The Offici@l

LEGAL NEWSLETTER ON EUROPEAN CIVIL SERVICE LAW

DALDEWOLF

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RENOUVEAU DEMOCRATIE CONSEIL

Edito

The recent and much awaited rulings of the EU General Court regarding the transfer of pensions rights' issue is the occasion to publish a special issue of "The Offici@l" and to propose a detailed commentary of these judgments.

Regarding private life, the national legislation applicable in Belgium to room renting on Airbnb is studied.

We wish you a pleasant reading,

The DALDEWOLF team

Day to Day in Belgium

Renting out your apartment on Airbnb: the applicable rules until January 2016

If you wish to rent out your place on Airbnb and you have four bedrooms minimum or your place can have 10 people minimum at the same time, in that case you only need a fire certificate.

A prior authorisation or notification procedure is only required if the host wishes to use the expression: "hotel", "guest house", "bed & breakfast", etc.

In conclusion, you can now freely rent out your room on Airbnb in Brussels. The tenant who wishes to rent out his/her place on Airbnb has to be aware that this amounts to a sub-tenancy which implies the prior authorisation of the lessor if the sub-tenancy is not expressly allowed in the main lease agreement. In Wallonia, the current system is close to the one currently in force in Brussels.

In Flanders, legislation on private homes is similar to the scheme designed by the Brussels Ordonnance: every tourist accommodation must fulfill opening and operating requirements. A prior notification and/or authorisation before the institution "Toerisme Vlaanderen" is required. The following categories: "guest house" and "holiday accommodation" are exempted from this prior authorisation when the accommodation has maximum two bedrooms and can have 8 guests maximum at the same time. In this case, a notification to "Toerisme Vlaanderen" is sufficient. On 13th July 2015, a Decree proposal was lodged at the Flemish Parliament which aims at simplifying the administrative formalities. The current system could therefore be replaced by an optional authorisation regime linked to *a posteriori* controls of the fulfilment of the operating requirements.

(Next month: Renting out your apartment on Airbnb: what's going to change in Brussels?)

Focus - Case law

The EU General Court rules on the transfer of pension rights' issue

In three judgements rendered on the 13th of October 2015 following appeals introduced against the rulings of the EU Civil Service Tribunal, the General Court interpreted article 11 §2 of annex VIII of the Staff Regulations on the transfer of pension rights from a Member State's scheme to the EU's scheme, as well as the general implementing provisions adopted by the decision C(2011) 1278 of the Commission on the 3rd of march 2011 ("2011 GIP"). The 2011 GIP, replacing the 2004 GIP, came into force on the 1st of April 2011 and are applicable retroactively to all applications for a transfer to the EU pension scheme introduced from the 1st of January 2009, date of the coming into force of regulation no 1324/2008 of the Council which modified the rate of contribution to the EU pension scheme. Following this regulation and the 2011 GIP, the number of years of pensionable service taken into account in the EU pension scheme is reduced due to the modification of the conversion coefficients.

Between the 1st of January 2009 and the 1st of April 2011, a significant number of officials and other staff members applied for a transfer of pensions rights acquired under a national scheme before entering the service of an EU Institution. The Institutions sent them a first proposal concerning additional pensionable years which a certain number of officials agreed to before receiving a second proposal, after the 1st of April, cancelling and replacing the first one. The conversion coefficient applicable in the 1st proposal, in accordance with the 2004 GIP, was more favorable than the one applied in the 2nd proposal, in accordance with the 2011 GIP. As a consequence, the numbers of pensionable years to be taken into account under the EU pension scheme and the surplus capital sum to be reimbursed to the officials were reduced. On the 11th of December 2013, the EU Civil Service Tribunal judged that the provisions of article 9 of the 2011 GIP, providing for the application of new conversion coefficients to officials who had agreed to a proposal concerning additional pensionable years prior to the coming into force of the 2011 GIP, were unlawful.

Hearing these cases on appeal, the General Court had to examine two remaining issues. Firstly, the issue of the possibility to challenge a proposal concerning additional pensionable years made by an Institution to its official. Secondly, if the General Court found that such a proposal could be not challenged, the issue of the lawfulness of the final credit decision after the reception of the transferred capital by the Institution according to the 2011 GIP, while the application had been introduced before their coming into force, in regards with the respect of acquired rights, of the reasonable time limit, of legal certainty, of legitimate expectations, as well as the principles of equal treatment and non-discrimination.

Firstly, the General Court examines the binding legal effects, flowing from the proposal concerning additional pensionable years, which affected the legal situation of the official. The General Court notes that it follows neither from article 11 §2 of annex VIII of the Staff Regulations nor from any other provision or principle, that the Institution, before which an official has introduced a transfer application, is bound by an obligation to submit to this official a proposal indicating additional pensionable years which he could potentially benefited from once the transfer has occurred. In practice, this "proposal" consists in an information as precise as possible on the extent of pension rights an official could benefit from if a transfer occurred. It aims at enabling an official to decide, in full knowledge, whether or not to proceed with the transfer. Therefore, the General Court considers that such a proposal does not produce any binding legal effect and that there is no new obligation binding the Institution flowing from it. As a consequence, such a proposal does not adversely affect the official.

Next, the General Court considers that interpreting a proposal concerning additional pensionable years as capable of adversely affecting an official, in that it would create an acquired right to benefit from the number of additional pensionable years indicated in the proposal if he agrees to the transfer, is contrary to article 11 §2 of annex VIII of the Staff Regulations. Indeed, the actual determination of the number of additional pensionable years can only occur once the transfer has taken place 'on the basis of the capital transferred'. No additional pensionable years can be attributed to the person concerned if it does not correspond to the capital effectively transferred to the EU pension scheme. Therefore, on the one hand, a proposal concerning additional pensionable years is not an act capable of being the subject of an action for annulment and, on the other hand, the applicability of the 2011 GIP to an application for a transfer introduced before the adoption of these 2011 GIP, but where the transfer occurs after their coming into force, is compatible with article 11§2 of annex VIII of the Staff Regulations and does not infringe the acquired right of the person concerned.

Secondly, the General Court considers that the fact the decision to be adopted once the capital has been transferred is the only act which can adversely affect an official, is sufficient to ensure effective judicial protection to officials. Indeed, according to the General Court, the official has to accept the fact that he can neither know with full certainty the future evolution of the EU pension scheme, nor the future evolution of the national pension scheme to which he was previously affiliated. An official's agreement to the proposal made by an Institution means that he agrees to the continuation of the procedure, not to the content of such proposal.

Thirdly, regarding the allegation of infringement of the reasonable time limit principle, the General Court notes that even if there is a delay in the treatment of an official's application leading to an infringement by the Institution of this principle, such infringement does not justify the application of the 2004 GIP instead of the 2011 GIP.

Fourthly, regarding the allegation of infringement of the legal certainty principle, the General Court recalls that individuals cannot invoke the principle of the protection of legitimate expectations to reject the application of a new regulatory provision, particularly in this field where the legislator enjoys a wide discretion.

Fifthly, regarding the allegation of infringement of the principles of equal treatment and non-discrimination between officials whose pension rights have been transferred to the EU pension scheme before the coming into force of the 2011 GIP and those who introduced an application for a transfer at the same time but whose pension rights have not yet been transferred, the General Court judges that their legal situations are different. The latter group still has their pension rights in another pension scheme while for the first group, the transfer of capital, with the effect of extinguishing such rights and the corresponding admission of additional pensionable years in the EU pension scheme, already took place. In addition, such difference in treatment relies on an objective element and independent from the Institution's will, i.e. the swiftness of the national pension authorities in dealing with the application for a transfer of the person concerned.

Therefore, the General Court concludes that a proposal concerning additional pensionable years is not an act capable of being the subject of an action for annulment and that decisions adopted in accordance with the 2011 GIP, fixing the pension rights were lawful in regards with article 11 §2 of annex VIII of the Staff Regulations, with the principles of a reasonable time limit, of legal certainty and legitimate expectations, as well as with the principles of equal treatment and non-discrimination.

(Cases of 13 October 2015: T-104/14 P, *Commission européenne / Verile et Gjergji*, ECLI:EU:T:2015:776 ; T-131/14 P, *Teughels / Commission européenne*, ECLI:EU:T:2015:778 ; T-103/13 P, *Commission européenne / Cocchi et Falcione*, ECLI:EU:T:2015:777).

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