The Offici@l

LEGAL NEWSLETTER ON EUROPEAN CIVIL SERVICE LAW

DALDEWOLF

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RENOUVEAU DEMOCRATIE CONSEIL

Edito

Dear readers,

In this issue, we supplement our analysis regarding non-marital partnerships. Following our previous overview of the legal framework applying to non-marital partners, we now turn to the limited rights they can draw from the Staff Regulations. In the case law, January has been marked by a departure of the General Court from its previous case law regarding the right to be heard of a member of the temporary staff when his contract is terminated by reason of an alleged breakdown in the relationship of trust.

Lastly, we briefly discuss the entry into force of the new legislative framework regarding fee-paying text-messages services.

We wish you a pleasant reading!

The DALDEWOLF team

Case law

Right to be heard of members of the temporary staff dismissed by reason of an alleged breakdown in the relationship of trust

In its case T-160/17 of 10 January 2019, the EU General Court initiated a significant evolution regarding the right to be heard of members of the temporary staff when their contract is terminated by reason of an alleged breakdown in the relationship of trust.

In the present case, the General Court annulled the decision of the AECE ("Authority empowered to conclude contracts of employment") rejecting the staff member's complaint lodged against the decision to terminate his contract. The said staff member had been assigned to a Commissioner's private office. The applicant notably relied on a breach of the right to be heard prior to his dismissal. The AECE considered that there was no obligation to hear the staff member in the present case, since the decision to terminate his contract relied on an alleged breakdown in the relationship of trust. The rejection of the applicant's complaint led him to bring an action before the General Court.

In its decision, the General Court mainly focused on the applicant's right to rely on the breach of the right to be heard, particularly when an alleged breakdown in the relationship of trust underlies termination of his contract.

The General Court recalls, on the one hand, the importance of the right to be heard in all proceedings liable to culminate in a measure adversely affecting a person and, on the other hand, that this right must guarantee the person concerned the opportunity to make known their views effectively before the adoption of any decision liable to adversely affect their interests, which is inevitably the case regarding a decision to terminate a staff member's contract.

The judges have confirmed the broad margin of discretion conferred to the Commission regarding the *intuitu personae* recruitment of staff members assigned to a Commissioner's private office. Indeed, these functions rely first and foremost on the existence of a relationship of trust. However, such relationship of trust could not justify a breach of the right to be heard prior to the adoption of any decision unilaterally dismissing a temporary staff member by reason of an alleged breakdown in the relationship of trust. The General Court thus departs from its previous case law, in which it held that the right to be heard does not apply prior to the decision to terminate the staff member's contract (see CJEU, 29 April 2004, *Parliament v Reynolds*, case C 111/02 P, pts. 51 to 60).

With respect to fundamental rights, the judges recall that it is necessary to take into account the provisions of the Charter of Fundamental Rights of the European Union, which have the same legal value as the Treaties. The right to be heard is enshrined in Article 41 of the said Charter. Still relying on the Charter, the General Court dismisses the case law *Parliament v Reynolds* relied on by the Commission, since it precedes the entry into force of the Charter.

The decision of the judges is influenced by the unilateral character of the contract termination on the part of the Commission and the negative consequences possibly resulting thereof for the continuation of the applicant's professional career. The applicant's notification is all the more essential in light of the Commission's broad margin of discretion regarding the alleged loss of trust underlying the decision to terminate the contract.

The General Court further indicates that when the foundation for contract termination is based on loss of trust, it is for the AECE to carry out a proper verification of the facts underlying the decision, as well as to ensure that the decision does not infringe fundamental rights or is not vitiated by a misuse of powers. Contract termination remains a measure of last resort, even where the specific situation is driven by loss of trust.

The General Court finds a breach of the right to be heard. After recalling that it is for the Commission to establish that the staff member concerned has had the opportunity to make known his views effectively – either orally or in writing – the General Court finds that the Commission has failed its obligation in the present case. Hence, the applicant's right to be heard before the decision to terminate his contract has been breached.

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, which could not be excluded in the case at hand.

Therefore, and for all the aforementioned reasons, the General Court annulled the contested decision.

Focus

The rights attached to non-marital partnerships (2/2)

Having first defined the concept of non-marital partnership (see *The Offici@l*, December 2018), we now propose to describe the limited rights conferred to non-marital partners.

It is therefore appropriate to distinguish, on the one hand, *(i.)* the rights granted during the life of the official or agent and, on the other hand, *(ii.)* the rights arising upon the death of the latter.

As regards the rights granted during the official or agent's life, the European legislator extends the coverage of the JSIS ("Joint Sickness Insurance Scheme") to the official or agent's spouse. The non-marital partner shall be treated as a spouse to the extent that two conditions are met. The first condition requires proof of the non-marital partnership, i.e. a union between two persons, which must satisfy certain elements of formalism (see the first three conditions referred to in Article 1 (2) (c) of Annex VII of the Staff Regulations). The second is to avoid as far as possible overlapping sickness insurance cover for the spouse, the latter having to prove that he does not benefit from any other sickness insurance scheme (see, in particular, CJEU of 13 July 1989, *Olbrechts v Commission*, case C-58/88, pt. 20).

The European legislator also grants special leave, apart from the official or agent's annual leave, in case of serious illness of the spouse, or upon the death of the latter. The above-mentioned conditions applying in the field of social security, making it possible to determine in which cases the non-marital partner shall be treated as a spouse, apply *mutatis mutandis* to the granting of special leave. In addition, if in theory an official or servant could also be granted special leave when making a declaration of legal cohabitation, in the same way as the leave granted in the event of marriage, it however appears that the administrative practice only grants such leave in cases of marriage, thus regarding "*persons who have formally contracted a civil marriage recognized by law*" (see TEU of 28 January 1999, *D v Council*, case T-264/97, pt. 26).

Lastly, the non-marital partner can benefit from a household allowance that is intended to cover the additional expenses incurred by the household. However, in addition to meeting the first three conditions set out in Article 1 (2) (c) of Annex VII of the Staff Regulations, the grant of this type of allowance requires a fourth condition: the absence of access to civil marriage in a Member State. Since opposite-sex couples have access to marriage everywhere, they do not fulfill the fourth condition and can therefore not benefit from the household allowance (see EU Civil Service Tribunal of 6 May 2014, *Forget v Commission*, F-153/12, pts. 25-26). The granting of a household allowance therefore specifically targets same-sex couples. Furthermore, in a judgment of the EU Civil Service Tribunal of 14 October 2010 (*W v Commission*, case F-86/09, pt. 45), the Tribunal stated that the official is not considered to fulfill the requirement of access to marriage when he establishes that he is exposed to criminal proceedings in the Member State of which he holds the nationality because of his sexual orientation. Only in the latter case must access to marriage in that State - and, consequently, the granting of a household allowance - be seen as purely theoretical.

With regards to entitlements upon the official or agent's death, the surviving spouse is granted a number of rights to adjust to his or her new life situation, for example the right to a survivor's pension or other types of financial support such as the reimbursement of funeral expenses or, in certain special circumstances, the right to additional financial assistance. These benefits are, however, granted only to the surviving spouse, meaning the marriage requirement must be satisfied, which requires a condition of anticipation, since the couple must have been married for at least one year at the time of the death of the staff member or agent. If marriage has been contracted after the termination of the latter's employment, a minimum of five years must have elapsed between the date of the marriage and the death of the said official or agent (see CJEU of 18 July 2017, *Commission v RN*, T-695 / 16 P, pts. 49-52, 54-57, 59-64). Consequently, the granting of these rights does not extend to non-marital partners (TEU of 17 June 1993, *Araujo-Dumay v Commission*, case T-65/92, pts. 27-30), apart from same-sex non-marital partners, who can rely on the exception of impediment of access to marriage in a Member State.

Day to Day in Belgium

New legislative framework regarding fee-paying text-messages services

The *Moniteur belge* of 16 January 2019 published the «Royal Decree of 12 December 2018 determining the obligations applicable to the provision of fee-paying services». This new text repeals the Code of Ethics for Telecommunications and reinforces the obligations with regard to fee-paying services, in particular fee-paying text-messages services, especially for the providers of such services and for telephone operators who charge these services to the end users.

As regards the obligations resting on service providers, the latter are primarily required to impose disclosure requirements on advertising (Articles 5, 11 and 13), including the obligation to mention the end-user tariff. This information must moreover appear in a way that is clearly understandable to the consumer.

The legislator also lays down requirements of fairness, transparency and honesty in the provision of fee-paying text-messages services and establishes a non-exhaustive list of certain practices which can be considered unfair (Article 6).

Service providers are also required to introduce a customer service procedure (Article 8), as well as a procedure for dealing with complaints lodged by the affected consumer of the proposed fee-paying service (Article 9). The service provider with whom a complaint has been filed or to which a telephone operator has transferred a complaint is responsible for answering the complaint within 5 working days. It is granted an additional 5-days-period to compensate the affected consumer should the complaint proves to be valid.

Especially regarding fee-paying text-messages services, the consumer must consent to the provision of services. Service providers bear the burden of proof of such consent (Article 13). This will prevent future cases of so-called «bill shocks», in which consumers are required to pay large sums for services they have never agreed to in the first place. When a consumer wants to withdraw his prior consent to fee-paying text-messages service, the legislator provides a simple procedure enabling unsubscription from that service (Article 19).

As regards the operators' obligations, the latter are responsible for blocking any fee-paying number when they are informed of a practice in violation of the rules laid down in the Royal Decree (Article 7). They are also responsible for forwarding any complaints they may receive to the concerned service providers (Article 9).

The new legal framework on fee-paying text-messages services came into effect on January 26th.

Our team

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