The Offici@l

LEGAL NEWSLETTER ON EUROPEAN CIVIL SERVICE LAW

DALDEWOLF

Contact theofficial@daldewolf.com - Web www.daldewolf.com - March 2019

Edito

Dear readers,

This new issue of *The Official* will be the last one under this presentation. Up from the next issue, you will discover the design of our brand new layout.

We would like to warmly thank Marc and Isabelle Coufopandelis from IBIS advertising (ibis-advertising.com) who have been taking care of the layout of our newsletter from the very beginning. The time has now come for a new layout.

In this issue, we look into the case law of the General Court on the conditions underlying the grant of an expatriation allowance. We moreover propose to focus on the notion of harassment and its conditions, as well as on some examples of conducts which do not fall under this notion.

Last but not least, under our column *Day-to-day in Belgium*, we comment on the «Brexit law», which has just been published in the *Moniteur belge*.

Excellent reading to all!

The DALDEWOLF Team

Case law

Conditions underlying the grant of an expatriation allowance

Through its decision dated 28 February 2019 (case T-216/18), the EU General Court looked into the conditions underlying the grant of an expatriation allowance provided in Article 4, § 1 of Annex VII to the EU Staff Regulations.

In the present case, the applicant was granted an expatriation allowance after taking up his duties at the Court of Auditors in Luxembourg in 2005. In 2017, following his interinstitutional transfer to the EU Parliament in Luxembourg, the Unit 'Individual Rights and Remuneration' of the European Parliament questioned the reasons underlying the grant of such allowance. Indeed, the applicant had been working under a Luxembourgian contract since 1997 before entering the Court of Auditors in 2005. He therefore did not fall under the reference period for the grant of such allowance, since he habitually carried on his main occupation within the Member State in whose territory the place where he is employed is situated (in this case, Luxembourg) for a period of five years, ending six months before he entered the service.

On the date of his transfer to the EU Parliament, the applicant was entitled a foreign residence allowance in lieu of an expatriation allowance. The applicant therefore lodged a complaint against the decision to no longer grant him an expatriation allowance. Rejection of this complaint led him to bring an action before the General Court.

In its decision, the General Court recalled two simple and objective criteria which must be met before granting an expatriation allowance. Such allowance is only granted to an official who has not pursued his main activity nor habitually resided within the Member State in whose territory the place where he is employed is situated during the entire abovementioned reference period.

In this case, the General Court can only assess that the applicant has indeed pursued his main activity in Luxembourg for the entire reference period. Consequently, he is not entitled to an expatriation allowance. The fact that the applicant habitually resided in Belgium is irrelevant, since the abovementionned requirements are non-cumulative. The same applies to the circumstance that the applicant maintained the permanent or habitual center of his interests in Belgium.

Although the criterion of the place of habitual residence is indeed essential, this is only so with regards to the nationality criterion which is laid down in Article 4, § 1 of Annex VII of the Staff Regulations. Conversely, this does not entail that the criterion of the place of main activity within the Member State in whose territory the official is employed is without relevance.

The judges further refute the applicant's contention that the refusal by the Appointing Authority to grant an expatriation allowance reduces the two negative conditions set out in the contested provision to just one. It is clearly established in the case-law that the granting of the expatriation allowance is precluded as soon as one of the two criteria listed above is not met (see, for example, judgment of the General Court of 16 May 2007, *F v Commission*, case T-324/04, pt. 54). Moreover, this does not necessarily and automatically bar the granting of that allowance to frontier workers. Indeed, the latter may still benefit from such allowance where they have carried out their main activity within the Member State in whose territory the place where he is employed is situated for only part of the length of the reference period mentioned above.

Accordingly, and in light of the clarifications set out above, the General Court dismissed the application.

Focus

The notion of "harassment"

Article 12a of the EU Staff Regulations prohibits any form of psychological or sexual harassment.

The reason behind the flourishing case-law of the Court of justice of the EU on the notion of harassment is that officials or agents might experience certain conducts as harassment and report them as such to their superiors, whereas these conducts do not reach the required threshold for the qualification of harassment. A bit of background is thus in order.

Regarding the notion of psychological harassment, it is common ground that two cumulative conditions must be fulfilled in order to qualify a conduct as psychologic harassment. Under the first objective condition, the alleged improper conduct must involve "*physical behaviour, spoken or written language, gestures or other acts that are intentional*", which must take place over a certain period of time as well as be repetitive or systematic. Under the second subjective condition, the improper conduct must have the capacity to "*undermine the personality, dignity or physical or psychological integrity of any person*" (see notably, judgment of the European Civil Service Tribunal of 18 May 2009, *Meister v OHMI*, joined cases F-138/06 and F-37/08, pts. 102, 104-108, 111-113).

Introduction of these two cumulative conditions means that a conduct which can be experienced by an official or agent as harassment, but which does not fulfill the conditions listed above, or only one of these conditions, does not fall under the notion of psychological harassment and cannot therefore be sanctioned as such.

For example, professional isolation could fall under the notion of psychological harassment. However, it is necessary therefore that the official or agent alleging isolation be able to demonstrate this in light of the two conditions listed above. In practice, this proves to be a difficult task, especially since the alleged conduct must be repetitive. Similarly, the fact that the conduct must be repetitive moreover entails that an official or agent against whom a superior becomes vocal from time to time or who is sometimes subject to bullying or «inappropriate» remarks cannot hide behind the prohibition contained in Article 12a of the Staff Regulations.

Moreover, an official or agent could not simply rely on negative comments contained in his staff report in order to allege psychological harassment. Indeed, European case-law is consistent in this respect: the comments contained in the staff report cannot found any form of psychological harassment so long as these remarks "*do not in any way cross the line into offensive or hurtful criticism of the actual person of the official in question*" (see, to that effect, judgment of the Civil Service Tribunal of 9 March 2010, *N v Parliament*, F 26/09, pt. 86).

In contrast, regarding the qualification of a conduct as sexual harassment, the finding of such conduct can be based on a single isolated act, provided it falls under the definition of sexual harassment, i.e. a "*conduct relating to sex which is unwanted by the person to whom it is directed and which has the purpose or effect of offending that person or creating an intimidating, hostile, offensive or disturbing environment*" (see recently, judgment of the EU General Court of 13 July 2018, *SQ v EIB*, case T-377/17, pts. 91-92).

Day to Day in Belgium

Belgium and Brexit

On 10 April 2019, the law on the withdrawal of the United Kingdom from the European Union (dated 3 April 2019 and more commonly called the «Brexit law») was published in the *Moniteur belge* following the European agreements of 13 December 2018.

The Brexit law includes a series of measures in preparation for the consequences of a no-deal scenario between the United Kingdom and the European Union. These measures are intended to apply within Belgian territory for a transitional period expiring on 31 December 2020. For this entire period, European law remains applicable to United Kingdom nationals.

These various measures notably include retention of residence rights for British citizens and their families in Belgium. This also entails that they may proceed with the renewal of their residence documents until the expiry of the transitional period.

In terms of employment, the Brexit law retains the rights of young British workers (under 26) under a contract of first employment until expiry of the transitional period.

The Brexit law also contains a number of social security measures. The United Kingdom, including Northern Ireland, remains a Member State of the European Union until the expiry of the transitional period. Consequently, rights of British nationals with regards to social security are guaranteed. This also applies to various branches of social security, including sickness benefits, benefits in respect of accidents at work and occupational diseases, unemployment benefits as well as pensions and survivors' pension.

A specificity has been introduced as regards taxation. The transitional period has been shortened so that the United Kingdom, including Northern Ireland, is considered a Member State of the European Union until 31st December 2019.

The Brexit law also includes additional measures in the areas of energy, finances, economics, justice, police and home affairs.

Anyhow, the Brexit law is only destined to enter into force in the event of a no-deal scenario.

Our team

The Offici@l

European Union law Thierry Bontinck, Anaïs Guillerme, Marie Forgeois and Livia Dubois (avocats).
Belgian law Kévin Mununguu, Yaël Spiegl, Olivier Bertin, Arnaud Piens, Julien Colson (avocats).

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