

Communicated on 16 September 2014

THIRD SECTION

Application no. 39966/09
Jozef Johan Anna GILLISSEN
against the Netherlands
lodged on 27 July 2009

STATEMENT OF FACTS

THE FACTS

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1. The applicant, Mr Jozef Johan Anna Gillissen, is a Netherlands national, who was born in 1946 and lives in The Hague. He is represented before the Court by Mr F. Sijbers, a lawyer practising in The Hague.

2. The facts of the case, as submitted by the applicant, may be summarised as follows.

A. The circumstances of the case

1. Factual background

3. From 1996 onwards the applicant enjoyed disability benefits under the Labour Disablement Insurance Act (*Wet op de Arbeidsongeschiktheidsverzekering* – “WAO”). He was allowed to earn by his own means a sum not exceeding 60,000 Netherlands guilders (NLG) without losing his entitlement under the WAO. This he did by running a one-man business as a trainer teaching people how to deal with stress.

4. The applicant states that he entered into an arrangement with an official of the competent social-security authority (at that time called *Cadans*), one Mr G., which was intended to make possible his transition into independent self-employment without the need for additional social security benefits. He alleges that Mr G. gave him the assurance that he would be permitted for a period of five years to earn income over and above the sum of NLG 60,000, the purpose being to allow him to create cash reserves in case his health should deteriorate further. The agreement had been witnessed by another official, one Mr S.

5. In February 1999 the applicant announced his intention to continue his business in the form of a limited liability company (*besloten vennootschap met beperkte aansprakelijkheid*). He wrote to the social-security authority (re-named Social Security Implementing Institution for Government and Education (*Uitvoeringsinstelling sociale zekerheid voor overheid en onderwijs*; “USZO”)) asking it to confirm that this change would not affect the arrangements made during the time when he was self-employed. In the ensuing domestic proceedings the social security authorities submitted one or more letters which they stated had been sent in response. The applicant states that he never received any reply.

6. In September 1999 the applicant’s limited liability company was created. The shares were held by the applicant’s wife. The applicant was its managing director and its only employee; he entered its employ on 1 October 1999.

2. The fraud investigation

7. On 3 September 2003 Mr D., an official of the social-security authority (by this time re-named Employee Insurances Schemes Implementing Body (*Uitvoeringsinstituut werknemersverzekeringen*; “UWV”)) submitted an extensive investigation report implicating the applicant and his wife in suspected social-security fraud. According to the report, the applicant had defrauded the social-security system by declaring only his own income as an employee of the limited liability company but not the company’s profits, which were declared as taxable income by his wife. The report included the following passage:

“It was arranged in addition that only what Gillissen earned in self-employment after his dismissal would be considered his residual earning capacity (*resterende verdien capaciteit*). The labour expert (*arbeidsdeskundige*) Mr G. has stated that he discussed this extensively with Gillissen, who could agree to that position and who indicated during the conversation that in the coming years more growth was to be expected and that it was his intention to make his own living in self-employment with a corresponding gradual reduction to zero (*afbouw*) of the WAO benefits.”

3. Administrative proceedings

a. Objection proceedings

8. On 28 January 2004 UWV gave a decision reducing the applicant’s WAO benefits with retroactive effect. On 3 March 2004 UWV gave a second decision ordering the applicant to repay the excess.

9. The applicant lodged objections (*bezwaar*) against both decisions. As relevant to the case before the Court, the applicant argued that as from 1999 he had kept the competent authorities informed of developments as they occurred, withholding no information, and invoked the arrangement which he had agreed with Mr G. He named Mr S. as a witness.

10. Having held a hearing on 11 January 2006, UWV gave a decision on 31 January 2006 dismissing the applicant’s objections. It found that the applicant could reasonably have been aware that the total of his additional income – the sum of his salary and the profits of the limited liability company – was too high for him to be entitled to the full amount of his social-security benefits. The alleged arrangement to the contrary was not

reflected in the case file, and in any case, whatever statements had been made (assuming that any had been made at all) had been made by a person lacking the requisite competence and could not bind UWV.

b. Proceedings before the Regional Court

11. The applicant lodged an appeal (*beroep*) with the Regional Court (*rechtbank*) of Roermond. As relevant to the case before the Court, he complained about the UWV's failure to question Mr G. and Mr S., which in his submission reflected a lack of due care affecting the quality of the investigation. He also submitted that Mr G. had acted within his competence in making the agreement alleged.

12. Having held a hearing on 30 August 2006, the Regional Court gave judgment on 21 November 2006 dismissing the applicant's appeal. Its reasoning included the following:

"The [applicant] has also stated that [UWV] officials had agreed with him that he would be permitted to earn unlimited income in addition to his WAO benefits for a period of five years. The Regional Court has found no evidence of such an agreement in the documents available, nor is there any other reason to consider it plausible. On the contrary, it appears from the labour expert Mr G.'s report of 26 October 1998 that the [applicant's] income did in fact have to be taken into account. ..."

c. Proceedings before the Central Appeals Tribunal

13. The applicant lodged a further appeal (*hoger beroep*) with the Central Appeals Tribunal (*Centrale Raad van Beroep*). As relevant to the case before the Court, he again asked for Mr G. to be heard as a witness in order to prove the existence of the agreement. He also prayed in aid his acquittal by the 's Hertogenbosch Court of Appeal, which had been given in the meantime (see paragraph 18 below).

14. Having held a hearing on 8 August 2008, the Central Appeals Tribunal gave judgment on 30 January 2009 dismissing the further appeal without having heard any witnesses. Its reasoning included the following:

"The agreement relied on by the [applicant], which is denied by UWV, does not appear from the case file and no other credible case for its existence has been made out by the [applicant]."

4. Criminal proceedings

15. In parallel with the administrative proceedings outlined above, the applicant was prosecuted for social security fraud and forgery.

16. On 20 January 2006 the single-judge chamber of the criminal division (*politierechter*) of the Roermond Regional Court convicted the applicant.

17. The applicant appealed to the Court of Appeal (*gerechtshof*) of 's-Hertogenbosch.

18. Having held a hearing on 4 May 2007, the Court of Appeal gave judgment on 16 May 2007 acquitting the applicant. Its reasoning included the following:

"The suspect states that he drew up a common plan with Mr G. of USZO in 1998 with a view to the gradual reduction to zero of the WAO benefits over five years. The applicant further states that he made arrangements with that Mr G. concerning the amount of additional income he would be allowed to earn in the said five-year period.

The suspect understood these arrangements in the sense that he would in principle be allowed to earn unlimited additional income without losing his benefits.

Prompted by the transformation of the one-man business into one or more limited liability companies the suspect sought confirmation from UWV that it would not matter for the arrangements made whether the provider of the income was the one-man business or the said limited liability companies. To this end he got in touch with USZO on multiple occasions by means of letters. These letters were answered by USZO with automatised standard letters which did not address the specific situation in which the suspect found himself and which the suspect himself had raised with USZO.

By the time this question was put by the suspect to USZO Mr G. had been succeeded by Mr M. The latter found no report in the USZO file of the arrangements mentioned by the suspect. It is not apparent from the file that any attempt was made to hear Mr G. about the said arrangements within the framework of this criminal case.

The Court of Appeal considers it plausible, in view of the facts outlined above, that the suspect made arrangements with Mr G. of USZO in one form or another concerning the amount of permitted additional income within the framework of the gradual reduction to zero of his WAO benefits. It makes no difference that no report of any arrangements was found in the USZO file because no attempt has been made to verify the existence of these arrangements with Mr G.”

B. Relevant domestic law

19. Provisions of the General Administrative Law Act (*Algemene wet bestuursrecht*) relevant to the case are the following:

Section 8:46

“1. The Regional Court may summon witnesses. ...”

Section 8:63

“... ”

2. The Regional Court may decide not to hear witnesses or experts summoned or brought along by a party if it judges that hearing them cannot reasonably contribute to the consideration of the case. ...”

20. At the relevant time, these provisions were applicable by analogy to the procedure of the Central Appeals Tribunal by virtue of section 17 of the Appeals Act (*Beroepswet*).

COMPLAINT

21. The applicant complains under Article 6 § 1 of the Convention about the failure of the Regional Court and the Central Appeals Tribunal, in the administrative appeal proceedings, to hear the witnesses G. and S.

QUESTIONS

1. Was Article 6 § 1 of the Convention under its civil head applicable to the proceedings in the present case?
2. Did the applicant have a fair hearing in the determination of his civil rights and obligations, in accordance with Article 6 § 1 of the Convention? In particular, was the failure to hear the witnesses requested by the applicant compatible with that provision?