The Offici@l

LEGAL NEWSLETTER ON EUROPEAN CIVIL SERVICE LAW

DALDEWOLF

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RENOUVEAU DEMOCRATIE CONSEIL

Edito

Dear readers,

January will be well under way and work will have resumed in the EU institutions as well as elsewhere when you receive notification of this December issue in your mailbox. Fortunately, it is still time to send our best wishes for 2019 and to wish you to find pleasure and interest in reading *The Offici@l*.

In this issue, we look into the statutory notion of "non-marital partnership".

In the case law, we comment on the decision of the Court of Justice regarding the transfer of pension rights acquired under a national pension scheme to the EU's pension scheme.

In Belgian case law, we focus on the constitutionality of the term of validity of interim measures prescribed in the wake of the break-up of a cohabitation.

We wish you a very pleasant reading!

The DALDEWOLF team

Case law

Transfer of pension rights acquired under a national pension scheme to the EU's pension scheme

In its decision of 6 September 2018, the Court of Justice looked into the transfer to the Union's pension scheme of assets representing acquired rights by virtue of a job as (self) employed within a Member State ("transfer IN"). In particular, the Court addressed the issue of differential treatment between EU officials, depending on whether they benefited from such transfer before or after the entry into force of the 2011 General Implementing Provisions (GIPs).

The applicant, an official working for the Secretariat-General of the Council of the European Union, lodged a complaint against the decision of the Appointing Authority definitively establishing the subsidy of the pension rights formerly acquired by the applicant under the Belgian pension scheme. The rejection of this complaint led the applicant to bring an action before the EU General Court. The latter however ruled in favor of maintaining the decision of the Appointing Authority definitively establishing the number of annual contributions to be credited to the EU's pension scheme, following the transfer of acquired pension rights under a national pension scheme prior to entering the service of the EU. Consequently, the applicant submitted the present action to the Court of Justice.

First off, the Court dismissed the first plea relied on by the applicant, and ruled in favor of (i.) the absence of an inadequate statement of reasons on the part of the first instance judges, who established that the criterion justifying the application of the former GIPs only to certain officials is objective in nature. The Court moreover decided that (ii.) the General Court could not be blamed for the lateness of national administrations regarding the transfer of the required information deemed necessary to establish a proposal concerning additional pensionable years, as well as the consequences resulting therefrom. Lastly, the Court brushes aside (iii.) any existing contradiction in the grounds of the judgment of the General Court and considers that the judges did not err in law when considering that, in light of its wide margin of discretion, the Appointing Authority could equate the situation of officials having agreed to the proposal concerning additional pensionable years, to that of officials whose assets have already been transferred to the EU's pension scheme.

Regarding the second plea in law relied on by the applicant, the Court mainly focuses on the one hand, on the exception to the retroactive *application* of the conversion coefficients contained in Annex 1 of the 2011 GIPs and on the other hand, on the retroactive *amendment* of the coefficient applicable to transfer IN.

The transitional provisions contained in Article 9, § 3 of the 2011 GIPs provide that the new GIPs are not applicable to the transfers when the termination of appointment occurred before January 1st, 2009. Moreover, they do not apply to transfers the application of which was registered before that date. This provision derogates in this respect from the retroactive application of the conversion coefficients, since in these two cases, the former 2004 GIPs continue to apply. However, the Court finds in the present case that the General Court gave sufficient reasons relating to the objective pursued by this exception, and that the said objective could justify a difference in treatment between officials and servants depending on whether they had lodged an application for transfer IN before or after January 1st, 2009.

Regarding the retroactive amendment of the conversion coefficient, the Court looks into the reasons the General Court relied on as a justification for the differential treatment resulting from this amendment by reference to the date of entry into force of Regulation No 1324/2008. The Court here merely indicates that it cannot be deduced from the previous case law of the General Court (judgment of the General Court of 13 October 2015, *Commission v Verile et Gjergji*, T-104/14 P) that the entry into force of the aforementioned Regulation has had no bearing on the conversion coefficient applicable to transfer IN - quite the contrary. Consequently, the General Court did not err in law when it justified the retroactive amendment of such coefficient in reference to the entry into force of the said Regulation.

As a result, the Court dismissed the appeal in its entirety.

Focus

Legal cohabitation and statutory notion of non-marital partnership (1/2)

Although no reference is made in the Staff Regulations to the term "legal cohabitation", several provisions (non-discrimination principle, social security, household allowance…) refer to the notion of "non-marital partnership".

There is however no formal definition with respect to the latter notion, unlike the uniform concept of marriage, referring to "persons who have formally contracted a civil marriage recognized by law" (see judgment of the General Court of 28 January 1999, *D v Council*, T-264/97, pt. 26). Absent a uniform concept in the various Member States (*cohabitation légale* in Belgium, *PACS* in France or *geregistreerd partnerschap* in the Netherlands), and in order to prevent diverging interpretations, the EU judge has defined this notion by reference to the first three conditions set out in Article 1, paragraph 2, point c), of Annex VII to the Staff Regulations.

Reading these conditions, it appears the existence of a non-marital partnership implies: (i.) a union between two persons, which is subject to (ii.) certain formal aspects (see judgment of the General Court of 5 October 2009, *Commission v Roodhuijzen*, T-58/08 P, pt. 82).

The first condition, of a substantive nature, implies a union between two persons, namely the existence of a couple. As expressly referred to in Annex VII of the Staff Regulations, this leaves aside situations in which people are related, whether descendants, ascendants or collateral relatives, (see abovementionned judgment in *Commission v Roodhuijzen*, T-58/08 P, pt. 84) as well as situations in which the persons are already covered by another partnership or marriage.

The second condition implies certain formal aspects. In that regard, the couple must produce a legal document acknowledging their status as non-marital partners. The legality of such document must moreover be acknowledged by any competent authority of a Member State.

For the remainder, it should be noted that no specific condition of registration is required beyond the abovementionned formal aspects. For example, despite the absence of registration, the cohabitation agreement («samenlevingsovereenkomst») falls under the notion of non-marital partnership (see abovementionned judgment in *Commission v Roodhuijzen*, T-58/08 P, pt. 77).

As far as the two conditions set out in Article 1, paragraph 2, point c), of Annex VII to the Staff Regulations are met, no other condition ought to be added. It is thus not required that the non-marital partnership be equivalent to marriage. Otherwise, this would add a condition to those comprised in this provision. Nor is it required that these conditions be foreseen under the relevant national legislation.

Day to Day in Belgium

Term of validity of interim and urgent measures prescribed in the wake of the break-up of a cohabitation

By its judgment nr. 177/2018 of 6 December 2018, the Belgian Constitutional Court ruled on the constitutionality of Article 1479, § 3 of the Belgian Civil Code, which provides for referral to the Family Court following the break-up of a cohabitation. According to this provision, the Court prescribes all interim and urgent measures required in the wake of the break-up, and determines the term of validity of such measures.

In the case at hand, a cohabitant referred a request of interim measures to the Family Court of the Court of First Instance of Namur. The couple having broken up their cohabitation after the referral to the Court, the judge relied on the content of Article 1479, § 3 of the Belgian Civil Code.

Such provision limits the term of validity of the prescribed measures to one year's duration (with the exception of measures relating to joint children) whereas these same measures are not time-barred regarding the break-up of a marriage or *de facto* cohabitation. Therefore, the Court expressed doubts as to the constitutionality of this provision.

The Constitutional Court firstly confirmed the existence of a difference in treatment regarding the term of validity of the prescribed measures. Such differential treatment relies on an objective criterion, namely the chosen status of the couple.

The Court then admitted that marriage, cohabitation and *de facto* cohabitation entail different legal situations respectively for the spouses, cohabitants and de facto cohabitants. Such differences may thus lead to a differential treatment.

However the abovementionned criterion of the chosen status of the couple cannot justify automatic termination of the interim measures founded on Article 1479, § 3. This is so especially since this limitation may turn out to be disproportionate, compelling former cohabitants willing to extend the interim measures prescribed by the Family Court beyond one year to refer to the President of the Court of First Instance past the three months-period following the break-up of the cohabitation.

Consequently, the Court ruled that Article 1479, § 3 violates Articles 10 and 11 of the Constitution owing to the prescribed one-year time limit.

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