

Application No. 22442/93
by Manfred KAGGL
against Austria

The European Commission of Human Rights (First Chamber) sitting in private on 2 September 1994, the following members being present:

MM. A. WEITZEL, President
C.L. ROZAKIS
F. ERMACORA
E. BUSUTTIL
A.S. GÖZÜBÜYÜK
Mrs. J. LIDDY
MM. M.P. PELLONPÄÄ
B. MARXER
B. CONFORTI
N. BRATZA
I. BÉKÉS
E. KONSTANTINOV

Mrs. M.F. BUQUICCHIO, Secretary to the Chamber

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 5 August 1993 by Manfred KAGGL against Austria and registered on 11 August 1993 under file No. 22442/93;

Having regard to the report provided for in Rule 47 of the Rules of Procedure of the Commission;

Having deliberated;

Decides as follows:

THE FACTS

A. Particular circumstances of the case

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

The applicant, born in 1961, is an Austrian national, residing in Vienna. In the proceedings before the Commission he is represented by Mr. Korab, a lawyer practising in Vienna.

On 16 December 1991 the applicant, represented by Mr. Korab, brought action against the W. Insurance Company claiming cover under a legal insurance policy for a suit concerning a claim for damages which he intended to bring against a travel agency.

The Insurance Company, in its submissions in reply to the above action (Klagebeantwortung), argued that the applicant had breached three of the duties incumbent on him as an insured party under the General Terms of Legal Insurance 1988 (Allgemeine Bedingungen für die Rechtsschutzversicherung 1988). In particular it submitted that the applicant had breached his duty under Article 8 paragraph 1.5.1. of the said Terms, according to which the insurer has to be given the possibility to pursue the claim of the insured party out of court, before he himself instructed a lawyer.

The applicant, in his further preparatory submissions (vor-bereitender Schriftsatz), contested the Insurance Company's view. He offered documentary and oral evidence and requested that he be heard as a party (Parteienvernehmung) on the question whether or not he had breached his duties. As to the allegation that he had breached Article 8 paragraph 1.5.1. of the General Terms in that he did not give the Insurance Company the possibility to pursue his claim out of court, he submitted that the Insurance Company itself had not fulfilled its obligations: neither had the Company pursued his claim out of court nor had it invoked the right to do so. It had simply done nothing at all. In that it now alleged that he had breached his duty under Article 8 para. 1.5.1. of the General Terms it contravened the principle of good faith which was inherent in all insurance contracts. The applicant did not make any submissions and did not offer evidence concerning the question of whether he had neither intentionally nor with gross negligence failed to meet the duties incumbent on him under the General Terms.

On 27 March 1992 the Vienna Commercial Court (Handelsgericht), decided that the Insurance Company was obliged to grant the applicant cover under his legal insurance policy.

The Court, having considered the submissions of the lawyers acting on behalf of the parties and having examined various documents presented by them, found that the applicant had not breached the duties at issue. The Court considered in particular that the Insurance Company had failed to show that the applicant had interfered with its right to pursue the claim out of court.

The Insurance Company appealed against this decision, claiming that the Commercial Court had wrongly found no breach of the applicant's duties under the General Terms, and, therefore, failed to take evidence on the question whether he had acted intentionally or with gross or slight negligence.

The applicant, in his submissions in reply (Berufungsbeantwortung), pursued his argument that he had not breached his duties, and that, therefore, there had been no need to establish intention or the degree of negligence on his part.

On 23 October 1992 the Vienna Court of Appeal (Oberlandesgericht), dismissed the Insurance Company's appeal. The Court found that the applicant had, through a lawyer, by two letters both dated 19 September 1991, requested the Insurance Company to grant him cover and addressed his claim to the person who had caused him damage. It considered that the mere addressing of a claim to the person who caused the damage, without further settlement negotiations being conducted, did not interfere with the Insurance Company's right to pursue the claim out of court.

The Insurance Company, in its appeal on points of law to the Supreme Court, again submitted inter alia that the applicant without its approval had appointed a lawyer to conduct settlement negotiations and that he had failed to prove that he had not acted with intention or gross negligence within the meaning of Section 6 para. 3 of the Insurance (Contracts) Act.

The applicant, in his submissions in reply (Revisionsbeantwortung), contested the defendant's view that he had breached the duty in question. As regards the Insurance Company's view that he failed to prove that he had not acted with intention or gross negligence, he stated that the courts of first and second instance had not found a breach of his duties. Thus, there was no need for him to offer evidence concerning intention or the degree of negligence on his part.

On 31 March 1993 the Supreme Court upheld the Insurance Company's appeal on points of law and, deciding on the merits, dismissed the applicant's claim.

The Supreme Court considered that the insured party lost its right to cover when conducting settlement negotiations out of court without the insurer's approval. The Court found that the applicant had addressed, through a lawyer, the letter of 19 September 1991 to the person who caused him damages, claiming damages for pain and suffering, for loss of earnings and, "in case of an immediate settlement", a lump sum covering his costs. By doing so he had already conducted settlement negotiations; thus, he had violated the insurer's right to pursue the claim out of court. Therefore, it would have been up to the applicant to prove that this violation was committed neither intentionally nor by gross negligence.

B. Relevant domestic law

Article 8 (1) of the General Terms of Legal Insurance 1988 (Allgemeine Bedingungen für die Rechtsschutzversicherung 1988) states that the insured party, when requesting insurance cover, is obliged to leave the appointment of a lawyer to the insurer (1.2); moreover, in cases relating to private law claims, the insured party has to give the insurer the possibility to pursue the respective claim out of court within reasonable time (1.5.1).

Section 6 paragraph 3 of the Insurance (Contracts) Act (Versicherungsvertragsgesetz) concerns the breach of duties incumbent on the insured party. The relevant part of this paragraph states that the insurer will not be free of his obligation to grant cover unless the breach was caused intentionally or by gross negligence.

COMPLAINTS

The applicant complains under Article 6 of the Convention that the proceedings were unfair. He submits in particular that he could not adduce evidence and that he was not heard personally on the question of whether he had breached his duties under the General Terms of Legal Insurance 1988 with slight negligence, gross negligence or intention. He considers that the Supreme Court, when finding, contrary to the lower court's decisions, that he had breached the duties at issue, should have referred the case back to a lower court.

THE LAW

The applicant complains under Article 6 para. 1 of the Convention about the alleged unfairness of proceedings against an insurance company.

Article 6 para. 1, so far as relevant reads as follows:

"In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing ...".

The Commission finds that the contested proceedings concerned a dispute between the applicant and an insurance company and were directly decisive for the applicant's civil rights (see Eur. Court H.R., Zander judgment of 25 November 1993, Series A no. 279-B, p. 38, para. 22). Article 6 is, therefore, applicable.

The applicant submits in particular that he could not adduce evidence and that he was not heard personally on a question which was decisive before the Supreme Court, as the Court failed to refer the case back to a lower instance.

The Commission recalls that the right to a fair trial includes the right that proceedings should be adversarial. The parties must have the opportunity to have knowledge of and comment on the observations filed or evidence adduced by the other side (see Eur. Court H.R., Ruiz-Mateos judgment of 23 June 1993, Series A no 262, p. 25, para. 63).

The applicant, in his preparatory submissions before the Commercial Court, had offered documentary and oral evidence and had also requested to be heard as a party on the question of whether or not he had breached his duties under the General Terms of Legal Insurance 1988. But he failed to make submissions and to offer evidence as to intention or gross negligence on his part. Both, the Commercial Court and the Vienna Court of Appeal

found that the applicant had not breached the duty at issue. However, the Supreme Court dismissed the applicant's claim, finding that he applicant had breached his duty to give the insurer the possibility to pursue the claim out of court and had failed to make submissions as to intention or the degree of negligence involved.

The Commission notes that the question relating to intention or the degree of negligence had already been addressed in the proceedings before the Vienna Court of Appeal. In particular, the Insurance Company elaborated this issue in its submissions to the Vienna Court of Appeal. Moreover, this issue was again relied on by the Insurance Company in its submissions before the Supreme Court. The applicant had the opportunity to make submissions in reply; however, in his submissions to the Supreme Court he explicitly refrained from commenting on the question of whether in any case he had not acted with gross negligence or intention.

In these circumstances, the Commission finds that the applicant, represented by counsel, could not reasonably exclude that the Austrian courts might find a breach of one of the duties at issue, with the result that the question of whether the breach was only due to slight negligence would become decisive. Consequently, there is no appearance that the course of the proceedings before the Supreme Court unduly restricted the applicant's possibilities to argue his case. There is thus no indication of a violation of the applicant's right to a fair hearing within the meaning of Article 6 para. 1 of the Convention.

It follows that the application is manifestly ill-founded within the meaning of Article 27 para. 2 of the Convention.

For these reasons, the Commission by a majority

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the First Chamber

President of the First Chamber

(M.F. BUQUICCHIO)

(A. WEITZEL)