



The Offici@l

LEGAL NEWSLETTER ON EUROPEAN CIVIL SERVICE LAW

DALDEWOLF

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Editorial

In this new issue of The Offici@l, we propose to examine the Belgian law about diplomatic clause in short term lease contracts.

On the professional side, we would like to focus on the conditions of recovery of undue payment by the Institutions and their obligation to deal with the pecuniary entitlements of officials with care and diligence.

We wish you a pleasant reading,

The DALDEWOLF team

Focus

Distinction between the occupational origin of an official's disease and permanent invalidity

The notion of permanent invalidity bears different meanings in the sense of article 73 and that of article 78 of the Staff Regulations. As a result, the recognition of the occupational origin of the disease of an official does not necessarily include the recognition of the occupational origin of his/her invalidity.

Indeed, permanent invalidity within the meaning of Article 73 of the Staff Regulations is equivalent to an adverse effect on physical and mental integrity. This provision provides for certain benefits in the event of death, in the event of total permanent invalidity and in the event of partial permanent invalidity caused by accident or occupational disease. In practical terms, a partial permanent invalidity entitles the official to compensation, even if it does not affect his ability to work. The Rules on the insurance of officials against the risk of accident and of occupational disease establish the scope and conditions of application of article 73 of the Staff Regulations. Permanent invalidity within the meaning of article 78 of the Staff Regulations is equivalent to incapacity for work and therefore for the need of a substitute income in the form of an invalidity allowance. Annexe VIII of the Staff Regulation entitled « Pension scheme » defines the conditions for the award of an invalidity allowance.

Both types of invalidity differ since while total invalidity within the meaning of Article 73 of the Staff Regulations generally entails total incapacity for work, the converse is not necessarily true, as an official may be totally unfit for work within the meaning of Article 78 while suffering only a very small degree of partial permanent validity within the meaning of Article 73. The practical consequence for the Civil Service Tribunal is that a procedure for recognition of a permanent total or partial invalidity, in application of article 73 of the Staff Regulations, and a procedure for the award of an invalidity allowance in application of article 78 of the Staff Regulations, could legitimately lead to divergent results even though the factual situation is the same.

In this context, the official should request that the Medical Committee takes a position on the link between the occupational nature of its disease and its permanent invalidity.

Day to day in Belgium

The interest of a diplomatic clause in short term lease contracts

You are posted in Brussels for a maximum three-year period, you conclude a lease of the same duration... What if, after a few months, you receive a notification of foreign detachment? Can you terminate the lease contract without indemnity or notice? Are you obliged to pay the rents until the end of the lease?

Belgian Law distinguishes the main residence contracts (9 years) from the short term lease (maximum 3 years). If, under certain conditions, the first ones can be prematurely terminated by each of the parties, it is unfortunately not the same for the short term lease contracts.

To protect tenants from conflict in case of professional detachment and early termination, the Belgian case-law usually accepts that the parties negotiate, before signing, a "diplomatic clause" which gives the possibility to the tenant to terminate his lease before the end of its planned duration with reasonable notice and indemnity.

It is generally advised to negotiate a clause giving the opportunity to the tenant to prematurely terminate the contract by giving a three months' notice and a compensation of three, two or one month's rent, depending on whether the tenant's presence in the apartment terminates during the first, second or third year of the contract.

Case law

Balancing the right of the Institutions to recover undue payment with their obligation to deal with the pecuniary entitlements of officials with care and diligence

On February 5th 2016, the EU Civil Service Tribunal annulled the decision from the Office for the Administration and Payment of Individual Entitlements (PMO) of the European Commission which retroactively revised the pensions awarded to the widow and the son of a former and deceased official and ordered the recovery of the excess amounts which were paid without entitlement, pursuant to article 85 of the Staff Regulations. Consequently, the Commission was condemned to repay those sums (F-96/14).

In the present case, the applicants were awarded from January 1st of 2009 a survivor and an orphan pensions calculated on the basis of the invalidity allowance allocated to the former official at the time of his death, and submitted to the limitations set in article 81a, § 1 c), of the Staff Regulations which provides that such pensions cannot exceed the amount of the pension to which he would have, had he been alive, been entitled to based on the same grade and step at the time of death. On July 31st 2010, the son having completed his studies could no longer be considered as a dependent child, which led to the revision of the calculation parameters of the applicants' pensions from August, 1st 2010. On June 17th 2011, the PMO revised the amount of the pension rights of the applicants, retroactively effective from August 1st 2010. While doing so, the PMO incorrectly capped the total amount of the pensions pursuant to article 81a, § 1 c), of the Staff Regulations, using the invalidity allowance of the former official as the reference, whereas the PMO should have used the total retirement pension payable to which, had he been alive, the former official would have been entitled to from August 1st 2010. On November 22nd 2013, the PMO having discovered its miscalculation, retroactively revised the pensions awarded and organised the recovery of the undue payment in accordance with article 85 of the Staff Regulations.

Firstly, the Civil Service Tribunal states that article 85 of the Staff Regulations on the recovery of undue payment does not only apply to officials, but also to all the persons affected by the Staff Regulations, including the beneficiaries of a survivor or an orphan pension as heirs of a former official who has deceased.

Secondly, the Civil Service Tribunal recalls that pursuant to article 85, for a sum paid without justification to be recovered, evidence must be produced by the Institution to show that the recipient was actually aware of the fact that there was no due reason for the payment, or that the fact of the overpayment was patently such that he could not have been unaware of it. In the present case, it is clear to both the Civil Service Tribunal and the Commission that the applicants were unaware that there was no due reason for the payment they received from the month of July 2011 onwards. Regarding the phrase 'patently such' relating to overpayment, it does not mean that the beneficiary of undue payments does not need to make an effort to reflect or check but rather that recovery is due where the error is one which does not escape the notice of the beneficiary of a survivor pension exercising ordinary care. The fact that he has doubts about the validity of the payments in question is sufficient for him to be obliged to contact the administration so that it can carry out the necessary checks.

In this context, the Civil Service Tribunal examines whether, in the present case, it is possible to conclude that the error made by the administration was patently such that the applicants could not have been unaware of the irregularity of the contested payments or should not have doubted their validity. The Civil Service Tribunal notes that the applicants could not have realised that the total amount of the pensions they received from July 2011 to November 2013 exceeded the total retirement pension that the former official, had he been alive, would have received from August 1st 2010, since they were only informed about the new cap which applied to their pensions pursuant to article 81a, § 1 c), of the Staff Regulations, on November 22nd 2013.

In addition, the Civil Service Tribunal considers, on the one hand, that despite the fact that the administration informed the applicants that their pensions would be recalculated taking into account new parameters, those were not explained in the revision note of June 17th 2011, and, on the other hand, it is the administration which, through its error, acknowledged the existence of a debt owed to the applicants. In that respect, the Civil Service Tribunal considers that these errors are so significant, that the Commission breached its obligation to examine with care the pecuniary entitlements of the applicants as required by the principle of sound administration under article 41 of the Charter of Fundamental Rights of the EU.

The Civil Service Tribunal, therefore, concludes that the conditions set in article 85 of the Staff Regulations are not fulfilled and the Commission ought to repay the amount unduly deducted from the applicants' pensions.

Our team

European Union law
Belgian law

Thierry Bontinck, Anaïs Guillerme (avocats) and Sabrina Cherif (élève-avocate).
Cilla Haringova, Yaël Spiegl, Sarah Honincks (avocats).

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