



The Offici@l

LEGAL NEWSLETTER ON EUROPEAN CIVIL SERVICE LAW

DALDEWOLF

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Edito

In this new issue of The Offici@l, we propose to continue our legal study of the Belgian legislation applicable to Airbnb.

On the professional side, we would like to focus on the official's obligation of dignity and on the recent case law on the Appointing Authority's duty to state reasons regarding promotion.

We wish you a pleasant reading.

The DALDEWOLF team

Focus

" The respect of dignity in the performance of duties "

Article 12 of the Staff Regulations constitutes a specific expression of the duty of loyalty which requires officials to abstain from any action which may reflect adversely upon their position and the respect owed to its Institution and its authorities, and to ensure that their behavior is above all suspicion, in order to maintain the confidence between him and its Institution. This obligation applies to the official at all times, even during a leave on personal grounds, and is intended to ensure that EU officials, in their conduct, present a dignified image in keeping with the particularly correct and respectable behaviour which one is entitled to expect from members of an international civil service.

In practice, the respect of dignity in the performance of their duties limits the fundamental right of officials to the freedom of speech. In that regard, the EU Civil Service Tribunal weighs, on the one hand, the elements likely to characterize a failure to comply with the respect of dignity in the performance of duties, such as the seriousness of the accusations made, the way they were formulated and broadcasted, and, on the other hand, the context within which the accusations were made, the potential impossibility to use other means of expression less offensive to the dignity of the person concerned, as well as the constructive nature of the critics which requires them to appear reasonably founded, to be formulated in the interest of the service and to not be excessive as to what is necessary for their understanding. For instance, the EU Civil Service Tribunal held that by sending an email to a whole unit insinuating that the head of unit proposed to recruit an agent and to maintain him in its post after two years, to the detriment of interest of the service, due to a their longstanding friendship, and insinuating that the head of unit had adopted retaliation measures against the applicant, the latter had failed to comply with article 12 of the Staff Regulations (*Case of 5th December 2012, Z / Court of justice (F-88/09 et F-48/10)*).

Nonetheless, the notion of acts liable to reflect on the officials' position is interpreted broadly by the EU jurisdictions. Indeed, it covers not only imputations likely to be detrimental to the dignity of the persons to whom they refer as such but also allegations of such a kind as to cast discredit on their professional honour. The form of the allegations does not matter; both direct attacks and allegations made in a manner expressing doubt, indirectly, covertly, by way of insinuation or referring to a person not expressly mentioned but who can be identified are covered. In this regard, insulting and defamatory statements in documents referring to the way in which the Court of Auditors performs its task of auditing accounts in the institutional framework of the EU amount to a failure to respect of dignity in the performance of one's duties and cannot be justified by the exercise of one's freedom to belong to a trade union (*Case of 21th of January 1997, Williams / Cour des comptes, C-156/96 P*).

The duty of confidentiality of officials flows from the obligation to the respect of dignity in the performance of their duties. In that regard, article 12 of the Staff Regulations implies that officials cannot have direct contact with the press without a prior request of intervention of the office of the spokesperson of their Institution. In addition, they are required to ask for the intervention of such services when the Institution is undermined in the press. For instance, in the case of 19th March 1998, *Tzoanos / Commission (T-74/96)*, the General Court rejected the application of an official who contested the decision of the Appointing Authority to open a disciplinary procedure against him, notably for having publicly criticized a Greek national agency for tourism and for taking personal initiatives to address the situation instead of requesting the intervention of the Commission spokesperson office.

Case law

Clarifications on the Appointing Authority's duty to state reasons regarding promotion

On November 18th 2015, the EU Civil Service Tribunal annulled a decision of the European External Action Service ("EEAS") not to promote an official and held the EEAS liable to remedy the loss of chance to be promoted as well as the non-material harm sustained by the official (F-30/15).

The applicant, who was originally serving in the European Commission, was transferred to the EU Council on the 1st of May 2009, while the Commission had removed his name from the list of officials eligible for promotion in 2009 and at a time when the Council had already published its list of officials promoted for 2009. In a note issued on the 17th of December 2009, the General Director of the DG "Human resources and Security" of the Commission informed his counterpart at the Council that the applicant presented all the merits to be promoted to grade AD12 in the 2009 promotion exercise of the Commission. The 1st of January 2011, the applicant was transferred to the EEAS. While he was on the list of the officials eligible for promotion to grade AD12 for the 2012 promotion exercise, his name did not appear on the list of promoted officials published by the Appointing Authority on the 10th of October 2012.

In its judgement rendered on the 26th of February 2014, the EU Civil Service Tribunal annulled the non-promotion decision of the 10th of October 2012, notably for failure to comply with the duty to state reasons, since it did not appear from the dismissal of the complaint introduced by the applicant against this decision that the EEAS had taken into consideration the specific situation of the applicant who would have been promoted in 2009 had he not been transferred to the Council before the closing of the promotion exercise. Pursuant to the ruling of the Tribunal, the Appointing Authority adopted a decision on the 29th of April 2014 indicating that it maintained its position and stating the reasons why it had, already beforehand, decided not to promote the applicant in 2012.

Firstly, the EU Civil Service Tribunal recalls that whenever an EU Institution enjoys a wide discretion, such as in the field of promotion, respecting certain procedural safeguards is of particular importance, and that those safeguards include the duty to examine, with care and in an impartial manner, all relevant aspects of the situation at issue as well as the duty to state sufficient reasons. The Tribunal emphasizes that the first aim of the duty to state reasons is to reduce the risk of arbitrariness by forcing the administration to organize its reasoning in a coherent manner and by leading it to rationalize its opinion and the effects of its decision based on relevant, unequivocal, conflict-free and sufficient grounds. Nonetheless, the Tribunal notes that its previous judgement had highlighted the necessity that the reasons provided in the new decision to be adopted by the EEAS showed that it had taken into consideration the circumstance that the merits of the official were such that he would have been promoted by the Commission to grade AD12 in the 2009 exercise had he not been transferred to the Council. In this regard, the Tribunal considers that the decision subsequently adopted by the Appointing Authority was too superficial and did not consist in an actual and relevant statement of reasons. Consequently, the EEAS failed to comply with article 266 TFEU which provides that the measures which ought to be taken to implement an annulment decision must comply with the operative part and the grounds supporting the judgement as well as EU law provisions; therefore the Tribunal declares unlawful the decision of 29th of April 2014 not to promote the applicant.

Secondly, the Tribunal, observing that the Institution which fails to comply with article 266 TFEU commits a breach of its administrative duty engaging its liability, notes that the applicant lost an opportunity to be promoted if the EEAS had taken into account the note of the 17th of December 2009. In addition, the Tribunal holds that the failure to comply with an annulment decision breaches the confidence which every citizen must have in the EU legal system, based notably on the rulings given by the EU jurisdictions and causes, in itself, a non-material damage for the applicant who received a ruling in its favor. Therefore, the Tribunal invites the parties to reach an agreement providing for pecuniary compensation within two months.

Day to day in Belgium

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

More and more people - owners or tenants - decide to go on Airbnb to easily rent out their place to tourists for short to medium duration in order to make some money out of it.

The applicable legislation in Belgium differs according to where you live: in Brussels, Wallonia or Flanders.

Brussels' legislation on tourist accommodation will soon be modified by the new Ordonnance of 8th May 2014. This Ordonnance covers six categories of tourist accommodation: hotels, apart-hotels, residence for tourism, private homes (including Airbnb), accommodation for social tourism and campgrounds.

What does this new Ordonnance contain? A prior declaration and registration procedure will be mandatory for any kind of tourist accommodations in Brussels, as well as the fulfilment of operating conditions. The accommodation will have to dispose of a fire certificate and a town and country planning certificate. The accommodation will have to be kept clean and sanitary.

Private homes like Airbnb accommodations will have to fulfill more specific requirements, such as having maximum five bedrooms which should be available for guests for at least four months a year. Each accommodation must have a private bathroom for guests only.

The host will not be allowed to have more than one private home where he will have to be domiciled.

The private home will have maximum 15 guests at the same time. The host will have to enter into written agreements for any room rental and to warn his/her liability insurance company as soon as he/she starts to operate his/her private home accommodation. The price of every room rental will have to be displayed.

A control and sanction system will be put in place. The host who may be caught not fulfilling the Ordonnance requirements could face administrative fines between € 250 and € 25,000.

This Ordonnance has not come into force yet, but should be in force in January 2016.

Our team

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