DALDEWOLF

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RENOUVEAU DEMOCRATIE CONSEIL

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EDITO

Dear readers,

In this new issue, we propose to analyze the rules and principles applicable to the medical examination prior to taking up employment.

With regard to case law, the General Court recently recalled the time limit to submit a complaint that applies to the notification of a decision by electronic means and the principles relating to the burden of proof of such notification.

In our "Daily life in Belgium" section, we will present the new Brussels regulation on rent indexation and the energy performance certificate (PEB).

If you would like us to address specific topics in future issues of the OFFICI@L, please send us your questions or suggestions (*theofficial@daldewolf.com*). We look forward to hearing from you.

We wish you a pleasant reading!

The DALDEWOLF team

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THE PRE-EMPLOYMENT MEDICAL EXAMINATION

Every candidate official who has been selected by the EU Administration must undergo a medical examination by one of medical officers of the recruiting institution before appointment (Article 33 of the Staff Regulations). The purpose of this examination is to check whether the candidate has the physical, mental and/or psychological aptitudes required to perform the function.

During this medical examination, the candidate is obliged to answer the medical questionnaire and the questions asked by the doctor sincerely and completely (judgment of 23 March 2000, Rudolph v. Commission, T-197/98).

In the light of these replies and the results of the examination, the medical officer may issue an *opinion of unfitness*, based on the existence of current disorders suffered by the applicant and/or on a medically founded prognosis of future disorders likely to jeopardise the normal performance of the duties envisaged in the foreseeable future (judgment of 18 September 1992, X v Commission, T-121/89).

Upon receipt of this opinion, the candidate official may request, within 20 days of notification of the doctor's opinion, that his case be re-examined by a Medical Committee made up of three doctors chosen by the Appointing Authority from among the institutions' medical officers. The candidate may submit to the Medical Committee an opinion drawn up by a doctor of his choice, with any other medical documents proving his suitability for the post. This procedure is an essential additional guarantee of the rights of officials to be heard and must be respected before any decision to refuse appointment is taken (judgment of 14 April 1994, A v Commission, T-10/930).

From the time of the candidate's request, the Medical Committee must give an opinion within a reasonable time, unless the institutions have adopted more detailed provisions.

In addition, in the event of refusal on the grounds of physical unfitness following the medical examination, the Administration must give its motivation by communicating the reasons for unfitness and the results of the medical examinations carried out to the doctor treating the unsuccessful candidate or directly to the latter, if he or she so requests (judgment of 27 October 1977, Moli v Commission, 121/76).

If the candidate chooses to bring an action for annulment against the decision not to recruit on the grounds of unfitness, the EU General Court will conduct a limited review of the medical assessments contained in the opinion of the medical officer or the Medical Committee, by verifying notably whether the opinion establishes a comprehensible link between the medical findings it contains and the conclusion it reaches (judgment of 21 October 2009, C v Commission, F-33/08). In addition, the judge may check whether the refusal to recruit is based on a reasoned medical opinion or whether the rules pertaining to the composition and functioning of the Medical Committee have been respected (judgment of 21 October 2009, V v Commission, F-33/08).

Furthermore, if the medical examination reveals that the candidate is suffering from a disease or infirmity, the Appointing Authority may decide to appoint him or her anyway, but to allow the candidate to benefit from the statutory guarantees regarding invalidity or death only at the end of a period of five years from the date of his or her entry into the service for the consequences of that disease or infirmity (Article 1(1) of Annex VIII to the Staff Regulations).

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Finally, as this examination constitutes an intrusion into the private life of the candidates, the institution cannot impose on the future official to undergo a test against the official's will (as for the VIH virus test for example). This could be an inordinate infringement of a person's right to keep his or her health status secret. However, if this test is necessary for the assessment of the candidate's physical abilities, the institution must inform the candidate that it will not be able to employ him or her if the test is not carried out (judgment of 5 October, X v Commission, C-404/92).

CASE-LAW

TIME LIMIT FOR APPEAL AGAINST A DECISION NOTIFIED BY ELECTRONIC MEANS AND BURDEN OF PROOF

In a judgment delivered on 1 August 2022 (Petrus Kerstens v. European Commission, C-447/21 P), the Court of Justice of the EU recalled the principles that apply to the time limit for bringing an complaint in the case of notification of decisions by electronic means and the burden of proof in the event of the action being out of time. The Court ruled, on appeal, on an order of the EU General Court which had dismissed as out of time an action for annulment brought against decisions of the European Commission, rejecting complaints relating to requests for assistance.

The Court recalls, firstly, that a decision is duly notified, within the meaning of the provisions of the Staff Regulations, when not only has it been communicated to the addressee, but the addressee must also have been able to have effective knowledge of its content.

Furthermore, it is up to the party claiming that the time-limit to lodge a complaint has been exceeded to prove the date on which the time-limit started to run. To do so, the party must not only show that a decision was sent to the addressee's e-mail address, but also that the recipient received it and had the opportunity to open the e-mail containing the decision in question and read it on that date. The addressee may then limit himself to challenging the factual elements produced by that party.

The analysis must therefore be made on a case-by-case basis. Consequently, any general presumption that the addressee of a decision notified by e-mail can only have been given useful knowledge of its content on the date on which he or she consulted the e-mail address, would not be compliant with the provisions of the Staff Regulations. The same conclusion applies to a general presumption that the addressee of such a decision is in a position to take note of its content, in any event, as soon as it is received in his or her e-mail account.

In this case, the Commission produced a copy of the e-mail containing the Institution's decisions in order to establish that the decisions rejecting the claims relating to its requests for assistance were sent to the recipient's e-mail address. Furthermore, it states that the e-mail address was valid at the time of sending and that it corresponded to the address that the recipient regularly use. Furthermore, to establish that the addressee had been made able to have effective knowledge of the content of the decisions sent, the Commission produced a document that the addressee had sent, in another case, by e-mail on a date subsequent to that of the sending of the Institution's e-mail, from the same e-mail address, in which he stated that, on the same day as he received the Commission's e-mail, he had access to this e-mail address.

On the basis of these factual elements, the Court found that the addressee has been able to have effective knowledge of the content of the document he had received by e-mail and that he was, at that time, in a position to consult his personal e-mail box and, therefore, also in a position to have effective knowledge of the decisions rejecting the complaints.

Therefore, the Court held that the rules on the burden of proof had been complied with and dismissed the appeal.

NEW REGULATION ON RENT INDEXATION IN BRUSSELS IN CONNECTION WITH THE PEB CERTIFICATE

On 13 October 2022, an order «portant modification du Code bruxellois du Logement en vue de modifier l'indexation des loyers» was adopted. Thus, from 14 October 2022 until 13 October 2023, the indexation of rents in Brussels is carried out according to the energy performance of the rented property.

This new regulation aims to support tenants facing the energy crisis and is part of the government's programme to accelerate the renovation of the Brussels building stock.

There are now three new categories of rental properties. Depending on their energy performance, the landlord may or may not index the rent.

According to article 224/2 of the Code du logement the categories are as follows:

- Properties with certificate A, B, C or D can be indexed at 100%.
- Properties with certificate E can only be indexed at 50%.
- Properties with certificate F, G or without any certificate can no longer be indexed.

Furthermore, the lease must be in writing, registered and the certificate must be communicated to the tenant in order to proceed to the indexation. These conditions have been inserted in the Code without time limits, in contrast to the blocking of indexation on the basis of the PEB (Performance énergétique du bâtiment) certificate described above.

This new measure does not apply retroactively. Rents that were indexed before 14 October 2022 are not covered by the new regulation. However, the new indexation rules will apply for 2023.

However, if the landlord carries out work that improves the energy performance of the property and possibly results in a better PEB certificate, the landlord will be able to index the rent.

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