DALDEWOLF

the OFFICI@L

legal newsletter on european civil service law
newsletter juridique de la fonction publique européenne

September 2022 - number 78 - 10th year

contact : theofficial@daldewolf.com — www.daldewolf.com

EDITO

Dear readers,

It's back to school time, we look forward to meeting you all again!

In this issue, we would like to take a look at the promotion procedure (in particular the conditions for promotion, the procedure for comparing merits and the rights of officials).

On the case law side, the Court of Justice recently overturned the position of the General Court, which had ruled that the eligibility requirements for a survivor's pension did not comply with the principles of equal treatment and non-discrimination.

In Belgium, we would like to give you an overview of your rights as a consumer with regard to third parties mandated to collect a company's debts against you.

the OFFICI@L is also a channel of communication between our team and its readers. So if you would like us to address certain issues in future issues of this newsletter, please send us your questions or suggestions (theofficial@daldewolf.com).

Finally, we are very pleased to inform you that our EU law team has been expanded to include seven lawyers and an assistant dedicated to your service. We introduce them to you in this issue.

We wish you a pleasant reading!

The DALDEWOLF team

FOCUS

THE PROMOTION

Let's use this time of year to review the promotion process, as unlike advancement to a higher step, promotion to a higher grade is not automatic but is decided by the Appointing Authority after consideration of the merits of the candidates.

Conditions for being eligible for promotion

Article 45 of the Staff Regulations provides that to be eligible for promotion, officials must fulfil two conditions:

- they must have completed at least two years in their grade. In this respect, the EU Courts have clarified that these two years of seniority must have been reached on the date of the promotion decision (judgment of 9 June 2015, F-65/14, §27) and that seniority as a temporary agent is not taken into account (judgment of 14 December 2016, T-366/15P, §§ 48 and 49);
- have the ability to work in a third language among the EU languages..

Consideration of the merits of officials eligible for promotion

Article 45 of the Staff Regulations provides that the Appointing Authority shall consider the merits of the different candidates for promotion and requires that at least the following be taken into account:

- the reports on the officials ;
- the use of languages in the execution of their duties other than the language for which they have demonstrated thorough knowledge;
- the level of responsibilities exercised by them.

The Appointing Authority enjoys broad discretion in comparing the merits of candidates. However, this consideration must be carried out carefully and impartially, in the interests of the service and in accordance with the principle of equal treatment. The General Court of the EU considers that, to this end, this consideration must be conducted on a basis of equality, using comparable sources of information (judgment of 18 May 2022, T-435/21, §§ 59 and 60).

The General Court of the EU has recently confirmed that the Staff Regulations do not confer a right to promotion, even on officials who meet all the conditions for promotion (judgment of 9 June 2021, T-453/20, §47). A promotion decision does not depend solely on the qualifications and abilities of the candidate, but on their assessment in comparison with those of other candidates eligible for promotion, and this at the time of each new promotion process. Thus, the fact that an official has obvious and recognised merits does not exclude, in the context of the comparative examination of the merits of candidates for promotion, that other officials have equal or superior merits. Likewise, the fact that a candidate has good merits, but was not promoted in a previous process, does not guarantee that he or she will be promoted in the next process.

The Staff Regulations do not detail the procedure to be followed in organising the comparative examination of the merits. The General Court confirms that the Appointing Authority has the power to undertake a consideration of comparative merits according to the procedure or method which it considers most appropriate and that there is no obligation on the institution concerned to adopt a particular appraisal and promotion system (judgment of 18 May 2022, T-435/21, §44). In practice, the EU Institutions have adopted general implementing provisions (GIPs) to organise the procedure in each Institution, which are not always aligned. The Council, the Parliament and the Commission have all provided for the setting up of advisory bodies on promotion, most often composed of members appointed by the Appointing Authority and the Staff Committee. These bodies assist the Appointing

FOCUS

Authority and make recommendations. The Appointing Authority is obliged to take these recommendations into account and if it does not follow them, it must give reasons (judgment of 30 January 1992, T-25/90, §29).

The promotion/non-promotion decision

The promotion of an official results in his or her appointment to the next higher grade in the function group to which he or she belongs.

At the stage of publication of the list of promoted officials, the Appointing Authority is not required to give reasons for a promotion decision either to the person to be promoted or to the candidates not promoted - even if the person not promoted so requests. This has been confirmed by the General Court (judgment of 13 September 2016, T-410/15P, §79).

Such a situation is problematic insofar as in some Institutions, officials do not have access to the individual reasons why they have not been promoted after the comparative examination, unless they lodge a complaint. This situation therefore requires officials to lodge a complaint for the sole purpose of finding out the Appointing Authority's reasons. It seems to us that a good practice could be developed in order to ensure more transparency, by communicating to the officials who wish to do so the reasons which led the advisory body for promotion not to recommend their promotion. In the reply to the complaint, the Appointing Authority is, this time, obliged to inform the official concerned of the individual and relevant reason for the decision not to promote him or her (judgment of 8 July 2020, T-605/19, §35). However, it is not in principle obliged to reveal in detail to the official not promoted the comparative assessment it made of his merits and those of the officials selected for promotion, nor to explain in detail how it considered that the promoted candidates deserved promotion.

OUR TEAM

DALDEWOLF:
- European law and human rights
  THIERRY BONTINCK,
  ANAÏS GUILLERME,
  THAÏS PAYAN,
  MARIANNE BRÉSART,
  LAUREN BURGUIN &
  WADII MIFTAH
- Belgian law
  DOMINIQUE BOGAERT

In partnership with the law firm PERSPECTIVES:
- Family law
  CANDICE FASTREZ

CASE-LAW

THE COURT OF JUSTICE OVERTURNS THE POSITION OF THE GENERAL COURT AND FINDS THAT THE CONDITIONS OF ELIGIBILITY FOR A SURVIVOR'S PENSION COMPLY WITH THE PRINCIPLES OF EQUAL TREATMENT AND NON-DISCRIMINATION

A recent judgment of the Court of Justice of 14 July 2022 leads us to look again at the conditions of eligibility to receive a survivor's pension - a topic we already covered in the February 2021 issue.

Articles 18 And 20 of Annex VIII to the Staff Regulations lay down the eligibility conditions that the surviving spouse of a former official entitled to a retirement pension must satisfy to be entitled to a survivor's pension. The Staff Regulations distinguish two scenarios:

- where the survivor spouse and the former official get married before the latter left the service of an Institution: Article 18(1) of Annex VIII provides for a condition of at least one year's marriage before the official's passing.

  Article 18(2) removes the condition of the duration of the marriage if there are one or more children of a marriage contracted by the official before he left the service, provided that the surviving spouse maintains or has maintained those children.

- where the survivor spouse and the former official get married after the latter left the service of an Institution: Article 20 of Annex VIII provides for a condition of at least five year's marriage before the official's passing.

By three judgments delivered on 16 December 2020 (cases T-315/19, T-243/18, T-442/17 RENV), the General Court of the EU had ruled that Article 20 of Annex VIII of the Staff Regulations infringed the principle of equal treatment and the principle of non-discrimination on grounds of age. The judges had noted that this provision requires a minimum duration of marriage five times longer than that of Article 18 without providing for any exception. Thus, a surviving spouse who entered into a marriage after the former official left the service and who does not meet the five-year requirement cannot prove that the marriage was concluded in good faith by providing objective evidence. Although the Administration's objective was to combat fraud, the judges considered that this condition was disproportionate to this objective. The judges added that budgetary considerations alone could not justify a derogation from the general principle of equal treatment.

The European Commission, supported by the Council and the Parliament, had lodged an appeal at the Court of Justice of the EU, arguing inter alia that the General Court had erred in law. This is an appeal mechanism which makes it possible to challenge the judgments of the General Court on questions of law. By a judgment of 14 July 2022 (C 116/21 P to C 118/21 P, C 138/21 P and C 139/21 P), the Court of Justice overturned and annulled the three judgments of the General Court.

The Court of Justice stated that when adopting provisions of the Staff Regulations, the EU legislature enjoys broad discretion. For this reason, the Court's review must be 'lighter'. Contrary to the reasoning of the General Court, any infringement of the principle of equal

treatment is not such as to lead to the annulment of the provision in question. According to the Court, in order to be annulled, the legislator must have made a genuine distinction which is arbitrary or manifestly inappropriate in relation to the objective pursued by the rules in question.

The Court of Justice then found that there was indeed a difference in treatment indirectly based on age between persons who are married before and after retirement. However, it considered that this difference in treatment is neither arbitrary nor manifestly adequate in relation to the objective pursued. Among other things, it stated that where the marriage is concluded after the official has retired, the incentive to commit abuse or fraud is likely to be greater "as a result of the greater predictability of and the closer proximity to the official's death". The Court of Justice therefore dismisses the three actions for annulment that led to these cases.

DAY-TO-DAY IN BELGIUM

WHAT ARE YOUR RIGHTS AS A CONSUMER WITH REGARD TO THIRD PARTIES MANDATED TO COLLECT A COMPANY'S DEBTS AGAINST YOU?

A company can use a third party to collect its outstanding debts. The procedure is called an amicable debt recovery procedure and is subject to the provisions of the law of 20 December 2002 on the amicable debt recovery of consumers.

The mandated third party can be a collection company, a bailiff or a lawyer.

The written request for payment (formal notice) sent to you must contain the following information:

- the identity of the creditor;
- the existence of the debt (invoice number and date);
- a clear description and justification of the amounts claimed;
- a statement that, if there is no reaction within the time limit set out in the notice, the creditor may proceed with other recovery measures.

You must be given at least 15 days from the date of the notice to react to the request for payment.

If the request comes from a specialised company, it must be registered with the SPF Economie in order to be able to carry out the collection activity. The list of approved companies is available on the SPF Economie website.

Lawyers and bailiffs are not required to be registered. However, they are subject to the other provisions of the law and in particular to compliance with Article 3 prohibiting behaviour or practices that:

- infringe the privacy of the consumer;
- are likely to mislead the consumer;
- offend against the human dignity of the consumer.

Except in the case of a manifest error which does not prejudice the rights of the consumer, any payment obtained in contravention of the provisions of the law shall be considered validly made by the consumer to the creditor but shall be refunded to the consumer by the person carrying out the activity of amicable debt collection.

If the collection of a debt concerns an amount that is totally or partially undue, the person who receives the payment is obliged to reimburse it to the consumer, together with default interest from the day of payment.

Last but not least, if you believe that you have no debt, it is very important to send the creditor and the debt collector a registered letter or an e-mail (with proof of receipt) containing a clear and reasoned dispute about the alleged debt. Indeed, the law prohibits «harassment of the debtor who has made it clear that he/she disputes the debt».

The debt could also be prescribed. Most debts become prescribed after ten years, but shorter limitation periods apply in some cases.

DALDEWOLF: THE "EU LAW" TEAM CONTINUES TO GROW

After announcing the appointment of Anaïs Guillerme as a partner on July 1st, DALDEWOLF is pleased to welcome two new associates to the "EU law" team: Marianne Brésart and Wadii Miftah.

On the picture, from left to right : Thaïs Payan, Wadii Miftah, Lauren Burguin, Marianne Brésart, Anaïs Guillerme, Julie Goffin, Thierry Bontinck and Sandra Volpin.

These two new recruits will strengthen the team in place, which now includes seven lawyers. Thierry Bontinck declared: *"Both the association of Anaïs and the considerable development of our clientele implied an enlargement of the team. This will allow us to maintain our high levels of competence, rigor and availability, at the service of our clients."*

Marianne Brésart, *Senior Associate*, is a lawyer registered with the Luxembourg and Brussels Bars. Before joining DALDEWOLF, she practiced for eight years within a team dedicated to European law in a leading firm in Luxembourg and advised numerous clients in both the public and private sectors. Her multidisciplinary experience covers many aspects of European Union law, in particular international sanctions enacted within the framework of the European Union's foreign policy, as well as State aid (including services of economic interest general) and civil service law.

Wadii Miftah, *Junior Associate*, holds an LL.M in EU law from the University of Liège and a Master's in law from the UC Louvain. He joined DALDEWOLF after various internships in leading law firms as well as at the French Competition Authority.

The DALDEWOLF EU team provides assistance in the context of internal market, audit and investigations relating to EU financial interests, regulated professions, common foreign and security policy (including sanctions), European contracts, European and international civil service, with particular attention paid to respect for fundamental rights. Anaïs Guillerme and Thierry Bontinck also have recognized experience in proceedings before the Court of Justice of the EU.

Patrick De Wolf, Managing Partner, adds: *"Marianne and Wadii reinforce the development dynamic of DALDEWOLF. The 'EU Law' team is more than ever able to assume its role as a reference at the heart of the European Union"*.