



The Offici@l

LEGAL NEWSLETTER ON EUROPEAN CIVIL SERVICE LAW

DALDEWOLF

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Edito

Dear readers,

We propose this month to focus on your rights during the annual evaluation process, especially regarding the dialogue with your reporting officer. Furthermore, the General Court recently ruled on the discretion of the Appointing Authority regarding the proceedings for a declaration of invalidity.

Regarding Belgian law, we continue the study of the reform of residential lease in Belgium.

We wish you a very pleasant reading.

The DALDEWOLF team

Case law

The discretion of the Appointing Authority regarding the proceedings for a declaration of invalidity [read...](#)

Focus...

Annual evaluation of officials: What's new? [read...](#)

Day to Day in Belgium

Reform of residential lease: follow up [read...](#)

Case law

The discretion of the Appointing Authority regarding the proceedings for a declaration of invalidity

By its judgment of 23 April 2018, the General Court dismissed the action brought by an official of the European Union Intellectual Property Office (EUIPO) against the decision of this agency refusing to recognise the applicant's permanent total disability and to declare that he is to be retired. The contested decision was based on the lack of any statement of reasons contained in the opinion of the Invalidation Committee. Concurrently, expressing doubts as to the regularity of the proceedings for a declaration of invalidity, the EUIPO asked the Invalidation Committee to clarify its initial opinion and requested the opening of an investigation at the European Anti-Fraud Office (OLAF). The complaint lodged by the applicant against the above-mentioned decision was rejected by the EUIPO, which led the applicant to bring an action before the General Court.

This judgment focuses mainly on the discretion of the EUIPO, acting in its capacity as Appointing Authority, as to the consequences to be drawn from the invalidation Committee's decision. In fact, the applicant disputed that the EUIPO had any discretion in the proceedings for a declaration of invalidity. Consequently, the applicant submitted that the EUIPO could only have endorsed the opinion of the Commission and declared that the applicant was to be retired.

Therefore, the General Court reflected upon the consequences that the Appointing Authority must draw from the opinion of the Invalidation Committee, particularly as these consequences cannot be found in the Staff Regulations.

The General Court first clarifies that the applicant cannot infer from previous case-law (Commission / Q, T-80/09 P) that the recognition of a permanent invalidity by the Committee automatically entails his retirement. These two elements must indeed be assessed independently. To hold otherwise would amount to an incorrect reading of articles 53 and 78 of the Staff Regulations.

The judges subsequently define the respective roles of the Invalidation Committee and the Appointing Authority. Where the former is solely competent to make medical assessments with respect to staff members, the latter can draw all the legal inferences necessary for its decision-making, albeit refraining from calling into question the said assessments. The Appointing Authority is therefore not required to adopt the findings of the Committee as they stand. Its discretion is, however, subject to review by the Court.

In this regard, the General Court recalls the scope of its judicial review, which is confined to questions regarding the proper constitution and functioning of the Invalidation Committee, as well as the regularity of its issued opinions, whilst leaving medical appraisals behind. As part of such review, the General Court has jurisdiction to determine, inter alia, whether the opinion contains a proper statement of reasons.

Lastly, the General Court attempts to strike a balance between the prerogatives of the Appointing Authority and the rights of the official. Thus, the Appointing Authority does have discretion as to the action to be taken on the opinion of the Invalidation Committee. However, it cannot amount to a purely discretionary power justifying the indefinite and unreasoned refusal to adopt a decision on the grounds of that opinion. In this case, however, in view of the request to the Invalidation Committee to continue its work and the opening of an investigation at the OLAF, the General Court dismissed the action, finding that the Appointing Authority did not in any way exceed its discretion.

Annual evaluation of officials: What's new?

Article 43 of the Staff Regulations provides for the establishment of the annual evaluation report for the purposes of assessing the ability, efficiency and conduct in the service of each official. In view of the relevance of this report in terms of advancement to a higher step and promotion, it is necessary to briefly discuss recent developments with respect to the annual appraisal of officials, both in terms of the dialogue such appraisal implies and with regard to the judicial review relating thereto.

Recent case law sheds some light on the appraisal interview, which precedes the adoption of the final report and constitutes the key to the evaluation system (judgment of 13 December 2017, *CJ / ECDC*, T-602/16, pt.76). This interview entails a dialogue – and therefore direct contact – between the staff member under appraisal and the reporting officer.

The General Court has been able to sketch an outline of such dialogue. Thus, according to the case-law, a dialogue must not only exist; it must also be a quality dialogue (judgment of 18 September 2015, *Wahlström / Frontex*, T-653/13 P, pts. 25-28 and 34). With respect to its existence, the General Court stated that the lack of dialogue in the course of the evaluation procedure is likely to constitute a substantial irregularity.

Regarding the quality requirement, the General Court assessed that in the event the draft evaluation report is challenged by the person under appraisal, the reporting officer cannot be criticised for failing to deepen the dialogue beyond an e-mail exchange where it turns out that the official did not intend to benefit from the interview to clarify his or her complaints. For the judges, this behaviour is akin to disinterestedness.

Lastly, it is necessary to point out that aforementioned dialogue cannot be likened to the discussion between the Authority empowered to conclude contracts of employment and an agent, prior to a decision to terminate or not to renew his or her contract. In the latter case, the discussion is based on an "assessment of overall performance over the periods of activity completed by that agent" (see judgment of 19 July 2016, *Meyrl v Parliament*, F-147/15, pt. 29) and not on the ability, efficiency and conduct of the official throughout the year covered by the assessment. For example, in the event of non-renewal of a contract due to complicated relations with an agent, it is not enough that these difficulties be addressed during the appraisal interview. They must also be discussed with the agent during the discussion prior to a decision not to renew the contract.

In its recent case law, the General Court also recalls its rather limited scope of judicial review in light of the appraisal report. This is the corollary of the appraiser's extensive discretionary powers when assessing EU officials or agents. Judicial review must therefore be confined to ensuring that the procedure is conducted in a regular manner, as well as ensuring the absence of an error of fact, a manifest error of assessment or a misuse of powers (see, in particular, judgment of 28 June 2016, *FV v Council*, F-40/15, paragraphs 66, 67 and judgment of 18 July 2016, *Winkel / EUIPO*, F-48/15, pt. 35).

Reform of residential lease : follow-up

As mentioned in the February edition of *The Official*, the Brussels ordinance of 27 July 2017 "on the regionalization of the residential lease" (hereinafter the «Ordinance»), which entered into force on 1 January 2018, sets forth general provisions applicable to all kind of residential lease agreements (main or secondary residence of the lessee, student lease, colocation, «intergenerational» lease, etc.).

With a twofold aim of improving transparency and combating discrimination in the area of access to housing, the Brussels legislator placed particular importance on the pre-contractual phase and on the pieces of information that must be included in the contract.

From now on, the lessor (or his representative) can only collect from the candidate-lessee (i) his/her name and surname(s), (ii) his/her contact details, (iii) a proof of identity, (iv) the number of persons composing his/her household, and (v) the amount of his/her financial resources or an estimate thereof.

On the other hand, neither the origin nor the nature of the resources can be requested. At the latest upon conclusion of the lease, the lessor must provide the lessee with minimum information such as a detailed description of the housing, the rent, the (in)existence of individual meters for water, gas and electricity, the enumeration and an estimation of the charges, the actual or flat-rate character thereof and the energy performance certificate. We will further examine in the next issue of *The Official* the main innovations brought by these general provisions.



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