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LEGAL NEWSLETTER ON EUROPEAN CIVIL SERVICE LAW

DALDEWOLF

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RENOUVEAU DEMOCRATIE CONSEIL

Edito

Dear readers,

We noticed your growing interest for *The Official*, which attracts more readers each month. It is both an honour and a mark of trust on your part.

In this issue, we suggest to take a closer look at a judgment of the General Court relating to the legality of a provision establishing age-based discrimination particularly in light of the EU Charter of Fundamental Rights.

We also briefly outline several key points in the Belgian legal news regarding the reform of the civil status.

Lastly, our focus is devoted to the disciplinary proceedings.

We wish you an excellent reading!

The DALDEWOLF team

Case law

Legality of age-based discrimination in light of the EU Charter of Fundamental Rights

In its decision T-11/17 of 7 February 2019, the EU General Court looked into the legality of Article 42c of the Staff Regulations as it establishes an age-based discrimination, the latter being prohibited by Article 21, paragraph 1 of the Charter of Fundamental Rights of the European Union. The contested provision has been included by Regulation No 1023/2013 amending the Staff Regulations, so that the latter now provides for a decision of the Appointing Authority on leave in the interest of the service.

The applicant, a former civil servant with the Council of the European Union, has brought an action with the EU General Court after the Appointing Authority dismissed the complaint submitted against the decision that she be placed on leave in the interest of the service on the grounds of the contested provision.

First and foremost, the EU General Court enumerates the provisions against which the legality of Article 42c must be examined. The EU General Court thereupon emphasised the relevance of Article 21, paragraph 1 of the EU Charter, which notably contains a prohibition of age-based discrimination. Subsequently, the EU General Court has decided to take into account the provision of Directive 2000/78 establishing a general framework for equal treatment in employment and occupation. This directive can indeed serve as inspiration for the purposes of defining the EU legislator's obligations in the field of EU civil service law.

The judges then clarify that since the principle of non-discrimination constitutes a specific expression of the principle of equal treatment, it must be determined whether the contested provision establishes age-based discrimination and whether in the affirmative, this difference in treatment meets the various criteria set out in Article 52, paragraph 1 of the EU Charter, i.e. *(i.)* any limitation must be provided for by law, it must *(ii.)* respect the essence of the rights and freedoms recognised by the Charter, and it must *(iii.)* be proportionate with the general interest recognised by the Union. The EU General Court takes a thorough look into this last provision.

Regarding the first question, the EU General Court finds that the contested decision does establish an age-based difference in treatment between civil servants entering the age bracket in between 55 and 66 years old, on the one hand, and civil servants who do not reach this age bracket, on the other hand.

Regarding the second question, since it has been demonstrated that the contested provision establishes a difference in treatment, it pertains to the EU General Court to examine the conformity of such difference in treatment with the "higher rule of law", i.e. Article 21, paragraph 1 of the EU Charter. In support of this, the judges review the criteria provided for in Article 52, first paragraph of the EU Charter.

Firstly, the judges observe that the age-based difference in treatment is "provided for by law" and that it respects the "essence" of the principle of non-discrimination.

However, it needs to be insured that the difference in treatment, which the contested decision establishes, meets at least one of the objectives of general interest recognised by the Union and that it is proportionate to the objective of general interest pursued.

The EU General Court finds that the difference in treatment meets at least one of the objectives of general interest, i.e. the objective of optimisation of Union institutions' expenses in the framework of vocational training. The General Court draws inspiration in this respect on Directive 2000/78, the latter featuring vocational training objectives as a legitimate aim justifying age-based discrimination.

The EU General Court consequently finds that the difference in treatment is proportionate to the objective of general interest it aims to achieve. For the purposes of assessing proportionality in the present case, one must examine whether the age-based difference in treatment is appropriate to meet the objective of general interest of optimisation of Union institutions' expenses in the framework of vocational training. One must moreover ascertain whether such difference in treatment does not go beyond what is necessary to the achievement of such objective.

The EU General Court here recalls its limited review in the light of the broad margin of discretion of the EU legislator in defining measures aimed at legitimate objectives in the general interest in the framework of staff policy. It is thus only where it appears *unreasonable* to consider the difference in treatment as appropriate to meet such objective and that such difference in treatment goes beyond what is necessary to the achievement of such objective that the EU judge will side in favour of an infringement of the principle of proportionality. *Quod non* in the present case, particularly in regard of the context of budgetary constraints and staff reduction the institutions are faced with.

Consequently, the EU General Court having dismissed the other pleas raised by the application, it annulled the applicant's action in its entirety.

Focus

The administrative and disciplinary proceedings

Article 86 of the Staff Regulations provides that an EU official or agent who fails to comply with his obligations may be liable to disciplinary penalty. A sanction can be taken at the end of a disciplinary procedure, provided for in Annex IX of the Staff Regulations. We briefly detail the main steps of these proceedings, in the light of recent case law on this matter.

The disciplinary procedure, which is necessarily preceded by the opening of an administrative inquiry (see below), aims at verifying the existence of a failure by an official or agent to comply with his obligations. The administrative inquiry aims, *prima facie*, to assess the accuracy of the alleged facts. In this respect, the EU General Court recently examined the case of an agent who allegedly failed to comply with his professional duties (case of harassment). The General Court was asked to review the lawfulness of the administrative investigation. In support of one of her pleas, the applicant relied in particular on the failure to establish the reality of the alleged facts. The General Court found that the accuracy of alleged precise facts could not be established on the basis of questionnaires containing multiple choice entries corresponding, in essence, to general categories of conduct liable to constitute psychological harassment. The General Court thus considered that the facts could have been established by other more appropriate methods, including bilateral interviews with persons who had submitted a complaint (EU General Court, 25 October 2018, *KF / EUSC*, case T-286/15, pts. 198-201).

If the opening of an administrative inquiry is a necessary precondition for which the institution or the agency has a broad margin of discretion, it stems from the case law that such inquiry can not be opened unless there exists a «reasonable suspicion» on the part of the staff member concerned of the commission of a disciplinary offence (EU Civil Service Tribunal, 13 January 2010, *A and G v Commission*, joined cases F-124/05 and F-96/06, pts. 173, 188).

Upon completion of the conducted administrative inquiry, the Appointing Authority may decide no case can be made against the concerned official or agent, or to address no more than a warning, even where there appears to have been a failure by the staff to comply with his obligations. The Appointing Authority may also decide, in the event of an established failure to comply with his obligations, to initiate disciplinary proceedings against the staff member concerned. It is settled case law that although the time limits referred to in Annex IX are not mandatory, "*disciplinary authorities are under an obligation to conduct disciplinary proceedings with due diligence and to ensure that each procedural step is taken within a reasonable period following the previous step*" (EU Civil Service Tribunal, 8 March 2012, *Kerstens v Commission*, case F-12/10, pts. 124-126). This duty of diligence and observance of a reasonable time limit applies both to the conduct of the disciplinary procedure as well as upstream, at the opening of the disciplinary investigation. In practice however, the Appointing Authority tends to delay the decision to initiate disciplinary proceedings.

Lastly, at the end of the disciplinary procedure, after transmission of its report by the Disciplinary Board, the Appointing Authority is required to hear the person concerned before rendering its decision as to the existence of a breach and as to the establishment of a disciplinary penalty. It is a matter of compliance with the rights of the defence. However, the absence of a hearing does not necessarily entail the annulment of the disciplinary proceedings, where the Appointing Authority has invited the person concerned on several occasions to attend a hearing and that the absence of a hearing is due to the official's own behaviour (EU General Court, 13 December 2018, *CX v Commission*, T-743/16 RENV, pt. 148.). This is the case, for example, where the person concerned repeatedly rejects the invitation to the hearing without good reason.

Compliance with the rights of the defence, and in particular the right to be heard, shall also be observed in the event of suspension of the official or agent from his duties. In that regard, recent case law has reiterated that when the Appointing Authority decides to suspend an official or agent accused of serious misconduct, such decision (which is a temporary measure and not a disciplinary penalty) may only be adopted after the staff member concerned has been put in a position to effectively make known his views on the evidence relied on against him (EU General Court, 25 October 2018, *KF v CSUE*, T-286/15, pts. 235-237).

For the time being, no limitation period is set to initiate disciplinary proceedings. However, discussions are now underway, notably in the context of the draft GIP implementing provisions of the European Commission on the conduct of administrative inquiries and disciplinary procedures. There are plans to insert a provision preventing the initiation of disciplinary proceedings beyond a certain time-limit.

Day to Day in Belgium

Reform of the civil status and transition to the digital area

Although the amendments were supposed to take effect on the first day of this New Year, the reform of the civil status has been postponed to 31 March 2019, the date of the entry into force of the law of 21 December 2018. The latter made amendments to the former "law of modernisation" of 18 June 2018.

Without providing an exhaustive overview, these changes notably include a shortening of the period after which the civil status records become public and thus accessible to the public. Although the time limit is ordinarily set at 100 years, it has however been shortened for several of these records, among which the death certificates (50 years) and the divorce certificates (75 years).

Several amendments also affect records set up abroad or records regarding individuals enjoying multiple nationalities.

Where the civil status record has been set up according to a foreign record, the law now specifies the various information which must be contained in the Belgian copy of the record.

In case of plurinationality, it is now possible to choose which of these nationalities will determine the law applicable to the names and surnames.

Other changes include the correction of material errors, which can now be made directly by the registrar of civil status by application to the family court. In addition, records of change of name and records of divorce must now include the place and date of birth of the person(s) concerned.

For the rest, let us point out here that the date of 31 March 2019 also marks the transition of the civil status to the digital age, since the completion of civil status records will now be exclusively done through electronic means. In addition, the establishment of these records will be done on the basis of models, sometimes containing mandatory information, sometimes optional information. These models are included in two Royal Decrees of 30 January and 3 February 2019.

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