DALDEWOLF

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EDITO

Dear readers,

This last issue of the OFFICI@L of 2022 is also an opportunity to wish you a happy holiday season and all the best for the new year.

Please remember that this is also your publication and we would be delighted to hear your feedback on the topics you would like to see covered. Please do not hesitate to write to us (*theofficial@daldewolf.com*).

In this new issue, we take a look at the duty of care.

In terms of case law, a judgment handed down on 5 October 2022 gives us the opportunity to examine the conditions under which the Administration may terminate an employment contract at the end of a sick leave.

Finally, in Belgian law, we will look at some new developments in private international law with the entry into force of the Brussels IIb Regulation.

We wish you a pleasant reading!

The DALDEWOLF team

FOCUS

DUTY OF CARE

The Administration's duty of care stems from case law and is intended to reflect the balance of reciprocal rights and obligations that the Staff Regulations and the Conditions of Employment of Other Servants of the European Union (CEOS) have created in the relationship between the public authority and its servants.

This duty, with the principle of good administration, implies that an administration, when deciding on the situation of an official or other servant, must take into consideration all factors which are likely to determine its decision and that, in so doing, it must take account not only of the interests of the service but also of those of the official or other servant concerned (judgment of 23 November 2022, Bowden and Young v Europol, T-72/21).

The duty of care reinforced, even positive, obligations on the part of the Administration, in particular when it comes to taking into account, before adopting a decision, the state of health of officials and other servants and their real career prospects.

Thus, as regards the health of staff members, the Administration must take adequate and effective measures to ensure that the official or other servant enjoys healthy working conditions (judgment of 10 December 2008, Nardone v. Commission, T-57/99).

Furthermore, it is settled case law that the Administration's obligations are substantially reinforced when its decisions may affect the particular situation of an official or other servant in respect of whom there are doubts as to his mental health and, consequently, as to his ability to defend his own interests adequately (judgment of 26 October 2022, KD/EUIPO, T-298/20). Thus, the European judge invited the Administration to insist that a civil servant with signs of mental disorder accept a medical examination in order to be certain of her mental health before taking any decision to dismiss her (judgment of 28 October 2010, U/Parliament, F-92/09).

If an official's physical or mental health is affected, the Administration must examine his or her requests in a particularly open-minded manner (judgment of 30 March 2022, PO v. Commission, T-36/21), such as a request for recognition of an occupational disease or for a review of the initial decision of the selection board.

As regards the preservation of genuine career prospects, since the assessment of the official's skills will necessarily influence his or her possible promotion, the annual assessment must take account of all relevant information and it is necessary for the hierarchical superior to set objectives in advance (judgment of 8 October 2013, Conseil/AY, T-167/12 P and judgment of 9 October 2013, Wahlström/Frontex, F-116/12). Otherwise, the Administration is in breach of its duty to have regard for the welfare of the employee.

The duty of care is important, especially for EU staff, when the Administration is assessing whether to renew a staff member's contract. This duty does not require the Administration to verify the possibility of reassigning a staff member to another department when his or her post is abolished (judgment of 19 July 2017, Parliament/Meyrl, T-699/16 P). Nor is it the basis for an obligation to reassign to another department a probationary official or a staff member on probation whose probationary period the Administration decides to extend (judgment of 13 December 2012, BW v Commission, F-2/11). Nevertheless, it is possible to justify the decision to extend the probationary period in order to give the probationer a second chance to obtain establishment.

However, the possibility of invoking the duty of care is not unlimited. The Appointing Authority still has a wide discretion in assessing the interests of the service and the review by the Court of Justice of the EU must therefore be limited to the question of whether the authority concerned has kept within reasonable limits and has not exercised its discretion in a manifestly erroneous manner (judgment of 4 December 2013, ETF/Schuerings, T-107/11 P). Furthermore, the protection of the rights and interests of civil servants must always be limited by compliance with the rules in force. Finally, a breach of the duty of care may render the Institution concerned liable for any damage caused, but it cannot in itself affect the legality of the contested decision (judgment of 7 September 2022, DD/FRA, T-470/20).

CASE-LAW

TERMINATION OF AN EMPLOYMENT CONTRACT AT THE END OF SICK LEAVE

In a judgment delivered on 5 October 2022 (case T 618/21), the EU General Court clarified the conditions under which the Administration may terminate an employment contract at the end of sick leave.

Article 16 of the CEOS provides that sick leave with retention of remuneration may not exceed three months or the length of service of the staff member, where this is longer, and may not in any event extend beyond the duration of the employment.

Article 48(b) of the CEOS provides, moreover, that if the staff member is unable to resume his duties at the end of such sick leave, his appointment may be terminated by the institution without notice. In such a situation, the Institution must therefore establish that the period of paid sick leave has expired and that the staff member concerned is unable to resume his duties at the end of that period.

In the case before the General Court, the applicant is a staff member who signed a contract of indefinite duration with a Union agency in 1997. After several periods of paid sick leave between 2019 and 2020, the Administration's medical service decided that the applicant could return to work part-time for one month from May 2020. However, he considered that he was not able to return to work and submitted a request for arbitration of this decision, at the end of which the conclusions of the medical service were confirmed, followed by a request to open an invalidity procedure, which was refused.

The Administration therefore considered that the staff member had been unjustifiably absent since May 2020 and that, by adopting such behaviour, he had terminated his rights to paid sick leave. In this context, his employment contract was terminated without notice, on the basis of Article 48(b) of the CEOS.

According to the applicant, Article 48(b) of the CEOS could not provide a basis for such a decision, since at the time of his adoption he was not on paid sick leave, but in a situation of unjustified absence. Moreover, the maximum duration of his paid sick leave should have corresponded to the duration of his service in the Agency, 22 years.

The General Court found in favour of the applicant, considering that the Agency had terminated his indefinite appointment without verifying that the first condition laid down in Article 48(b) of the CEOS had been met (exceeding the time limit for paid sick leave). In particular, the General Court refuted the interpretation put forward by the Agency, according to which the finding of unjustified absences of a staff member could exempt the Administration from its obligation to ensure that the condition relating to exceeding the time-limit for paid sick leave laid down in Article 16 of the CEOS is met.

This verification is a necessary preliminary step. The Court considers that, since the Agency did not assess the first condition, the second condition (impossibility for the staff member to return to his duties at the end of the period fixed for paid sick leave) could not be considered as satisfied.

In conclusion, even if the Administration notices unjustified absences of a staff member, this does not absolve it from its obligation to ensure that the condition relating to the exceeding of the time-limit for paid sick leave laid down in Article 16 of the CEOS is met, if it intends to terminate his contract of employment. If this is not the case, other procedures may be considered, such as the opening of an invalidity procedure, or disciplinary proceedings against her or him.

ENTRY INTO FORCE OF THE BRUSSELS IIB REGULATION ON JURISDICTION, THE RECOGNITION AND ENFORCEMENT OF DECISIONS IN MATRIMONIAL MATTERS AND THE MATTERS OF PARENTAL RESPONSIBILITY

On 25 June 2019, the Council of the EU adopted Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction, known as the "Brussels IIb" Regulation. The latter recasts and replaces the so-called "Brussels IIa" Regulation of 27 November 2003.

Any person involved in divorce or parental responsibility proceedings may be affected by the implementation of this Regulation if there are foreign elements (different nationalities, place of residence other than Belgium, place of marriage other than Belgium, place of first common residence, etc.).

Brussels IIb is fully enforceable in Belgian law since 1 August 2022. It applies between all EU Member States, except Denmark.

It is impossible to discuss all the changes in detail, but it is worth mentioning the following major changes.

As regards the question of jurisdiction, the spouses are still unable to choose the judge who will rule on their divorce, although they can choose the law applicable to their divorce under the "Rome III" Regulation.

However, several criteria exist and allow the spouses to choose, among several States, and taking into account criteria which are not in order of importance, the one before which to initiate divorce or legal separation proceedings. This clearly encourages what is known as "forum shopping".

However, the spouses cannot jointly elect their judge.

With regard to parental responsibility, the child is at the heart of the recast, to align with other international instruments.

Again, as regards jurisdiction, the reference criterion is clearly that of the child's habitual residence, and this does not change. The court having jurisdiction to rule on questions of parental authority and custody is the court of the State of the **child's habitual residence**, to be assessed at the time the court is seized (Article 7 Brussels IIb).

However, while the spouses cannot choose the judge for their divorce, Article 10 of the Regulation allows the holders of parental responsibility to agree on the competent judge "at the latest at the time the court is seized", provided that this choice is made in the best interests of the child. This is a new provision.

Still on the subject of parental responsibility, Article 21 of the Regulation also gives a much **more important place to the child's views**. This is a right as soon as the child is capable of forming his or her own views. The judges will be required to give reasons that formally meet the child's views (one way or the other). Some sanctions are provided for in the Regulation.

Therefore, a decision may not be recognised in another Member State if the child has not been given the opportunity to be heard. This becomes a ground for non-recognition (Article 39 of the Regulation).

Finally, **a procedure for international child abduction is established**.

The purpose of the Regulation is to supplement the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, which remains fully applicable.

However, the Regulation now sets time limits for return proceedings (six weeks per level of jurisdiction) and hence requests Member States to use the most rapid procedures available under their national law. This is also new.

The emphasis is still on the interests of the child by requiring that the child be heard but also that return be ordered only if it is in his/her best interests.

The role of the central authorities is also strengthened.

Finally, the Brussels IIb Regulation aims **to facilitate the circulation of judgments, authentic instruments and certain agreements within the European Union**. Exequatur is simply abolished. Only a certificate drawn up by the Member State of origin is required in order to enforce a decision, an authentic instrument or an agreement in another Member State (although grounds for refusing recognition or enforcement do exist).

Both practitioners and litigants should therefore remain vigilant, taking into account the changes that have come into force.

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