



The Offici@l

LEGAL NEWSLETTER ON EUROPEAN CIVIL SERVICE LAW

DALDEWOLF

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Edito

Dear readers,

For the last issue of The Offici@l before the summer-break, we propose to share with you some thoughts regarding the rules applicable to administrative inquiries and disciplinary proceedings. Moreover, an important order has been recently released by the EU General Court, regarding the application of article 42 quarter of the Staff Regulations.

We wish you a very pleasant reading ... and an excellent summer holiday!

The DALDEWOLF team

Case Law

Provisional suspension of simultaneous decision to place an official on leave in the interest of the service and on compulsory retirement

By an Order of 18 May 2017 (T-170/17R), the EU General Court ordered the suspension of the European Commission's decision imposing simultaneously on an official a leave in the interest of the service based on Article 42(c) of the Staff Regulations and an automatic retirement with effect from 1 June 2017.

The applicant is an official who has already reached the minimum retirement age but has not reached the statutory retirement age (65 in the present case).

He lodged an appeal in order to obtain the stay of execution of this decision until a judgment on the merits of the case would be released. The Court granted the request.

The judges note, prima facie, that there is doubt as to the conditions for the application of Article 42(c) of the Staff Regulations. Indeed, the applicant was placed against his will on leave in the interests of the service and simultaneously on compulsory retirement, even though he had not yet reached the legal age allowing an automatic retirement. Pursuant to Article 52 of the Staff Regulations, an official is retired either automatically when he reaches the statutory retirement age or at his request if the official has reached the minimum age to retire or when the official reaches the statutory retirement age while on compulsory leave in accordance with Article 42c of the Staff Regulations. In the present case, the applicant challenged the simultaneous application of the provisions on leave in the interests of the service and automatic retirement.

In light of these considerations, the EU General Court considered that, prima facie, article 42(c) of the Staff Regulations does not allow the administration to decide that an official who has reached the minimum retirement age will be placed on leave in the interest of the service and, simultaneously, automatically be retired against his will.

Moreover, the EU General Court considered that the condition of urgency justifying the stay of execution was satisfied in the present case. Without suspension of the Commission's decision, the applicant would have been automatically excluded from reinstatement in his post until a possible annulment of a decision on the merits would have been released. However, having regard to the applicant's age, the decision on the merits would only have been taken while the applicant's activity would be reduced further. Consequently, the annulment of the decision on the merits would not suffice to compensate the damage suffered by the applicant. The official was therefore reinstated in his duties pending the judgment of the EU General Court on the merits of the case.

To be continued...

Focus

What is to be expected from the new GIP on disciplinary proceedings at the Commission?

The Commission and staff representatives are currently discussing extensively on the new GIP draft on the conduct of administrative inquiries and disciplinary proceedings.

The recast of the GIP would be a golden opportunity to both improve some of the procedures and better protect the fundamental rights of the person concerned in the light and respect of the EU Charter of Fundamental Rights, which is applicable to the Institutions of the Union as well as to the Member States.

- For an independent IDOC, limited to the role of an investigator assessing incriminating and exonerating evidence.

Unfortunately, it is not apparent from what could be filtered out of the reform plans that such guarantees will be implemented. On the contrary, IDOC (Investigation and Disciplinary Office of the Commission) will come out strengthened from the on-going draft. Although defined as independent by the EU General Court, this body still remains attached to the DG Human Resources.

His ubiquitous role neutralizes the balance resulting from the provisions of Annex IX to the Staff Regulations, which provides for a clear and proper distinction between the inquiry phase and the disciplinary phase. Indeed, IDOC is everywhere: it investigates during the administrative phase and carries out the audition provided for in article 3 of the Annex IX, which is in principle conducted by the Appointing Authority. Thereby, the referral decision before the disciplinary board is widely based on IDOC's report, but IDOC also represents the AA and does ask for a penalty before the Disciplinary Board. Lastly, it participates in the hearing as "secretary of the AA" where, following the Disciplinary Board's opinion, it will be decided on the opportunity to pronounce a disciplinary penalty. This mingling of roles is inappropriate. On this subject, a judgment of the EU General Court would be welcomed.

For the rest, the upcoming project seems to focus on the idea of a non-biased and impartial inquiry rather than on an investigation based on incriminating and exonerating evidence. One cannot be impartial and objective by investigating only incriminating evidence. Here, the role of IDOC can be mistaken with the one of a prosecutor which consists in laying the charges against a person, and not trying to assess the incriminating and exonerating elements.

- Dashed hopes ?

Moreover, it seems that these upcoming GIP do not mention the general principles that are inherent to the disciplinary procedure, such as the right to not incriminate oneself or to remain silent. However, these GIP insist on the duty of loyalty which, in such cases, may impede the basic rights of the defence.

The new text would also enshrine the option to use anonymous witnesses. If it can easily be conceived that, in certain rare cases, it is necessary, such situation always presents major drawbacks for the rights of the defence. Indeed, this option would make impossible for the person concerned to defend himself, to identify the reasons why some of the testimonies have been sought or to be able to replace them in a specific context. Such exceptions should be strictly limited and strictly subject to justification, accessible to the person concerned and to the Disciplinary Board. Bringing anonymous witnesses should only be used when it is established that it is not possible to proceed differently.

Finally, despite that it is not the purpose of the GIP, we cannot ignore the both biggest weaknesses of the European disciplinary procedure which are, one the one hand, the lack of a limitation period, which is contrary to all fundamental principles of law and, on the other hand, the fact that the opinion given by the Disciplinary Board is still non-binding. At the very least, Annex IX of the Staff Regulations should provide that if the Appointing Authority can reduce the penalty proposed by the Disciplinary Board, it can in no way aggravate it.

Day to Day in Belgium

Forthcoming prohibition of additional charges in case of payment by Bancontact

The Belgian Federal Public Service Economy announced that additional costs charged on the payment service users using Bancontact by the merchants in case of small payments would be abolished by the end of 2017.

The Belgian Code on Economic Law provides that such additional charges may be requested (article VII.55, §3).

However, the Directive 2015/2366/EU on payment services in the internal market that limits the right of the payee to request charges to payment service user must be transposed on January 13th 2018. Moreover, the Belgian Code foresees the possibility to prohibit or limit the right of the payee to request charges for the use of payment instruments, by Royal decree.

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