The Offici@l

LEGAL NEWSLETTER ON EUROPEAN CIVIL SERVICE LAW

DALDEWOLF

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Edito

For The Offici@l's last issue of the year, we propose to focus on the EU General Court's recent position regarding the setting of officials and agents' objectives for the coming year and the Administration's duty of care regarding temporary and contractual agents. Such study is indeed interesting, considering the fact that the EU Civil Service Tribunal's competences would be soon transferred to the EU General Court (see "In Brief").

We wish you happy Christmas holidays and a wonderful New Year 2016.

The DALDEWOLF team

Case law

The setting of new objectives is a mere internal measure of services organization

On December 3rd 2015, the General Court of the European Union rejected the appeal made by an official of the Office for Harmonization in the Internal Market (OHIM) against the judgement of the EU Civil Service of December 11th 2013, by which it had declared inadmissible the appellant's action for annulment of the objectives set for the appellant by OHIM.

The AD12 official complained that the EU Civil Service Tribunal ruled that his appraisal report, in respect of the period 1 October 2010 to 30 September 2011, which contained a heading "Objectives for the future", as well as two emails of OHIM from the 2nd of February 2012 setting objectives for the period 1 October 2011 to 30 September 2012, were not acts adversely affecting him and capable of being challenged before EU Courts.

Firstly, the General Court points out that the only acts or decisions that are capable of forming the subject-matter of an action for annulment are those which produce binding legal consequences that are likely directly and immediately to affect the applicant's interests by significantly changing his legal situation. According to the General Court, such binding legal consequences only flow from the act which definitively establishes the position of the concerned Institution, in the absence of which, the legal situation of the applicant has not been changed directly and immediately. In the present case, the adoption of a decision setting objectives for a determined period constitutes a necessary prerequisite for the adoption of a final decision during the following appraisal exercise.

Secondly, assessing whether a decision setting objectives for a determined period does not produce, in itself, binding legal consequences that are likely directly and immediately to affect the applicant's situation, the General Court, like the EU Civil Service Tribunal, considers that EU Institutions and organs have a broad discretion to organize their departments to suit the tasks entrusted to them and to assign the staff available to them in the light of such tasks, in order to achieve effective organization of work and to adapt the organization to varying needs. Therefore, a decision setting objectives for the coming year is a purely internal measure of services organization.

Nonetheless, the General Court notes that such an organization must be carried out in the interests of the service and in conformity with the principle of assignment to an equivalent post. In this context, in order to demonstrate that the measure adversely affect him, the official must provide evidence that the setting of objectives for the coming year leads to the conferral of tasks clearly going beyond what can be requires from an official of his grade and that the measure is contrary to the interests of the service. In this respect, the General Court held that the argument that the applicant "could" be exposed to a considerable stress harmful to his health was not sufficient. Therefore, the decision setting new objectives was not an act which could be challenged before the EU Courts.

Focus

Duty of care and the decision not to renew members of the contract staff

The Administration duty of care means the obligation on the Administration to provide assistance. The duty of care reflects the balance of the reciprocal rights and obligations established by the Staff Regulations in the relationship between the official authority and the civil servants. A particular consequence of this balance is that when the official authority takes a decision concerning the situation of an official, it should take into consideration all the factors which may affect its decisions and that when doing so it should take into account not only the interests of the service but also those of the official concerned .

Concerning more specifically the relationship between the duty of care and the interests of the service as regards to the decision to renew the contract of a member of the contract staff, it has been consistently held that the possibility to renew the contract of a member of the temporary staff is not an entitlement, but merely a possibility left to the discretion of the competent authority. Indeed, the Institutions have a wide discretion to organise their departments to suit the tasks entrusted to them and to assign the staff available to them in the light of such tasks on condition, however, that the staff are assigned in the interest of the service. Therefore, the General Court has held that, in that context, review by the EU Courts is limited to determining that there has been no manifest error of assessment or misuse of power (judgement 21st May 2014, Commission/Macchia, T -368/12 P, § 49).

As a result, in the light of this case-law, the General Court ruled that the Conditions of Employment of Other Servants (CEOS) neither provides for an obligation first to consider redeploying the staff member concerned, employed pursuant to article 2 of the CEOS, in case of termination of a contract of indefinite duration (judgement of 4th December 2014, ETF/Schuerings, T-107/11 P § 98), nor in case of non-renewal of a fixed-term contract (judgement of 21st May 2014, Commission/Macchia, T- 368/12 P, § 57).

In its judgement rendered on the 24th of November 2015, the General Court considered that this reasoning could be applied to a decision not to renew a member of the contract staff hired under article 3a of the CEOS. In this context, the General Court annulled the judgement of the EU Civil Service Tribunal which had ruled that, pursuant to the duty of care, the Appointing Authority had to examine whether there was no other position within the services of the Office for Infrastructure and Logistics (OIL) where the applicant could be reassigned as a member of the contract staff and upon which his contract could have been rightfully renewed, in the interests of the services of the OIL, and corresponding to the administrative and technical tasks of the applicant's group of functions (judgement of 24th November 2015, Commission / Luigi d'Agostino, T 670/13 P, § 38).

In brief…

Reform of the European Union Court of Justice Statute

On the 3rd of December 2015, the Council of the European Union approved in its 2nd reading the Regulation of the European Parliament and of the Council amending Protocol n° 3 on the Statute of the Court of Justice of the European Union. The Regulation, which should be signed and published shortly in the EU Official Journal, sets at 56 the number of judges of the General Court. Each Member State will, therefore, have two judges to be appointed during the partial renewal of the General Court in 2016, 2019 and 2022. In this context, the regulation provides for the suppression of the EU Civil Service Tribunal, whose litigation competences will be transferred to the General Court. Next month, we will assess the impact of the reform on officials and other servants once the text is finalized.

Day to day in Belgium

EU officials and Belgian taxes

The country competent to tax most incomes of an individual is in principle the country where that person has established his «tax residence».

This would be in Belgium if the person has his residence in Belgium or if he administers his goods and values from Belgium.

EU officials, however, are an exception to this principle. The Protocol on the Privileges and Immunities of the European Communities of 8 April 1965 (transposed in Belgian law of 13 May 1966) provides that *"officials and other servants of the Communities who, solely by reason of the performance of their duties in the service of the Communities, establish their residence in the territory of a Member State other than their country of domicile for tax purposes at the time of entering the service of the Communities, shall be considered, both in the country of their actual residence and in the country of domicile for tax purposes, as having maintained their domicile in the latter country provided that it is a member of the Communities"*.

This is what we call the «tax-domicile exception». It applies to the extent that the following three conditions are met:

1) The European official has established his residence in Belgium only because of his hiring to the Communities;
2) The European official had, upon taking office, his tax residency in a Member State of the European Union other than Belgium;
3) The European official does not engage in other professional activity in Belgium. An activity quite accessory, such as non-active partner in a Belgian company is nevertheless tolerated.

The exception also extends to the European official's spouse if he had at the time of taking office tax residency in a Member State of the European Union other than Belgium and if he does not exercise a professional activity in Belgium. If he works in Belgium, the spouse will be regarded as a Belgian tax resident.

The exception also extends to children dependent on and in the custody of the EU official if they were not tax resident in Belgium at the time of taking office.

Finally, the exception applies to income taxes, wealth taxes and death duties and in the application of conventions on the avoidance of double taxation concluded with other Member States. For all these taxes, Belgium must consider the persons benefiting from the tax-domicile exception as non-residents.

The consequences are wide.

With respect to income taxes, Belgium is not competent to tax the earned income paid to the official. Salaries, wages and emoluments paid by the Communities for one of its officials are exempt from national taxes and subject to tax for the benefit of the Communities.

For capital income (interest, dividends, etc.) the situation is less clear and should be analyzed case by case and in view of the double-tax treaties concluded between Belgium and the country of tax residence of the official. In general, unless specific provision in the relevant treaty, Belgium has the power to tax capital gains produced or received in Belgium. The withholding tax withheld by the payer of income is, for the non-resident, a definitive tax.

Real estate revenues are taxable in Belgium if the building is located in Belgium. The same principle applies to registration duties due in connection with the acquisition of a property.

Finally, the scope of inheritance taxes in Belgium will also depend on the tax residence.

The tax-domicile exception goes off at retirement. The official who maintains his residence and / or the place from where he administers his goods and values in Belgium after his retirement will therefore become Belgian tax resident. At his death his heirs will therefore be taxed in Belgium on his worldwide estates. The heirs of the official who left Belgium at the time of his retirement will only pay in Belgium inheritance rights on the deceased's estate located in Belgium.

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