the OFFICI@L

legal newsletter on european civil service law
newsletter juridique de la fonction publique européenne

DALDEWOLF

april 2019 - number 51 - 6th year
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EDITO

Dear readers,
Time is flying. Your Newsletter is celebrating its six years of existence and you are holding its 51st issue in your hands.
As previously announced, *the OFFICI@L* unveils its new look.
The new *OFFICI@L*, is more than just a new layout. We will soon be adding new headings and we will offer you the possibility to find all our former issues online, as well as a table of contents.
This new issue will also be easier to print if you so wish.
Under this new version, we comment on recent case-law of the General Court regarding the retroactive application of medical cover deferment to a staff member who, in the context of his pre-recruitment medical examination, deliberately withheld information relating to an illness for which he was undergoing long-term treatment.
We will then focus on the limits within which a staff member is entitled to rely on the principle of the protection of legitimate expectations in case of errors of the administration.
Lastly, we will briefly go over the latest reform as regards the means of registration of a lease agreement.
Excellent reading to all!

The DALDEWOLF team

OUR TEAM

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This newsletter is published in collaboration with RENOUVEAU & DÉMOCRATIE

CASE LAW

Retroactive application of a medical cover deferment

The General Court has examined the consequences, in the context of the pre-recruitment medical examination, of the failure of a staff member to disclose a sickness or invalidity affecting him (T-303/18 RENV). The complainant is a former member of the European Commission who deliberately withheld information relating to an illness for which he was undergoing long-term treatment. The applicant subsequently took up his duties and the medical officer did not ask the AECC to defer medical cover pursuant to Article 32 of the CEOS.

The medical officer eventually diagnosed the applicant as suffering from a psychiatric illness. Since his condition led to many absences, the applicant was placed on unpaid sick leave. The matter was referred to the Invalidity Committee, which concluded that the applicant was suffering from total permanent invalidity preventing him from performing the duties.

The applicant initially brought his case before the EU Civil Service Tribunal (10 July 2012, *AV v Commission*, F-4/11), which annulled two decisions of the AECC against which the applicant had previously filed a complaint. The AECC had decided to apply the deferment of medical cover retroactively and not to grant the applicant an invalidity allowance. The judges concluded that while the AECC could apply the deferment retroactively, it still had to follow the procedure laid down in Article 32 of the CEOS, which was not the case here.

Pursuant to the annulment of the contested decisions and as a way of correctly enforcing the judgment of the Civil Service Tribunal, a newly composed Invalidity Committee was reconvened. This Committee unanimously concluded that the AECC would have deferred medical cover, had the applicant declared his illness at his pre-recruitment medical examination.

The AECC thus decided to retroactively apply the deferment of medical cover and not grant the applicant an invalidity allowance. Dismissal of the complaint submitted against that decision led the applicant to again bring his case before the Civil Service Tribunal (21 July 2016, *AV v Commission*, F-91/15), which annulled the contested decision. The Commission brought an appeal before the General Court (17 May 2018, *Commission v AV*, T-701/16 P). The latter upheld the appeal and referred the case back to another chamber of the General Court (10 April 2019, *AV v Commission*, T-303/18 RENV).

The applicant puts forward, *inter alia*, a plea alleging infringement of Article 32 of the CEOS and challenges the retroactive application of a medical cover deferment. The judges first recall the *ratio legis* of this the pre-recruitment medical examination, which aims at ensuring that the staff member is physically fit to perform his duties. This is in fact in the legitimate interest of the institution, which must be able to fulfill its missions. However, a staff member who is physically fit to perform his duties, but who suffers from an illness, may soon fall under the invalidity scheme (EU Civil Service Tribunal, 20 July 2016, *HC v Commission*, F-132/15, pt. 65).

The staff member thus has a duty to disclose an illness affecting him or having affected him in the past (above-mentioned judgment *HC v Commission*, pt. 80). At the very least, he is required to answer sincerely and completely the questions asked about his health in the medical form at the pre-recruitment examination. This will allow the AECC to assess whether to apply the deferment of medical cover. Consequently, the judges consider that the mere failure to answer sincerely and completely the questions asked about his health in the medical form allows the AECC to apply the deferment of medical cover retroactively (above-mentioned judgment *HC v Commission*, pt. 85), even where the applicant did not deliberately conceal his illness.

However, in order to apply the deferment of medical cover retroactively, the AECC must follow the procedure provided for in Article 32 of the CEOS. It must firstly refer the matter to the medical officer, who must assess whether the sickness warranted deferring medical cover when the staff member was engaged. Secondly, the AECC must inform the staff member of the decision taken on the basis of the opinion of the medical officer, in case the staff member wishes to lodge an appeal against this decision with the Invalidity Committee.

In the present case, by failing to answer sincerely and completely the questions asked about his health in the medical form, the applicant misled the medical officer and deprived the AECC of its possibility to apply the deferment of medical cover pursuant to Article 32 of the CEOS.

Accordingly, the General Court dismissed the claim for annulment.

FOCUS

The protection of legitimate expectations in case of errors of the administration

On several occasions, the case law looked into the possibilities for a staff member to rely on the principle of the protection of legitimate expectations in case of errors of the administration.

Three conditions must be met in order to apply this fundamental principle of Union law (see CJEU of 5 May 1981, *Dürbeck v Hauptzollamt Frankfurt a. M*, C-112/80, pt. 48 and case law cited). Firstly, the administrative authorities must have given the person concerned precise, unconditional and consistent assurances originating from authorised and reliable sources. Secondly, those assurances must be such as to give rise to a legitimate expectation on the part of the person to whom they are addressed. Lastly, the assurances given must comply with the applicable rules (see recently General Court of 25 October 2018, *PO and Others v EEAS*, T-729/16, pts. 79 and 80).

The CJEU has notably refused application of this principle where one of the conditions is not satisfied. In a case in which the administration was criticised for failing to detect undue payment of an expatriation allowance to an official, the judges considered that such error could not be regarded as a "*specific act*" of the administration liable to give rise to legitimate expectations on the part of that official or staff member. As a consequence, for the sake of this principle, the official or staff member concerned cannot oppose themselves to subsequent recovery of the amounts wrongly paid (General Court of 16 May 2007, *F v Commission*, T-324/04, pts. 159, 164-166 and 170).

More generally, errors committed by the administration in respect of payments made in favour of an official or staff member cannot by themselves be regarded as "*precise, unconditional and consistent assurances*" permitting the official or staff member to rely on the protection of legitimate expectations. To maintain otherwise would continuously prevent the administration from recovering the amounts wrongly paid (EU Civil Service Tribunal of 7 July 2015, *WR v Commission*, pt. 64). It is irrelevant that such error occurred over the course of several years.

Pursuant to the principle of protection of legitimate expectations, the administration is not entitled to withdraw an unlawful act where its addressee could rely on its apparent lawfulness. However, it clearly stems from the case law that an official or a staff member rebuts the presumption of lawfulness of acts of the administration when "*objective circumstances*" should have led the person concerned to realise the error committed or, at the very least, to cast doubts as to the lawfulness of the act (General Court of 17 May 2017, *Piessevaux v Council*, T-519/16, pt. 88).

It has moreover been held in the case law that an official or agent cannot rely on the fact that the administration repeatedly failed to detect such error to rely on the principle of protection of legitimate expectations (General Court of 12 May 2010, *Bui Van v Commission*, T-491/08 P, pts. 49-50).

In addition, it stems from consistent case law that no person may rely, in support of his claim, on an unlawful act committed in favour of another (see notably CJEU of 4 July 1985, *Williams v Court of Auditors*, C-134/84, pt. 14). Consequently, and where it appears that an apparent unlawfulness has been committed in respect of an official or a staff member, another official or staff member cannot rely on the principle of equal treatment to justify that there has been an unlawful act committed against them (EU Civil Service Tribunal of 1st July 2010, *Casta v Commission*, F-40/09, pts. 88-89).

Lastly, in a recent case dated 28 February 2019 (T-216/18), the General Court dismissed the application of the principle of protection of legitimate expectations to an official who was unduly paid an expatriation allowance. The judges held that in the context of an interinstitutional transfer, the new Appointing Authority could re-examine the officials' or staff members' financial entitlements before taking up their duties. Moreover, the employing institution may review these financial entitlements (see General Court of 16 May 2007, *F v Commission*, T-324/04), even absent any transfer (order of the General Court of 7 December 2011, *Mioni v Commission*, T-274/11 P), in order to safeguard the financial interests of the EU.

DAY-TO-DAY IN BELGIUM

Lease: new method of registration

Articles 23 to 25 of the law of 28 April 2019 laying down various fiscal provisions and modifying the Registration Fees Code, which was published in the *Moniteur belge* on May 6, contain the latest reform as regards the means of registering a lease agreement – "*bail sous seing privé*" (i.e., the lease signed directly between the future tenant and the landlord). These provisions entered into force on 16 May 2019.

Upon signature, the landlord (or the tenant, to the extent that the parties have expressly agreed so) must register the lease.

He may choose to submit the lease for registration using the *MyRent* online application, after having first duly completed and signed the lease agreement.

He may also appear in person at the registration office, with two signed copies of the lease agreement.

Since the reform, the landlord retains the choice between these two possibilities. However, regarding the second option, he must no longer appear in person at the registration office.

Registration is now centralised at a "scanning center", where the tenant may *(i.)* send a copy of the lease agreement, or *(ii.)* deposit the copy directly in the mailbox of the center.

The landlord must attach a standard form to the copy of the lease agreement and its annexes. This form is established by Royal Decree, which contains the description of the documents sent or deposited.

After these proceedings, the registered lease will be available on *MyMinFin*.