Office of the Attorney General

Supreme Court:

-I-

Your Honor, on the grounds that the arguments contended in the special submission and maintained in the complaint may - prima facie - involve federal matters susceptible for judgment in the proceedings provided for in Article 14 of Law 48, declared as admissible the direct appeal of the petitioner and ordered the suspension of the course of the trial and the continuation of the provisional remedy (pp. 269 and 280).

-II-

In the case at hand, the Civil and Commercial Court of Appeals (Room 3) confirmed the decision of the previous trial level that rejected the claim filed against the *Obra Social de Empleados de Comercio y Actividades Civiles* (Welfare Fund for Employees of Commerce and Civil Activities - Osecac) with the aim of obtaining healthcare coverage as a voluntary adherent (pp. 165/171).

In reaching this decision, it considered the acceptance of income in the capacity of voluntary beneficiary of Osecac to be subject to the sole judgment of the welfare agency, pursuant to the provisions of Article 3.1 of the regulation approved in Resolution 165/98 of the Superintendence of Health Services, thus denoting a strictly contractual nature, which rejects any branding of the refusal as discriminatory; it was further considered that the complainant can always resort to the public health service (pp. 187/189).

Following this ruling, the petitioner filed an appeal to the federal courts (pp. 192/199), which was answered

(pp. 203/213) and refused on p. 215, thus giving rise to the direct appeal on pp. 255/262, declared by Your Honor - prima facie - as admissible, as stated, on p. 269.

-III-

The complainant contends that the ruling is arbitrary and violates the provisions of Articles 33, 42, 43 and in accordance with the Argentine Constitution; Articles 4, 5 and in accordance with the Pact of San José (Article 75, Para. 22 of the Constitution) and Laws 23,798, 24,455 and 24,754. He states that the arguments grounded in the right to life and the physical and mental safety of the complainant were not considered, and that the court instead was concerning itself only with the matter of discrimination, avoiding the fact, however, that it is at all times incumbent on the accused to prove the absence of any liability in this respect.

He further states the failure, in the context of voluntary affiliation, to examine the fact that the defendant's function is presently one of a kind of pre-pay healthcare company, and that the provisions of Law 23,754 are therefore applicable, in addition to the tendency set forth in Rulings: 324:677 and 754, considered in the context of a contractual concept, and characterized - as a rule - as adherence and consumption.

He also emphasizes, in relation to mandatory health care, that no injury can be caused to the defendant through the affiliation of the petitioner, since the former pays a monthly sum; and that in framing the dispute, it was necessary to appraise the applicability and relevance of the precept approved in Resolution 165/98, in light of the particular values and interests at stake (pp. 192/199).

-IV-

As an employee of the firm BG S.R.L., the complainant was a beneficiary of Osecac between October 1993 and March 2001, when the three-month leave referred to in Article 10 of Law 23,660 ended following his dismissal by his employer, recorded as having occurred in December 2000.

The dispute arose from the petitioner's attempt to join the defendant's benefits scheme, called OSECAC TOTAL, in the capacity of voluntary beneficiary, and the subsequent rejection of this application, which the complainant attributed to the fact that he had been suffering from HIV-AIDS since 1990; his grievance, among others, was born from a sense that he was being discriminated against by Osecac (cfr. pp. 13 /18).

As stated, both the trial judge (pp. 165/171) and the Court (pp. 187/189) concurred with the position set forth by Osecac insofar as the acceptance of the affiliation application was subject to the sole judgment of the welfare agency, and that there were no valid grounds to infer any injury had been caused by said refusal.

-V-

Having examined the proceedings, I note that, throughout the trial, the parties debated aspects exclusively related to the subject matter , which - according to the petitioner - were not afforded due consideration by the Court, confined in this respect - let me reiterate - to the argument grounded in the discretional nature of the admittance of the affiliation application.

In particular, these aspects concerned the rights of beneficiaries previously with long-term affiliations with agencies such as the defendant, particularly those whose

circumstances involved medical conditions such as that described herein; in particular, based on the opinion set forth in Rulings: 324:677; a precedent that was repeatedly cited by the petitioner, along with that published in Rulings: 324:754 (pp. 24 back/25, 71, 140, 155 and 180/181).

Further emphasis was made on the legality of the relationship with a pre-pay healthcare body, as established by the longevity and continuity of healthcare benefits, whereby the stability of the relationship is a relevant aspect, without considerations of whether the relationship was established by the interested party or his former employer on his behalf being of major significance, since the economic equation of the relationship - this aspect was guaranteed through the quota payment of the adherent - the economics and the specific purpose of the business remain protected.

It is worth highlighting that the analogy between welfare funds and prepaid healthcare agencies - mentioned, for example, by Justice Vázquez in Rulings: 324:754, highlighting the legal, economic and operational similarities between both entities, and between these and the insurance contract - was made here by Osecac, which places particular emphasis on the similarities between the legal treatment of such companies and that of the OSECAC TOTAL plan, to which the petitioner intended to adhere (p. 133).

Your Honor specified on this point that , although pre-pay healthcare companies retain commercial aspects, the fact that they aim to protect the guarantees to life, health, safety and personal security also infers that they take on a commitment that exceeds or transcends that of a mere commercial plan (Rulings: 324:677 y 754, opinion of Fayt and Belluscio); and we should not overlook the fact that, in view of the above, the defendant has asserted that the nature of the company is

predominantly one of social welfare, over and above the contractual nature of its adjunct plan for voluntary beneficiaries (p. 133 back).

In addition to the foregoing, and without losing sight of the fact that the complainant's right to life and health are jeopardized - essential regulations to which effect were elaborated on by V.E. et al, in the precedents of Rulings: 321:1684; 323:1339, 3229; 324:3569, with particular reference to obligations that shall be adopted by welfare funds and pre-paid healthcare agencies in this field - it is worth stating that the appeal did not, as is necessary, address the objections in relation to the lack of valid grounds for rejecting the affiliation application that was timeously submitted by the petitioner.

Regardless of the legal relationship between the petitioner and the Welfare Fund, it is clear that, for little more than seven years, the petitioner had access to the general benefits system provided by the defendant. Under these circumstances, and given the latter's awareness of the medical condition of the petitioner - stated in the foregoing and the petitioner's affiliation application (pp. 114/115) - it is unjustifiable that specific discussion of whether the petitioner's demand that he be provided reasons justifying the rejection of his application for adherence to the welfare fund was ruled out, beyond the mention that this had "undergone the evaluation provided for in effective legislation...has been denied" (pp. 7).

It is to be noted that, once the petitioner highlighted the significance of being included in the voluntary Osecac plan - in terms of the continuity, regularity of and familiarity with the treatment and consultation centers, and his interest in avoiding potential waiting periods - the

defendant framed the application's rejection in the context of an abusive exercise of rights, citing the provisions of Article 1071, Paragraph 2 of the Civil Code (see p. 182), without inciting, however, any consideration of the appeal, as had occurred previously with the trial judge.

A similar oversight is to be reprimanded in respect of the argument constructed based on the petitioner's constitutional rights to life and health, which were pleaded in the pre-trial stage and reiterated throughout the trial (cfr. pp. 6, 9, 17/18, 23/25, 70, 180/82, etc.), and the explicit pleading based on these ordinances, emanating from a higher authority, in respect of the inapplicability of Article 3.1 of the regulation approved in Resolution SSS 165/98 (cfr. p. 182), upon which precepts the decisions of both courts were ultimately based.

I hereby deem that the above mentioned course of action - framed in a context whereby the ruling of Law 23,798 highlighted the intention of law to make the fight against HIV, and the safeguarding of certain basic values ensuring social solidarity, a matter of public policy (see Rulings: 323:1339, opinion of Justice Vázquez), by order of which subsequent Laws 24,455 and 24,754 constitute no more than an ostensible correlative - ultimately deprives the ruling on pp. 187/189 of any valid legal basis.

-VI-

Moreover, it is worth stressing that the defendant's refusal to provide reasons justifying the rejection of the petitioner's affiliation application has not been substantially amended in the course of the proceedings before the courts of justice. In fact, the welfare fund has reiterated that its actions were consistent with the provisions of Article 3.1 of

the regulation approved in Resolution 165/98 (see pp. 116/125). Nevertheless, on at least one occasion, it explained that its criteria for approving applications "...is based on the purpose of the Welfare Fund, that the natural beneficiaries of healthcare provision, namely those persons due benefits in their capacity as employees included in Collective Agreement 130/75, should have absolute priority..." (the part emphasized is contained in the original instrument of the defendant); whereby it is inadmissible "...to distract funds contributed by and due to beneficiaries to meet the needs of those not included under the terms of Law 23,660..." (p. 135).

The line of argument transcribed deserves several observations, in addition to an allusion to the clear fact that until a short time previously, and for a considerable period, the petitioner was also a commercial employee. These observations - framed within the context determined in Article 1 of Law 23,798 [declaring the fight against HIV-AIDS in the public interest] and the obligations established in Laws 24,455 and 24,754 - include the fact that a monthly quota was paid by the affiliate-adherent, part of which amount - it is not trivial to note - is channeled to the Solidarity Distribution Fund of the Superintendence of Health Services, which highlights, if there was ever any doubt, the relationship existing between the "natural" segment of the Welfare Fund and that belonging to voluntary affiliations (cfr. Art. 6.1 and 5 of the regulation approved in Resolution 165/98).

In view of the coexistence of a welfare segment defined under the terms of Law 23,660 and another analogized by the party itself with the benefits provided by so-called pre-paid healthcare, within an agency such as the defendant, this is at the very least controversial in cases such as the one before us, as it can lead to a severe division in terms of

behavior and responsibility, as expressed by the Welfare Fund; specifically, when addressing the provisions of the paragraph above and the statements of the defendant (p. 135).

I understand, to some extent, the paradox implied whereby a party that initially defends its position by clinging to an argument of contractual discretion, in relation to the system provided for in Resolution 165/98, before trying to justify its actions by citing the commitment made to its commercial workers (p. 135), might then realize this difficulty.

In respect of the latter regulation, it is worth highlighting - due to its proximity to the facts in this case - that Article 9.1 of the regulation provides that Osecac may not, under any circumstances, enforce the clause for contract termination upon adherent beneficiaries if the affiliate or his/her family unit has been diagnosed with a condition after having joined the plan. This aspect clearly illustrates the presence of regulatory reprimand in this case ——despite referring to the voluntary segment—— in relation to actions that are in some way similar to those being defended by the appellee here.

According to my understanding, the examination of the matter raised in the petition improperly bypassed the deliberation of the aspects indicated, thus depriving the decision of its legal basis; and utmost care cannot be considered to have been taken in the appraisal of the recourse herein, which would have involved taking into account the nature of the rights at stake and the pursuit of the protection of guarantees whose interpretation has been entrusted to Your Honor. Rulings: 311:2247; 324:677, etc.).

-VII-

In conclusion, I stress that the petitioner, having been a beneficiary of the defendant for more than seven years and suffering from HIV-AIDS, has been impeded from enjoying the health care provided by the defendant for the reasons stated in the opinion.

Under this circumstance, and as expressed in Rulings: 324:677 and 325:677, it cannot be ignored that the petitioner would find it extremely difficult, or perhaps impossible, in his present condition, to access another similar health plan, in addition to the fact, as indicated on pp. 13 back., 22, 69, etc., that his condition requires regular, undeferred treatment, and any absence thereof - in proper time and form - in cases such as this appears to be an aggravation susceptible to injure the patient's innermost feelings, as well as entailing - depending on the case of each patient - an immediate, or mediate, violation of basic rights (Rulings: 323:1339, opinion of Justice Vázquez). On the other hand, the solution proposed by the Welfare Fund in the mail correspondence contained on p. 11 ("...join any private or state welfare program..."), as partly reiterated in the appeal when referring to the public healthcare system further implies ignorance or disregard of the entirely critical present situation of the sector mentioned.

Therefore, and in view of the foregoing, I do not rule out that Your Honor should decide to access the fund mentioned herein and that the matter be finally settled (Rulings: 316:713; 324:677, and many more), for which I deem it necessary to state the following considerations.

The petitioner appears in this summary and urgent proceeding before the court, definitively postulating that, under pretext of a line of argument based on commercial

autonomy, the defendant has denied him the opportunity to continue his healthcare plan with this Welfare Fund.

He hereby pleads for the protection of his right to life and health, and to the avoidance of discrimination, and I hereby deem him to be right in his plea for constitutional protection.

I do so because, in reference to the foregoing, I deem that the rejection of his application for adherence to the Welfare Fund has not been demonstrated as reasonable, in view of the absence of any explanation or conclusive proof to the contrary - which, in my view, the circumstances and relevance of the interests at stake required - and in view of the offering of protection in relation to the economic balance of the relationship, determined by the intention of the defendant to free itself of the continued treatment of the condition of the petitioner, rather than the pretext of contractual independence given, which the aspects of the case authorize me to reject.

Furthermore, in the stated context of a pre-existing legal relationship, I deem that the welfare body lacks full and absolute authority, and that this must be interpreted restrictively, as in debatable cases such as the one before us, hermeneutics of equality must prevail to benefit the party wishing to remain in the welfare relationship, given his position as the weaker party in the relationship, in keeping with the principle of good faith that must be upheld in relationships of this type (see Article 1198, C.C.).

Thus, as I was able to stress in issuing my opinion in the precedent of Rulings: 324:677, which it is appropriate to have here before me, for assumptions such as the aforementioned a severe and strictly commercial approach to the issue is not advisable, but rather, account should be taken of

the concrete circumstances of the petitioner and the particular context in which the relationship takes place. In other words, from my perspective, the specifics of the case - regarding as it does a body emanating from a guild, whose ultimate aim is to provide medical and healthcare services - required a different behavior on the part of the defendant towards an individual that, as a long-standing affiliate that faces probable limits on his personal independence as a result of the virus from which he suffers (Rulings: 323:1339), merely intended to continue the relationship, albeit under a different regulatory status.

-VIII-

In view of the foregoing, I deem it appropriate to declare the federal objection as admissible and to redress the actions of the originating court in order that a new decision be rendered in accordance with the foregoing; or rather, that in exercise of the authorities that Your Honor deems to be conferred thereunto by Article 16, Paragraph 2 of Law 48, and given the nature and urgency of the matter, that the sentence be revoked and, if deemed appropriate, that a ruling be rendered in respect of the fund in question, with the scope expressed therein.

Buenos Aires, December 22, 2003

SAMPLE DOCUMENT Nicolás Eduardo Becerra

Supreme Court of Justice of the Nation

Buenos Aires, December 2, 2004

Having reviewed the record of proceedings: "V., W. J. vs. Obra Social de Empleados de Comercio y Actividades Civiles re: summary and urgent procedure".

Whereas:

The matters set forth in these proceedings are adequately addressed by the opinion of the Attorney General, whose considerations are appropriate to be essentially remitted for reasons of brevity.

Therefore, in accordance with the opinion of the Attorney General, the special remedy is hereby deemed admissible and, in accordance with the provisions of Article 16 of Law 48, the judgment appealed is hereby revoked and the petition is hereby admitted, ordering that Obra Social de Empleados de Comercio y Actividades Civiles insert the petitioner in the healthcare plan for which application was made, in accordance with the terms and scope provided in the rules and regulations of the service. It is ordered that the defendant bear the costs of all court proceedings. It is ordered that notice be given and that it be returned. ENRIQUE SANTIAGO PETRACCHI - AUGUSTO CESAR BELLUSCIO - CARLOS S. FAYT - ANTONIO BOGGIANO - JUAN CARLOS MAQUEDA - E. RAUL ZAFFARONI - ELENA I. HIGHTON de NOLASCO.

SAMPLE DOCUMENT

Appeal on points of fact filed by **Dr. Isabel Dolores Rajoy**, on behalf of, **W. J. V., petitioner in proceedings.**

Originating court: **Civil and Commercial Court of Appeals, Room III**

Previous processing courts: **10th National Federal Court for Civil and Commercial Matters**