DALDEWOLF

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contact : theofficial@daldewolf.com — www.daldewolf.com

EDITO

Dear readers,

In this new issue, we would like to take a look at the personal file and what it may or may not contain.

In terms of case law, the General Court recently recalled the principles that apply to the duration of disciplinary proceedings.

In our "Daily life in Belgium" section, we will discuss the new obligation of companies to offer consumers the possibility of making their payments electronically.

the OFFICI@L is also a means of communication between our team and its readers. So if you would like us to address certain issues in this newsletter, please do not hesitate to send us your questions or suggestions (*theofficial@daldewolf.com*).

We wish you a pleasant reading!

The DALDEWOLF team

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THE ROLE OF THE PERSONAL FILE IN PROTECTING AND INFORMING THE OFFICIAL OR OTHER SERVANT

The Staff Regulations provide for a set of guarantees aimed at protecting EU officials and other servants by ensuring that decisions taken by the Administration, which affect their administrative situation are not based on facts of which they are unaware or about which they have not been heard. The personal file is part of this set of guarantees.

Thus, article 26 of the Staff Regulations (applicable to temporary staff by virtue of article 11 of the CEOS) provides that an official's personal file is confidential and contains all documents relating to his administrative situation and all reports concerning his ability, efficiency and conduct and any comments he may have made on those documents (article 26(1) of the Staff Regulations). In addition, every official has a right of direct access to the documents drawn up, if these are used for the assessment or modification of his administrative situation by the institution to which he belongs.

Documents relevant to the administrative situation of the official include formal documents with an "official connotation" (according to the formula used in the case law - judgment of 15 April 2015, Pipiliagkas / Commission, F-96/13) such as a decision on establishment, staff reports, promotion decisions and "all documents likely to affect the administrative situation of the official and his career" (Ojiha / Commission, T-77/99), including documents recording facts or factual elements concerning the conduct of the official, which will subsequently be used for the adoption of a decision affecting his administrative situation and his career. Therefore, in the case of a decision to reassign an official for example, notwithstanding the fact that the documents do not constitute reports concerning the ability, efficiency or conduct of the official concerned - within the meaning of article 26 of the Staff Regulations -, e-mails or a note signed by officials and other servants denouncing the attitude of the official in question, these documents must be placed on file if they are likely to have a decisive influence on the decision to reassign him or not (judgment of 15 April 2015, Pipiliagkas / Commission, F-96/13).

However, injunctions addressed to an official by his hierarchical superior (judgment of 6 May 2005, Schmit / Commission, T-144/03) or legal opinions requested by an institution in connection with the particular situation of an official (judgment of 5 October 2009, De Brito Sequeira Carvalho / Commission, T-40/07) are not in principle included in the personal file. Similarly, no mention of an official's political, trade union, philosophical or religious activities and opinions, racial or ethnic origin or sexual orientation may be included in the file.

In principle, no document may be used against an official or other servant unless it has been communicated to him or her prior to filing in the personal file. Consequently, documents which should be in the file, but which have not been placed in it cannot be used against him.

Moreover, it has been held that article 26 of the Staff Regulations does not prevent an institution from opening an administrative enquiry or disciplinary procedure and from constituting a separate file for that purpose (a "disciplinary file"). In this case, the only documents relating to this procedure which must be attached to the official's personal file are any decisions to impose a penalty taken at the end of the investigation and disciplinary procedure (judgment of 9 September 2015, De Loecker / EEAS, F-28/14). On the other hand, a decision to impose a penalty, even if it has previously been placed in the personal file of an official, cannot be invoked against him when there is no longer any mention of that decision in the file (judgment of 6 October 2021, IP v Commission, T-121/20). If the disciplinary penalty has been removed from the personal file (as permitted by article 27 of annex IX to the Staff Regulations), an institution can therefore no longer rely on it, even on the grounds of recidivism.

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In addition, an official who has an irregular or incomplete file (*e.g.* in the case of missing staff reports) may suffer a moral damage because of the uncertainty and anxiety in which he or she finds himself or herself as regards his or her professional future (judgment of 8 November 1990, Barbi / Commission, T-73/89). This damage may give rise to a right to compensation (judgment of 6 February 1986, Castille / Commission, 173/82).

CASE-LAW

DISCIPLINARY PROCEEDINGS AND REASONABLE TIME

The obligation to observe a reasonable time in the conduct of administrative proceedings is a general principle of Union law and is included as a component of the right to good administration (article 41(1) of the Charter of Fundamental Rights of the EU).

In a judgment delivered on 7 September 2022 (case T-91/20 WT / Commission) concerning an action for annulment of a disciplinary penalty, the General Court recalled the conditions relating to this principle. In this case, the applicant had been reprimanded for infringement of articles 12 and 21 of the Staff Regulations.

The General Court recalls first of all that the disciplinary authorities are under an obligation to conduct the procedure with diligence and to act in such a way that each act takes place within a reasonable period of time in relation to the previous act. The duration of a disciplinary procedure is not only that which starts from the decision to open the procedure. The fact that a greater or lesser period of time has elapsed between the occurrence of the alleged disciplinary offence and the decision to open the disciplinary procedure is taken into account, but the reasonableness of the duration is also assessed in the light of the specific circumstances of each case, the importance of the dispute for the person concerned, the complexity of the case and the conduct of the applicant and the competent authorities.

The General Court further states that none of these particular factors is decisive. The examination is of each of them and then of their cumulative effect and the procedural steps must be applied in accordance with the principle of good administration. Where it is found that the "reasonable time" has been exceeded, it is for the Appointing Authority to establish that there are special circumstances to justify this.

In this case, the procedure had lasted almost six years from the opening of the procedure until the adoption of the contested decision. The General Court reviewed all the steps taken (hearings and observations submitted by the applicant) in the course of the investigation. It noted that following the judgment in another case on February 2017 (Kerstens / Commission, T 270/16 P) the legality of a decision imposing a penalty without the disciplinary procedure having been preceded by an administrative investigation could be questioned. Therefore, in the case of WT, the Appointing Authority decided to close the ongoing procedure and to open a new one, in order to comply with this principle. This certainly contributed to prolonging the disciplinary procedure, but the Court emphasises that such an opening was decided in the interests of sound administration and, more particularly, to further ensure respect for the applicant's rights of defence.

The Court concludes that, in those circumstances, the procedure was conducted overall within a period which is not unreasonable. It also states that the penalty relates to misconduct which continued over time, after the proceedings had been initiated.

Finally, the judgment recalls that a breach of the principle of sound administration does not, as a general rule, justify the annulment of the decision, unless it has an impact on the rights of the defence and affects the content of the decision or the validity of the procedure itself. In the present case, the applicant's argument that the facts occurred "in the distant past" and that it is difficult for her or her witnesses to remember them does not constitute a specific circumstance indicating a breach of the rights of the defence.

THE OBLIGATION TO PROVIDE ELECTRONIC MEANS OF PAYMENT

Under the new provisions introduced into the Code of Economic Law in July 2022, businesses must offer consumers the possibility of paying electronically.

Since 1 July 2022, under article VI.7/4 of the Code of Economic Law, all businesses dealing with consumers are required to provide consumers with electronic means of payment (*i.e.* fixed or portable payment terminals, contactless payment via smartphone or connected watch, bank transfer, etc.).

This provision applies to all businesses as defined in article I.1., 1° of the Code of Economic Law (self-employed, legal person, etc.) and includes, in particular, liberal professions (doctors, lawyers, notaries as well as administrations or associations which carry out economic activities in relation to consumers).

Businesses are free to choose the electronic payment method to be used (in particular according to the specific characteristics of their customers). Payments by meal vouchers or écochèques are not considered as electronic means of payment even if they are made by card.

Consumers can still pay for their purchases in cash.

Businesses are not allowed to charge their customers additional costs if they pay electronically, nor are they allowed to refuse electronic payments of any amount.

They may, however, offer different electronic payment methods depending on the amount to be paid, provided that they inform their customers of this in a visible way (*e.g.* by posters).

OUR TEAM

DALDEWOLF:
- European law and human rights
  Thierry BONTINCK,
  Anaïs GUILLERME,
  Thaïs PAYAN,
  Marianne BRÉSART,
  Lauren BURGUIN &
  Wadii MIFTAH
- Belgian law
  Dominique BOGAERT

In partnership with the law firm PERSPECTIVES:
- Family law
  Candice FASTREZ