



The Offici@l

LEGAL NEWSLETTER ON EUROPEAN CIVIL SERVICE LAW

DALDEWOLF

Contact theofficial@daldewolf.com - Web www.daldewolf.com - October 2017

This newsletter is published in collaboration with **Renouveau & Démocratie**

Edito

Dear readers,

This new issue of "The Official" shall provide you with an update on the principle of non-discrimination on the grounds of gender in the EU civil service.

In addition, in a recent judgement presented here, the EU General Court reiterated the obligations for the EU Institutions to state the reasons for the decisions to refuse a promotion.

We wish you a pleasant reading,

The DALDEWOLF team

Case law

Decision to refuse a promotion and the obligation to state the reasons

Focus

The discrimination on the grounds of gender in the EU civil service

Case law

Decision to refuse a promotion and the obligation to state the reasons

By a judgement of 26 October 2017 (T-601/16), the EU General Court allowed the appeal brought by an official who was challenging the decision of Director of the European Centre for the Development of Vocational Training (Cedefop), not to promote him to Grade A12 in the 2015 promotion exercise.

On 4 November 2015, the Appointing Authority established the list of the officials promoted which did not include the name of the applicant. In support of his action, the applicant alleged in particular a breach of the obligation to state reasons by the Appointing Authority.

In accordance with settled case-law, if the Appointing Authority is not required to state reasons for a decision to promote, either for its recipient or for the candidates not promoted, it is however required to state reasons for the decision rejecting the complaint submitted by a candidate not promoted under Article 90(2) of the EU Staff Regulations. In this present case, the Appointing Authority did not state the reasons either for the decision to promote or for the implied decision rejecting the complaint.

However, the General Court noted that even an implied decision rejecting a complaint can be considered, exceptionally, as sufficiently reasoned if it has been adopted in a context known by the official and enabling him to ascertain the scope of the decision affecting him.

Analyzing the context in which the disputed decision not to promote was adopted, the General Court found that the applicant, although he had knowledge of the criteria to attribute a promotion and of the negative criticism expressed against him at a professional level, he could not understand how the criteria set out in Article 45 of the EU Staff Regulations, which govern the rules of nomination, were translated into practice with regard to his situation.

Indeed, the appraisal reports contained also positive feedbacks. Furthermore, the fact that the applicant applied for a position in the Council a month before the adoption of the disputed decision does not establish, according to the judges, that he knew he was not going to be promoted but, at most, that he had doubts that the negative criticisms expressed against him could have an influence. The judges ruled that the official was not in a position to understand, before the appeal was brought, the way in which these criticisms had been taken into account in the comparative assessment of the merits. Accordingly, they noted that the Appointing Authority did not provide any beginning of reasons for its decision to not promote the Applicant.

For these reasons, the General Court annulled the decision to not promote the Applicant for lack of reasoning and condemned the Cedefop to pay a compensation in the amount of €2000.

The discrimination on the grounds of gender in the EU civil service

Article 1d(1) of the EU Staff Regulations prohibits any discrimination on the grounds of gender.

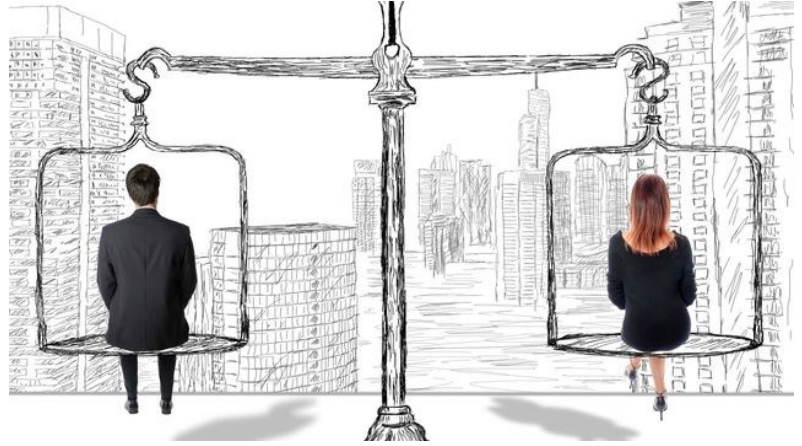
In accordance with a well-established case-law, the EU Court of Justice protects the subsequent principle of genders equal treatment in the EU civil service, for both officials and agents. The principle constitutes a fundamental human right, which is enshrined in Article 21 of the Charter of Fundamental Rights of the European Union.

It follows from this fundamental principle that EU Institutions are prohibited, like any other employers, to discriminate a pregnant woman. On this subject, the EU Court of Justice ruled, in a judgement of 8 November 1990 (C-177/88), that refusing to hire a female candidate because she was pregnant constitutes direct discrimination on the grounds of sex. In a judgement of 28 January 1992 (T-45/90), the EU General Court ruled that same conclusions must apply to the termination of an female employee's contract because she was pregnant. For these reasons, Article 47 of the Conditions of Employment of Other Servants of the European Union provides that, if an EU Institution terminates a contract with an agent, the period of notice shall not start to run during pregnancy and if the notice has already begun to run, it shall be suspended.

Regarding pension rights, the Court ruled, in a judgement of 11 September 2007 (C-227/04 P), that the use of factors which vary according to sex to calculate the number of additional years of pensionable service to be credited following the transfer to the European Union scheme of the pension rights acquired in the course of professional activities prior to entry in the service of the Union European, constitutes a direct discrimination. Obviously, the corresponding provisions of the EU Staff Regulations have been amended to comply with the judgement.

Article 1d (5) of the EU Staff Regulations provides that persons who consider themselves wronged because the principle of equal treatment has not been applied to them must establish facts from which it may be presumed that there has been a discrimination. The EU Institution shall thus prove that there has been no breach of this principle. For example, in a recent judgement of 26 October 2017 (T 706/16 P), the EU General Court rejected the appeal filed by an official against a decision not to promote her because she had not establish facts presuming a discrimination on the grounds of gender. In this case, the applicant was not promoted in the 2014 promotion exercise. Indeed, her staff report for the year 2013 said there was not enough example to assess the evaluation period because of a lengthy absence, due a maternity leave. However, according to the General Court, that report did not constitute a sufficient indication to presume the decision not to promote was been adopted due the pregnancy of the applicant. The judges have underlined, inter alia, that the comparative assessment of the official's merits for the promotion covered not only the year 2013 but also the years 2011 and 2012.

Finally, Article 1d (2) and (3) allows the Appointing Authority to adopt measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers in all the areas covered by the EU Staff Regulations. On this subject, the EU General Court stated that the Appointing Authority is not obliged to adopt such measures, this is optional and does not give a right to the officials and agents concerned (T-137/03). Moreover, the adoption of those measures is subject to conditions. For example, in the field of recruitment, the EU General Court ruled that the Appointing Authority can only give preference to applications from women if they have equal qualifications with male candidates (T-181/01).



Our team

European Union law Thierry Bontinck, Anaïs Guillerme and Marie Forgeois (avocats), Lauren Burguin (élève-avocat).
Belgian law Kévin Munungu, Yaël Spiegl, Sarah Honincks, Olivier Bertin (avocats).

This newsletter is published in collaboration with [Renouveau&Démocratie](#).

The Offici@l