DALDEWOLF

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EDITO

Dear Readers,

This issue contains a practical guide to cases of absence on medical grounds, in the Focus section. The Jurisprudence section is devoted to the judgment of 18 April 2024 in which the Court of Justice clarified the national social security affiliation obligations of officials and other servants.

Finally, an analysis of the conditions that a bank must meet in order to terminate a consumer contract with a customer in respect of whom the bank is clearly unable to fulfil the due diligence obligations imposed by the rules on anti-money laundering.

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

OUR TEAM

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FOCUS

THE RIGHT REFLEXES WHEN IT COMES TO MEDICAL ABSENCES

An official who provides evidence that he is temporarily unable to carry out his duties due to illness or accident is entitled to sick leave.

In the event of absence on medical grounds, certain reflexes should be adopted to avoid the penalties provided for in the Staff Regulations for irregular absences when checks are carried out by the Administration. These can be deductions from the official's annual leave or pay. The Administration may even initiate administrative or disciplinary proceedings.

Reflexes to adopt:

Any official temporarily prevented from carrying out his duties must notify his institution as soon as possible by producing a medical certificate from the fourth day of his absence. This certificate must be sent no later than the fifth day of the absence.

The official will also be required to produce a medical certificate for any further absences due to illness where absences due to illness without a medical certificate of no more than 3 days exceed a total of 12 days over a 12-month period.

Temporary incapacity to work, which gives entitlement to sick leave under Article 59 of the Staff Regulations, and which maintains remuneration, should not be confused with permanent and total invalidity (under Article 78 of the Staff Regulations), which gives entitlement to an invalidity allowance.

Medical examination:

An official on sick leave may at any time be required to undergo a medical examination arranged by the institution (judgment of the Civil Servant Tribunal of 30 November 2010, Taillard v Parliament, F-97/09). If the medical examination reveals that the official is fit to carry out his duties, his absence is considered to be unjustified. This means that deductions will be made from the official's annual leave and, once this period has elapsed, from his remuneration.

As regards the content of the examination, it is up to the medical service of the official's institution to decide, based on the official's state of health, what type of examination is appropriate or essential, even if it involves psychiatric tests.

Disciplinary proceedings:

In addition, irregular absence may lead to the initiation of administrative enquiries and, if necessary, disciplinary proceedings (judgment of the Civil Servant Tribunal of 30 January 2020, PV/Commission, T-786/16 et T-224/18).

The official may, of course, challenge the conclusions of the medical examination and submit to the institution, either directly or through his doctor, a request for arbitration by an independent doctor within two days (judgment of the Civil Service Tribunal of 22 May 2007, Lopez Teruel/OHMI, F-99/06). The institution must then forward this request to another doctor appointed by mutual agreement between the official's doctor and the institution's medical officer. If these two doctors do not agree within 5 days, the institution chooses one of the persons on a list of independent doctors drawn up each year for this purpose by mutual agreement between the Appointing Authority and the Staff Committee.

The official may contest this choice within two working days. In this case, the institution again makes a new choice, which is final. The opinion given by this independent doctor (the arbitrator) is binding on both parties and requires prior consultation with both the official's doctor and the institution's medical officer:

=> positive opinion from the arbitrator: confirmation of the conclusions of the check organised by the institution, the absence will be treated as an unjustified absence;

=> negative opinion from the arbitrator: no confirmation of the conclusions of the inspection, the absence will be treated as an absence for good reason. As a result, any deductions from annual leave and salary will be withdrawn retroactively, and the disciplinary procedure will also be withdrawn.

Referral to the Invalidity Committee :

If an official is on sick leave for more than 12 months in any period of three years, the Appointing Authority may refer the matter to the Invalidity Committee, which may examine the official's ability to perform the duties corresponding to a post in his function group, and thus assess whether he is suffering from permanent invalidity deemed to be total within the meaning of Article 78 of the Staff Regulations.

In principle, there is nothing to prevent a civil servant from also requesting that his or her case be referred to an Invalidity Committee, without a minimum period of absence being required.

CASE LAW

DO CIVIL SERVANTS WHO ENGAGE IN AN ANCILLARY PROFESSIONAL ACTIVITY HAVE TO JOIN THE NATIONAL SECURITY SCHEME?

In one of the rare rulings handed down on 18 April 2024 on preliminary questions concerning the EU civil service, the Court of Justice was confronted with the obligation imposed by Belgian law on all persons, including EU staff and officials carrying out a secondary activity in Belgium, to join and contribute to the national social security scheme (C-195/23).

This ruling follows the “Acerta” case (C-415/22). In that case, the Court stated that a Member State that requires an EU official, who has remained in service until retirement age and then pursues a self-employed activity, to join the social security scheme, does not respect the Union’s exclusive competence to determine the social security obligations applicable to EU officials.

Facts

The claimant before the Brussels’s Tribunal du travail francophone is a Commission official who, from 2015, was authorised to carry out a paid teaching activity for 20 hours a month.

In 2018, the claimant joined a Belgian social insurance fund in order to comply with a request from the Belgian authority

responsible for social security for the self-employed (INASTI), which had told him that he was obliged to do so.

Considering himself exempt from such an obligation, the claimant therefore brought an action before the French-speaking Labour Court of Brussels, which stayed the proceedings in order to put questions to the Court of Justice in this regard.

Preliminary question

The question asked was whether an EU official, already subject to the EU institutions' social security scheme, could be required by a Member State to also be subject to a national social security scheme and pay social security contributions. This question referred to Article 14 of the Protocol on the Privileges and Immunities of the EU and Article 4(3) TEU.

Contribution

The Court recalled that the Union has exclusive competence to determine the rules applicable to its officials and that Article 14 of the Protocol exempts officials from the obligation to join and contribute to the national social security scheme. It ruled that a Member State's rule requiring an EU official to join its social security system infringes the Union's exclusive competence and violates the principle of loyal cooperation set out in Article 4(3) TEU.

The Court also noted that such a rule could lead to unequal treatment of EU officials, potentially discouraging them from working for the EU. However, officials may still be taxed by Member States on their other income, but not on their social security obligations.

BELGIAN LAW

DE-RISKING, OR WHEN A BANK MUST TERMINATE A CONTRACT

By Pierre PROESMANS

"De-risking" is the decision taken by a financial institution to refuse to enter into business relations with potential customers or to terminate existing business relations with its current customers, on the grounds that these customers belong to a category of persons with which the financial institution believes there are excessive risks of money laundering or terrorist financing.

The relationship between a bank and its customer is based on the "account contract", which is a contract concluded for an indefinite period of time, with a strong element of intuitu personae.

The general principles governing the termination of open-ended contracts apply.

This means that any party to the contract - whether the bank's customer or the bank itself - has the right to terminate it, subject to certain contractually agreed conditions, and generally subject to reasonable notice. There is no right to maintain a bank account forever. Bank accounts are closed at the end of the relationship.

Book VII of the Code of Economic Law, which deals with payment services, also legitimises the unilateral termination of the framework contract governing the relationship between an institution and its customer, stating that if the contract so provides, the service provider may terminate the contract concluded for an indefinite period, in accordance with the procedures laid down in the Code, giving at least two months' notice.

The Belgian law on Anti-Money Laundering of 18 September 2017 also gives banks an additional legal basis for terminating the banking relationship. It provides that credit institutions that cannot satisfy the due diligence obligation imposed by law may neither enter into the business relationship nor carry out a transaction for the customer. This law also states that, where they cannot satisfy this same obligation in respect of existing customers, banks must terminate the business relationship already entered into.

However, aware of the problems posed by de-risking, the National Bank of Belgium - the banking sector regulator - has drawn up a circular to clarify the regulator's prudential expectations in relation to this phenomenon.

The National Bank confirms that it is neither appropriate nor consistent with the legal and regulatory requirements relating to the fight against money laundering and the financing of terrorism for a financial institution's client acceptance policy to make it a rule to exclude all business relationships with potential or existing clients on the basis of general criteria such as, among other things, their belonging to a particular economic sector.

For example, the National Bank of Belgium invites financial institutions whose acceptance policy includes such provisions to repeal them as soon as possible.

The National Bank considers that the provisions of the Belgian law on Anti-Money Laundering of 18 September 2017 should only be invoked to justify a refusal to enter into a business relationship requested by a customer in cases where the bank can justify that it is demonstrably unable to fulfil the due diligence obligations imposed by the Belgian law on Anti-Money Laundering of 18 September 2017. These recommendations also apply when an institution terminates a business relationship because it is unable to fulfil its due diligence obligations.

Traditionally, the only possible restrictions on a banker's freedom to terminate a relationship are abuse of rights, legal provisions relating to non-discrimination, and the basic banking service - for individuals and businesses.

The basic banking service for individuals was introduced by the legislator to combat banking exclusion. It requires banks to provide a guaranteed service.

Any consumer legally resident in a Member State of the EU is entitled to a basic banking service if the following conditions are met: the consumer does not already have a basic banking service or another current account in Belgium, even with another bank; the consumer does not have accounts for at

least € 6,000, including money held in accounts with other banks; the consumer does not have credit agreements for at least € 6,000; the consumer has not been guilty of a breach of the Belgian law on Anti-Money Laundering of 18 September 2017.

If these conditions are met, a bank cannot normally refuse the basic banking service.

Similar provisions exist for companies, subject to compliance with conditions and a procedure laid down by law.