The Offici@l

LEGAL NEWSLETTER ON EUROPEAN CIVIL SERVICE LAW

DALDEWOLF

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RENOUVEAU DEMOCRATIE CONSEIL

Edito

Dear readers,

On May 24, DALDEWOLF organised its second edition of *The Official's* Day dedicated to the latest legal developments in the field of EU civil service law. Six presentations and numerous exchanges made this year's edition a success.

Three topics have been addressed: the officials and agents' right to be heard during administrative procedures, data protection EU officials and agents' data protection, as well as the invalidity procedure, notably focusing on the issue of burn-out.

We look forward to seeing you again next year for our third edition. The date and practical details will follow. We would be very happy to receive some insightful suggestions for the topics you would then like to see addressed. In the meantime, we will reflect on the various presentations in these columns and will focus in this issue on the invalidity procedure.

We wish you a very pleasant reading and will be back in September. Happy holidays.

Focus

Invalidity: important, complex and often mismanaged proceedings

Three requirements must be fulfilled for the recognition of invalidity: the agent or official must be aged less than 66 years, they must be in a position to claim pension rights and they must be recognised by the Invalidity Committee as suffering from total permanent invalidity preventing them from performing their duties.

The critical choice of the second doctor

The Invalidity Committee consists of three doctors. The first is appointed by the institution the official concerned belongs to, whilst the second is designated by the official concerned. The third is appointed by agreement between the first two doctors. The choice of a doctor by the official or agent is critical. This doctor must maintain a high standard of independence and be able to withstand possible pressure regarding the choice of the third doctor. The relationship of trust between a doctor and his patient is particularly important in this type of procedure.

The Invalidity Committee may be referred to either by the official or the agent who considers himself in the abovementioned situation or by the Appointing Authority if the accumulated leave of the official concerned exceeds 12 months in the last three years.

Invalidity and occupational origin

Once seized, the mandate of the Invalidity Committee is threefold. It must acknowledge the incapacity for work and therefore the invalidity. This is so if the person examined has an incapacity for work of at least 2/3 with regard to a post in his career bracket (i). The Invalidity Committee must, where appropriate, and if this is requested either by the official concerned or by the Appointing Authority, decide on the issue of the origin of the invalidity. If it is recognised that the origin of the invalidity is occupational, the invalidity allowance shall not be less than 120% of the minimum subsistence figure (ii). Lastly, the Invalidity Committee will determine the need and the frequency of the medical examination. If the invalidity is considered as permanent at the time of diagnosis, it is not necessarily irreversible. Indeed, insofar as these conditions are no longer fulfilled, the agent or official must resume his duties (iii).

In the event the invalidity is recognised, the invalidity allowance shall be equal to 70 % of the official's last basic salary. However, said allowance may not be less than the minimum subsistence figure.

Opinion of the Committee. Decision of the Appointing Authority

The opinion of the Invalidity Committee shall be forwarded to the Appointing Authority. The latter shall render its decision on the basis of the former opinion. The issue of the mandatory nature of the opinion is controversial. On the other hand, there is no doubt that the Invalidity Committee is required to decide on the issue of invalidity and, if so requested, on the issue of the origin of the invalidity. The Appointing Authority cannot be advised of any medical information and can no longer comment on such information.

For more information: Invalidity Committee Procedure Manual (College of Chief Executives, September 10, 2008).

Case law

Contract termination and right to be heard: outline of the exception

By its judgement of 17 May 2018, the General Court annulled the decision of the Authority Empowered to Conclude Contracts of Employment ("the AECE"), regarding the termination of the applicant's contract as a member of the temporary staff. The latter had been hired to serve for the 'Greens/European Free Alliance' political group of the European Parliament on matters regarding internet policies and intellectual property rights. The applicant lodged a complaint against the decision to terminate his contract. Said decision was justified by the reorganisation of the Group's Secretariat as a result of the Parliamentary elections in May 2014. The rejection of the applicant's complaint led him to bring an action before the General Court.

The Court focuses solely on the plea alleging infringement of the right to be heard and outlines the exception to the possibility to rely on the said plea.

It first notes that the principle of the right to be heard, which stems from the fundamental principle of the rights of the defense, applies in cases concerning the civil service. Indeed, this principle is acknowledged in article 41(2)(a) of the Charter of Fundamental Rights, which has been found to be of general application.

The General Court however recalls of the existence of an exception to the possibility to rely on the plea alleging infringement of the right to be heard. It follows from the case-law that such plea cannot be relied upon effectively to challenge a decision ending the secondment of an official to a Parliamentary political group, owing to the particular nature of the tasks exercised (see the decision of the Court of 29 April 2004, C-111/02 P - *Parliament / Reynolds*, pts. 51 to 60). In addition, the judges otherwise add that the said exception can be applied each time the decision to terminate the contract rests on the ground of a loss of trust (see the judgment of 11 September 2013, *L / Parliament*, T-317/10 P, pt. 81 and case-law cited). This exception could however not be applied by the judges to the case at hand, as it did not rest on the ground of a loss of trust, but was motivated by a reorganisation of the Group's Secretariat.

Therefore, and as a consequence, the applicant should have been given the opportunity to put forward effectively his view before the decision to terminate his contract was taken. Although the applicant was invited to attend a meeting with the AECE to discuss the consequences of the restructuring of the organigram of the Group, the judges consider that the abovementionned opportunity has not been observed in casu. To say otherwise would render meaningless the right to be heard (see notably the judgement of 8 October 2015, F-106/13 and F-25/14, DD / FRA, pt. 67).

This is so firstly, and from a procedural point of view, because the possibility of the applicant's dismissal could not be inferred either from the generic wording of the invitation to the meeting, or from the draft of the new organigram, which did not change the number of persons attached to the department. The General Court further argues that the applicant was not given enough time (one working day) to prepare his views effectively.

Additionally, and from a substantive point of view, the General Court stresses that it cannot be inferred from the minutes of the meeting that the main reason for the applicant's dismissal - i.e. the fact that his profile became unsuitable to the requirements of the department - was raised in the course of the meeting. Therefore, the applicant could not effectively put forward his view on that aspect.

Moreover, the judges indicate that although the reorganisation could not as such be equated with an individual measure directly affecting the applicant, it does however affect him indirectly and undeniably, in such a way that he should have been given the opportunity to put forward effectively his view regarding that matter.

Lastly, the General court recalls that the plea alleging infringement of the right to be heard could only be relied on where it can be proven that the irregularity was decisive for the outcome of the procedure. This could not have been excluded in the case at hand as the applicant could have relied on his professional experience to offset the lack of required qualifications.

In light of all the above circumstances, the General Court upheld the plea alleging infringement of the right to be heard and consequently annulled the contested decision.

Day to Day in Belgium

Special residence permit and duration of legal residence required to acquire Belgian nationality

Recent case law has considered the issue of taking into account a special residence permit to determine the duration of legal residence required to acquire Belgian nationality.

In its judgment of March 29, 2018 the Brussels Court of Appeal interpreted the notion of «legal residence» within the meaning of Article 7bis(2), paragraph 1, 2° of the Belgian Nationality Code (« BNC »).

The public prosecutor considered that the special residence permit enjoyed by the applicant cannot be taken into account when determining the duration of legal residence and based its argument on the second paragraph of Article 7bis(2). This provision must indeed be read in conjunction with Article 4 of the Royal Decree of 14 January 2013, which does not include the special residence permit within the list of documents to be taken into account as evidence of legal residence.

Although the Court of Appeal acknowledges the restrictive nature of the list contained in Article 4, it nevertheless welcomes the reasoning of the Family Court according to which this same provision is discriminatory. Said provision creates an unjustified differential treatment between European citizens legally residing in Belgium who dispose of a residence permit included in the abovementionned list, and those whose permit is not mentioned in that same list.

Accordingly, the Court of Appeal dismissed Article 4 in application of article 159 of the Belgian Constitution.

A judgment in the same direction which is currently under appeal was delivered by the Family Court on the 8th of May 2018. The same question was asked to the Court, and its ruling follows very similar lines of argument. The Court notably examines the evidence of economic participation, one of the conditions required in Article 12bis(1) 2 °, under e) of the BNC for the purpose of acquiring Belgian nationality. Having demonstrated his social integration by means of a certificate proving that he has worked uninterruptedly during the period of 5 years preceding his declaration of nationality, the applicant is presumed to have completed the legally required 468 days in the course of those five years within the meaning of that provision. This presumption applies both to the employed and self-employed by virtue of a circular of 8 March 2013. The Court otherwise extends the said presumption to (European) officials.

Our team

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