DALDEWOLF

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EDITO

Dear Readers,

This issue focuses on the role and activities of the European Ombudsman in relation to the European civil service, and on a recent ruling by the EU General Court concerning promotion decisions.

In our section "Belgian law", we will be looking at distance contracts for urgent repairs.

This newsletter is also yours, and we welcome any suggestions you may have for future issues. Don't hesitate to contact us by e-mail: theofficial@daldewolf.com.

We hope you enjoy your reading!

The DALDEWOLF team

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FOCUS

THE EUROPEAN OMBUDSMAN

The European Ombudsman is an independent body that helps to identify situations of maladministration by the institutions, bodies, offices and agencies of the European Union.

In practical terms, the European Ombudsman can be called upon by EU staff and officials to resolve blockages or disputes relating to certain practices of the European administration acting as an employer.

For example, in January 2024 the European Ombudsman closed an enquiry launched in 2023 which had led the European Personnel Selection Office (EPSO) to cancel and repeat a selection procedure that had taken place solely at a distance. In this case, EPSO had set a series of technical requirements likely to have a negative impact on candidates with lower incomes: on the one hand, the candidate was required to use personal computer (with administrator rights, excluding "company" computers), with a screen of at least 19 inches and a recent version of Windows or macOS, and, on the other hand, he or she had to take the test in a physical space meeting strict characteristics.

The Ombudsman has also identified shortcomings in terms of:

i. prior information on the conditions for taking the test;
ii. clear instructions on technical incidents;
iii. transparency in the lodging and handling of complaints;
iv. a procedure for rescheduling the tests in exceptional circumstances, given that the candidate could not choose the date on which the tests would be repeated).

Following complaints from candidates and the Ombudsman's intervention, EPSO cancelled and re-launched the selection procedure. In this way, recourse to the European Ombudsman represent an additional string to the bow of agents and officials in the range of possibilities for asserting their rights, in an attempt to obtain a relatively rapid and accessible resolution of the problems encountered in the performance of their duties.

However, it is important to bear in mind that lodging complaints with the European Ombudsman does not suspend the time limits for appeals in administrative or judicial proceedings.

How do I lodge a complaint?

Any natural or legal person, including EU officials and other servants, residing or having its registered office in an EU Member State may lodge a complaint about maladministration with the Ombudsman.

A complaint to the Ombudsman must be made after internal administrative procedures have been exhausted and within 2 years of the administration concerned becoming aware of the reasons.

In practical terms, concerning the civil service, this means that the staff member or official concerned must ensure that he or she has first notified the authority concerned (Appointing Authority or AECC) of his or her grievances, by means of a request and/or a formal complaint within the meaning of Article

90 of the Staff Regulations. This is a prerequisite for the Ombudsman to consider the complaint admissible.

Procedure

When prior internal remedies fail and are exhausted, a complaint of maladministration may be submitted. This can be lodged individually or on behalf of others, and must contain a detailed description of the problem encountered and set out the relevant evidence.

Once a valid complaint has been lodged, and if he considers it admissible, the European Ombudsman investigates the complaint. As part of this, the European Ombudsman will contact the EU institution concerned in order to obtain information and possible explanations about the problems complained of. The Ombudsman also has a wide range of investigative measures at his disposal, including searching for relevant documents and conducting interviews where appropriate.

The procedure before the European Ombudsman is designed to be accessible, enabling individuals to submit complaints independently.

It is therefore not compulsory to be assisted by a lawyer, although this can be particularly useful when the case concerns the interpretation of a legal provision.

Results

If the institution acknowledges the error and takes corrective action, the case is resolved and, if the complainant is satisfied with the outcome, the European Ombudsman closes the case. Please note, however, that the European Ombudsman simply makes recommendations, and the Institution may decide not to follow them if it does not consider it appropriate to do so. In this respect, it is important to bear in mind that lodging complaints with the European Ombudsman does not suspend the time limits for appeals in administrative or legal proceedings. The staff member or official therefore often has to choose between these types of procedure.

Nevertheless, the intervention of the European Ombudsman can be particularly effective in situations where a rapid solution is crucial both for the complainant and for the Institution in order to avoid a conviction and compensation for any damage: in 2022, for example, the intervention of the European Ombudsman led the Parliament to respond in one month to a request for recognition of the occupational illness of a member of staff which had been pending for more than a year..

CASE LAW

NON-PROMOTION DECISION

In a judgement dated February 7, 2024 (XH/Commission, T-353/22), the General Court of the European Union confirms the Commission's decision not to include the applicant on the list of officials for the 2021 promotion exercise.

On this occasion, the Court recalls its consistent case law on promotions, particularly regarding the criteria and documents that can be taken into account by the Appointing Authority (AA)in the context of the comparative examination.

The applicant before the Court is an official at OLAF and was recruited at grade AD5 in 2014. She was then promoted to grade AD6 as part of the 2018 promotion exercise.

In terms of promotion, the applicable standards prescribe:

1. the comparison of merits of officials eligible for promotion
2. considering, for this purpose:

   2.1. the evaluation reports the candidate for promotion has received since its last promotion, or since its recruitment if no promotion had occurred;

   2.2. the use, in the performance of their duties, of languages other than the language in which they have demonstrated proficiency;

   2.3. the level of responsibilities exercised;

   2.4. this list is not exhaustive, other criteria may also be considered.

In the present case, the applicant had already not been selected for the 2017 promotion exercise and had filed an appeal seeking the annulment of the 2017 non-promotion decision on the ground that her probationary period report, which had mentioned difficulties encountered by the applicant with some colleagues at the beginning of her probationary period, had been taken into account at the time in the comparative assessment of her merits.

Following a first appeal (XH/European Commission, T-511/18), the 2017 non-promotion decision had been

annulled due to the consideration of this probationary period report during the promotion exercise.

According to the applicant, the judgement delivered in the context of the first appeal had been executed by the Commission, as her probationary period report was still part of her personal file at the time of the comparative assessment of merits for the 2021 promotion exercise, negatively influencing her chances of being promoted.

On this specific point, the Court recalls that while it contains several observations on the official's work aptitude, the probationary period report's sole purpose is to prepare the Administration's decision to confirm or to terminate the official's appointment at the end of the probationary period. In this context, the probationary period report cannot be considered in the promotion exercise of a confirmed official, especially when, as in this case, it contains criticisms that exceeded those objectively necessary to assess the existence of difficulties in the service.

The Court considered that the applicant can no longer rely on the alleged negative influence of her probationary period report on the 2021 promotion exercise. In particular, the Court emphasizes that it had deemed, at the time, that the circumstances should lead to the exclusion of the applicant's mid-term report from the documents forming the basis of the comparative examination of merits conducted for the 2017 promotion exercise. However, contrary to the applicant's request, the Court is not competent to order the removal of said documents from an official's personal file. In any case, in this instance, it appears that her reports were removed from the applicant's Sysper 2 personal file in 2018. The applicant's arguments are therefore rejected.

According to the applicant, the AA also made an error of assessment concerning the merits of the candidate officials.

Nevertheless, the 2021 non-promotion decision is sufficiently informed and unambiguous. The Court recalls that it is not its role to conduct a detailed re-examination of the promotable candidates' files and, to preserve the useful effect of the AA's margin of appreciation, interprets the term "manifest" as targeting errors that are easily perceptible and can be clearly detected through the application of the criteria in the comparison made by the AA.

In the context of its limited review, it is worth noting that the Court still examines the merits of the excluded candidate in comparison with other promoted colleagues, namely the type of responsibilities exercised (simple or management responsibility compared to high-level responsibilities); the number of languages spoken by the candidates; the role and integration of candidates within their unit ("quick integration" and "participation in daily activities" compared to "pillars of the unit"; "highly appreciated by their colleagues and hierarchy", "indispensable for the unit"); the quality of the candidates' performances ("satisfactory" compared to "work with dedication, competence, and efficiency"); the level of the candidates' progression, etc.

As a result, the Court did not find any manifest errors, hence it did not grant the applicant's request and dismissed the appeal.

BELGIAN LAW

DISTANCE CONTRACT FOR URGENT REPAIRS

The legal framework for distance contracts for urgent repairs

How can you protect your rights when you need to call on a service provider urgently?

Resorting to a service provider (e.g. a plumber or locksmith) in emergency situations can expose consumers to abuse. The use of such services falls within the scope of contracts described as "distance contracts for emergency repairs", which are covered by consumer protection provisions in the Code of Economic Law (articles VI.45 et seq.).

A distance contract is defined as "*any contract concluded between a service provider and a consumer, under an organised distance sales or service-provision scheme, without the simultaneous physical presence of the trader and the consumer, by the exclusive use of one or more means of distance communication until the conclusion of the contract*".

Distance contracts for "emergency repairs" are defined as "*contracts in which the consumer has expressly asked the company to visit him in order to carry out urgent maintenance or repair work*" (Art. VI.53/8 of the CDE).

Some contracts are excluded from the scope of the above provisions because they are subject to special regulations. These include, for example, **agreements concerning legal aid provided by a lawyer** (Article VI.1/1 of the CDE) or relating to financial services.

The Code of Economic Law stipulates that, prior to the conclusion of a distance contract for emergency repairs, the consumer must receive **the following pre-contractual information from** the service provider **in a clear, intelligible and comprehensible manner**:

- the **main features** of the service, as appropriate to the communication medium;
- the **name** of the service provider and its postal, telephone and e-mail address;
- **the address** of the service provider (and its registered office if different) ;
- the **total price** of the service including all taxes or the **calculation method of the price**, where the price cannot be reasonably calculated in advance due to the nature of the good or service (i.e. additional costs of transport, delivery, postage and any other eligible costs);
- the **cost of using** the distance **communication technique** to conclude the contract, if the basic tariff is not used;
- **terms of payment**, delivery and performance,
- the **date** on which the company undertakes to perform the services ;
- the arrangements made by the company for **handling complaints and the possibility of having recourse to an extrajudicial complaints and redress procedure, where applicable**;
- mention of the absence of the right of withdrawal and the circumstances in which the consumer loses this right (Art.VI.45/ and Art.VI.53/8 of the CDE);

If, on the occasion of this visit, the business provides services in addition to those specifically requested by the consumer or goods other than spare parts essential for maintenance or repair work, the right of withdrawal applies to these additional services or goods. (Art.VI.53/8 of the CDE)

- the existence of a **code of conduct** ;
- the **duration of the contract** ;
- the minimum duration of the consumer's obligations ;
- the existence of applicable financial **warranties**;
- where applicable, the possibility of recourse to an extrajudicial complaint and compensation proceedings to which the company is subject (by virtue of the contract or a code of conduct) and the arrangements for accessing it.

The burden of proof regarding compliance with the information obligations set out in this Article shall lie with the service provider.

In the context of emergency situations, requiring the full communication of this information prior to intervention by the service provider may appear unrealistic.. Therefore, if the service provider cannot provide all the information, because of the limits imposed by the communication of this data, he must at least indicate the characteristics of the goods or services, their price, his identity, the duration of the contract and the right of withdrawal. To avoid any misuse, it is essential to request an estimate price prior to the work being carried out and to retain proof of this estimation communicated (via some form of electronic communication: hypertext link, photo sent by email of the paper version, etc.).

In the event of non-compliance with this enhanced consumer protection and if no solution can be found with the company concerned, the consumer may have recourse to an extrajudicial complaints or redress procedure if this is provided for in the contract or in a Code of Conduct binding on the service provider in question.

If no extrajudicial procedure is available, the consumer may submit a request for out-of-court settlement of a consumer dispute to the online Consumer Mediation Service (Request form | Consumer Mediation Service (consumerombudsman.be) (Art.XVI.6 and XVI.15 of the CDE). This request is processed free of charge.

Appeals may still be lodged with the ordinary courts.