one, but only when the court considered it had insufficient information, met the requirements of a fair trial under Article 6 § 1 de la Convention. It was not the Court's role to say whether an expert opinion should have been sought in the present case, but rather to determine whether the proceedings as a whole, including the presentation of the evidence, had been fair. In that regard the Court found that the Health Insurance Office had reached its decision based solely on the opinion of its consulting doctor. That doctor, however, was not under the direct authority of the North Finistère Health Insurance Office but under that of the National Health Insurance Fund for Salaried Employees. As the administrative services of the Health Insurance Office had not had access to the medical records requested by the applicant company either, the Court considered that the Health Insurance Office had not been given a substantial advantage over the applicant company in the proceedings. It accordingly concluded that the principle of equality of arms had been respected in this case.

The Court held that the complaint lodged by Eternit, alleging a violation of Article 6 § 1 of the Convention, was ill-founded and should be declared inadmissible.

The decision is available only in French.

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