The Offici@l

LEGAL NEWSLETTER ON EUROPEAN CIVIL SERVICE LAW

DALDEWOLF

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Edito

In this new issue, «The Offici@l» team proposes some clarifications regarding the Appointing Authority's margin of appreciation and duties regarding the disciplinary proceedings. Last minute news regarding the merger of the Civil Service Tribunal and the EU General Court are also provided.

We wish you an excellent reading.

The DALDEWOLF team

Focus

Discretionary power and obligations of the Appointing Authority in disciplinary proceedings

The Appointing Authority enjoys a certain margin of appreciation in disciplinary proceedings as recalled by the Civil Service Tribunal in its judgement *FU/European Commission* of April 11th 2016 (F-49/15).

When a preliminary and mandatory administrative inquiry is ended, the Appointing Authority may decide to begin disciplinary proceedings against the official in question, without a preliminary referral to the Disciplinary Board. However, the Appointing Authority has then to hear the official a second time. In order to balance the large discretionary power left to the Appointing Authority when it decides not to involve the Disciplinary Board, it can only inflict lesser penalties: a written warning or an admonition.

Should the Appointing Authority decide to refer the official to the Disciplinary Board, he is entitled, in accordance with the principle that both parties must be heard, to the communication of the Appointing Authority's report and its annexes to which he has a right to reply. The official must be granted at least 15 days to prepare its defence and has a right to legal assistance. The Disciplinary Board then delivers a reasoned opinion as to whether the charges he is accused of are established and as to any penalty which should be decided.

Nonetheless, as recalled recently by the Tribunal in its *FU/Commission* judgement, the Appointing Authority is not bound by the choice of penalty proposed by the Disciplinary Board and can appreciate the responsibility of the official in a different manner from the Disciplinary Board. In this case, the official was accused of asking, on the one hand, the Court of Auditors to benefit from the resettlement allowance as well as the reimbursement of his moving expenses and travel expenses from Luxembourg to his country of origin, and, on the other hand, asking the Commission for the reimbursement of travel expenses from this country to Brussels. The outcome of the disciplinary proceedings, which involved the Disciplinary Board, was his classification in a lower function group without downgrading.

In this case, the Tribunal ruled that the Appointing Authority was therefore entitled to consider that a lesser number of breaches were established than those by the Disciplinary Board, while choosing the same penalty as the Disciplinary Board.

Finally, regarding the articulation between disciplinary proceedings and national criminal law, article 25 of annex IX to the Staff Regulations prevents the Appointing Authority from definitively settling the disciplinary position of an official who is the subject of criminal proceedings for the same matters by adjudicating on those matters, as long as the decision handed down by the criminal court has not become final.

Nonetheless, it is only where such criminal proceedings have been initiated that the matters to which they relate can be identified and compared with the matters in respect of which the disciplinary proceedings were instituted, so that it can be determined whether they are the same. In practical terms, the burden of proof lies on the official. In its judgement, the Tribunal considered that a mere exchange of emails between the official and the national police authorities in which he was referred to as a "suspect" is not sufficient, in the absence of a prosecution decision, to prove that the facts he was accused of in the disciplinary proceedings were identical to those being simultaneously prosecuted at the national level.

Case law

Time-limit for lodging a complaint in the absence of an administrative decision

On April 11th 2016, the EU Civil Service Tribunal rejected the claim brought by an official against a decision by the Pay Master's Office « PMO » to limit the payment of the expatriation allowance, which had been wrongly omitted since 1 September 2007, to a period of 5 years preceding the discovery of the error (F-77/15).

Following a secondment, the applicant was reinstated at the Commission and his right to the expatriation allowance was confirmed by the PMO in a note signed on September 21st 2007. In May 2014, having noticed that the section « IDE » detailing the payment of the expatriation allowance was missing from his pay slip since September 1st 2007, the applicant asked the PMO for the back dated allowance he had not received. Reminding the applicant that the time-limits set in articles 90 and 91 of the Staff Regulations for bringing a complaint or, if need be, lodging an appeal are mandatory, the PMO granted him *ex gratia* the payment of the allowance for the past 5 years, i.e. from the month of May 2009.

The Tribunal notes that in the absence of a decision depriving the official from benefitting from the expatriation allowance adversely affecting him, the non-payment of the allowance amounts to an administrative misconduct on the part of the Commission due to the negligence of its services. Therefore, in the absence of such a decision the Tribunal considers that the time-limit to bring a complaint pursuant to article 90 of the Staff Regulations must be reasonable and must be assessed, notably, according to the 5 year statute of limitation provided for in article 46 of the European Court of Justice Statute regarding the non-contractual liability of the EU.

In the present case, the Tribunal considers the 7 year time period which elapsed between the damaging effects resulting from the Commission error, which appeared with the payment to the applicant of his pay, not including the expatriation allowance, in September 2007, and his complaint brought in 2014, as unreasonable.

In addition, the Tribunal considers that the working conditions of the official during his secondment and while he was posted to Delegations abroad are not sufficient as such to prove an exceptional situation which could have prevented him from noticing the error of the administration.

Therefore, the Tribunal concludes that the decision of the PMO not to grant the payment of the expatriation allowance for a period going beyond five years preceding the discovery of the administration's error should not be annulled.

In brief...

Merger of the Civil Service Tribunal of the EU

The reform of the Court of Justice of the European Union adopted in October 2015 provides for the disappearance of the Civil Service Tribunal. A draft regulation on the transfer of jurisdiction at first instance to the General Court in disputes between the EU and its servants is currently being examined by the EU law-making bodies.

According to this draft regulation, all staff cases still pending with the Civil Service Tribunal on 31 August 2016 are to be transferred to the General Court, which will deal with them as it finds them at that date. It will be possible to appeal those cases to the Court of Justice.

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