



The Offici@l

LEGAL NEWSLETTER ON EUROPEAN CIVIL SERVICE LAW

Dal & Veldekens

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Edito

Through this new edition of “The Offici@l”, we would like to focus on the recent EU Civil Service Tribunal’s case law regarding the calculation of the official’s length of service within the annual promotion exercise. We are also concluding our study on the consumers’ rights regarding distance and off-premises’ contracts.

We wish you a pleasant reading,

Dal&Veldekens’ team

Focus

Official on secondment

Pursuant to Articles 37, 38 and 39 of the Staff Regulations, an established official shall, in the interest of the service or at his own request, serve temporarily in a post outside his institution.

When seconded in the interest of the service, the official shall retain his post, his right to advancement to a higher step and his eligibility for promotion and remain subject to all his obligations as an official of his parent institution. Moreover, he shall be entitled to reimbursement of all additional expenses entailed by his secondment. It is important to point out that a possible removal of the expatriation allowance or the application of the new country of assignment’s correction coefficient is not considered as additional expenses (*Case Gouvras/Commission, July 15th 2004, T-180/02*).

The guarantees granted to the official seconded at his own request are less extensive. He retains his right to advancement to a higher step.

Any official in active employment or on leave on personal grounds may apply for, or be offered, secondment in the interests of the service. Once the official is seconded, the leave on personal grounds shall be terminated. The secondment is decided after hearing the official concerned. At the end of every six months, the official may request the termination of his secondment.

However, the appointing authority may, in the interest of the service, terminate unilaterally the secondment before expiration of the period initially fixed. Moreover, the termination of secondment may be requested before the authority which granted it. In that case, the Appointing Authority has a discretion power on such a request (*Case Reynolds/Parlement, January 23, 2002, T-237/00*). However, every early termination of the secondment has to comply with the rights of the defense and cannot be pronounced without prior hearing of the official concerned (*Case Reynolds/Parlement*).

When his secondment in the interest of the service ends, an official shall at once be reinstated in the post formerly occupied by him. On the contrary, if the official has been seconded at his own request and does not request the termination of the secondment within six months, another person can be appointed to his post. Once the secondment ends, the official must be reinstated in the first post corresponding to his grade which falls vacant in his function group provided that he satisfies the requirements for that post. If he declines the post offered to him he shall retain his right to reinstatement when the next vacancy corresponding to his grade occurs in his function group, subject to the same proviso. If he declines a second time, he may be required to resign.

Day to day in Belgium

The Right of Withdrawal in the Economic Law Code (3/3)

3. The Right of Withdrawal

With regard to contracts which are being subject of the present study, the right of withdrawal may be exercised by a consumer without giving any reasons to his decision to withdraw.

A valid exercise of the right of withdrawal by a consumer requires from any trader or professional to reimburse all the payments received from the consumer, including, if applicable, the costs of delivery, no later than 14 days from the day on which he is informed of the consumer’s decision to withdraw from the contract. The consumer has a period of 14 days to withdraw from a contract (as far as contracts for services are concerned). The consumer is entitled to be informed about the time limit and conditions for the exercise of the right of withdrawal, as well as about the model withdrawal form set out in Annex II of book XIV ELC.

If a trader (or a professional) has not provided the consumer with the above stated information, the withdrawal period expires 12 months from the end of the initial withdrawal period.

However, if the consumer has been provided with the information within 12 months, the withdrawal period expires 14 days after the day upon which the consumer receives that information. The consumer may exercise his right of withdrawal either by using the model withdrawal form as set out in Annex II of book XIV ELC, or by making any other unequivocal statement setting out his decision to withdraw from the contract.

With regard to contracts for the supply of water, gas or electricity; distance contracts concerning a financial service; and contracts between a consumer and a professional, when a consumer exercises his right of withdrawal after having requested the performance of the contract, he has a duty to pay to the trader (or professional) an amount which is in proportion to what has been provided until the time the consumer has informed the trader (or the professional) of the exercise of the right of withdrawal, in comparison with the full coverage of the contract.

In some circumstances, the consumer cannot exercise his right to withdraw from the contract.

With regard to traders (book VI ELC), the consumer cannot exercise his right of withdrawal, essentially, as regards the following:

- service contracts after the service has been fully performed if the performance has begun with the consumer’s prior express consent, and with the acknowledgement that he will lose his right of withdrawal once the contract has been fully performed by the trader;
- the supply of goods or services for which the price is dependent on fluctuations in the financial market which cannot be controlled by the trader and which may occur within the withdrawal period;
- the supply of goods made to the consumer’s specifications or clearly personalised;
- etc.

As to professionals (book XIV ELC), the consumer loses his right of withdrawal after the service has been fully performed if the performance has begun with the consumer’s prior express consent, and with the acknowledgement that he will lose his right of withdrawal once the contract has been fully performed by the professional.

Case law

Annual promotion exercise: seniority of service

On April 29th 2015, the EU Civil Service Tribunal rejected the action for annulment of the applicant held against a decision of the Council of the European Union refusing to include him on list of officials eligible for promotion in the 2011 promotion exercise (Case. F-78/12).

In 2006, the applicant was recruited by the Council as a temporary agent AD 5. His contract was to end on December 31st, 2010. In the meantime, he succeeded the EPSO exams and was appointed administrator of AD 5 grade by a decision of November 23, 2010. Moreover, his seniority in the step acquired as temporary agent was retained.

In September 2011, the Appointing Authority (AA) published the list of officials eligible in the 2011 promotion exercise, but the name of the applicant was lacking. The applicant brought a claim against this decision, which was rejected on the ground that the applicant had not completed a minimum of two years in his grade since he was appointed as official and, as a result, the requirement of seniority laid down under Article 45 of the Staff Regulations was not satisfied. Therefore the applicant seized the Civil Service Tribunal in order to obtain both annulment of the AA’s decision and damages for material and moral harm caused by it.

The Civil Service Tribunal considers that Article 45 of the Staff Regulations which states that “*the promotion shall be exclusively be selection from among officials who have completed a minimum of two years in their grade*” is to be construed as allowing the AA to take into consideration only the seniority achieved in the official post. Therefore, when a temporary agent is appointed permanent as official there is no legal continuity between his professional experience as a member of temporary staff and the one related to his new post. To strengthen this thesis, the Tribunal notes that Article 34 of the Staff Regulations requires officials to serve a nine month probationary period before they can be established. However, no distinction is made between agents who became officials after having worked as temporary agents and the others. Moreover, if the work accomplished as temporary agent had to be taken into consideration while determining one’s seniority, it would have been written down explicitly in the Staff Regulations, as it is the case for Article 32.

As to the question of whether Article 45 is in compliance with the principle of non-discrimination laid down under Article 4 of the framework agreement on fixed-term work (appended to the directive 1999/70/CE), the Tribunal recalls that potential differences concerning the treatment of permanent officials and agents do not fall under the principle of non-discrimination because such differences are not based on whether the work is a fixed-term one or not, but on whether the work relation is statutory or a contractual.

In brief...

Challenging the appraisal report and prior complaint

Pursuing to Article 91.2 of the Staff Regulations, the Civil Service Tribunal has jurisdiction in any dispute between an EU official and his Appointing Authority (AA) regarding the legality of an act affecting the person adversely, provided that the AA has previously had a complaint submitted to it pursuant to Article 90.2 within the period prescribed and that the complaint has been rejected by express decision or implied decision.

However, this preliminary review procedure is not necessary in some cases. Indeed, according to the EU Court of Justice’s case law, lodging of a formal complaint is not a necessary preliminary to bringing an application before the EU Civil Service Tribunal against a staff report on which the AA has no discretion and cannot therefore annul or amend it. In this case, the official can lodge a preliminary complaint before the AA or directly filed an application before the EU Civil Service Tribunal.

Our team

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