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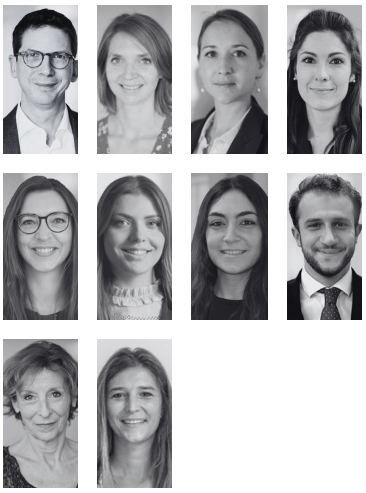

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EDITORIAL

Dear readers,

After a two-month break, The Offici@l is back for the start of the new season. The rights of officials and agents are at the heart of this September issue. Our feature article focuses on the issue of entitlement to contract renewal for agents and the precariousness that results from this.

In the case-law section, we examine the recent *Stanecki* judgment, which strengthens the rights of the person concerned and reinforces the principle of proportionality in disciplinary sanctions.

In our "Belgian Law" column, our family law specialists provide an overview of jurisdiction rules and applicable legislation in cross-border divorce cases.

This newsletter is also yours, and we welcome all your suggestions for future editions. Feel free to contact us by email: theofficial@daldewolf.com.

We wish you a pleasant reading!

The DALDEWOLF team

Focus – The precarious nature of fixed-term agent contracts

The growing reliance on fixed-term agent contracts within the European civil service has become a source of social insecurity and institutional instability. This precariousness runs counter to the principle that an independent administration should be based on staff with stable employment, protected against arbitrary dismissal (European Court of Auditors Report on the European Civil Service, No. 24/2024, p.17).

Temporary and contract agents now represent a significant portion of the workforce, reaching nearly 35% in 2023, highlighting a structural issue within the institutions (European Court of Auditors Report on the European Civil Service, No. 24/2024, p.19). It occurs that temporary contracts do not reach the maximum six-year duration. Sometimes positions are not renewed on the grounds of being no longer necessary; other times, agents have not attained the required level of skills.

Absence of a right to contract renewal

In the European civil service, a temporary agent holding a fixed-term contract does not have an acquired right to the renewal of that contract (Judgment of 14 December 2022, SU/AEPP, T-296/21, para. 48). As the General Court points out, the renewal of such a contract is merely a possibility, subject to the interest of the service (Judgments of 6 February 2003, Pyres/Commission, T-7/01, para. 64, and 16 December 2020, VP/Cedefop, T-187/18, para. 103), for which the administration has broad discretion (Judgment of 13 December 2018, Wahlström/Frontex, T-591/16, para. 46 and cited case law; Judgment of 16 December 2020, VP/Cedefop, T-187/18, para. 106). Nevertheless, according to settled case law, the competent authority is required, when deciding on the situation of a member of staff, to take into consideration, in accordance with the duty to have regard for the welfare of officials, all the factors which may determine its decision, that is to say, not only the interests of the service but also, in particular, those of the member of staff concerned (Judgment of 24 April 2017, HF/Parliament, T-584/16, para. 119 and cited case law).

Applied to a decision on the potential renewal of a contract agent's contract, the duty of care obliges the competent authority to balance the interest of the service with that of the agent (Judgment of 11 November 2020, AD/ECHA, T-25/19, para. 160).

In practice, unlike officials who enjoy a job stability provided for by the Staff Regulations, the discretion granted is such that only a legal error or a manifest error of assessment can lead to the annulment of a non-renewal decision.

Limited discretion where Internal Directives have been adopted

When an institution adopts internal procedures to regulate contract renewals, it imposes upon itself certain criteria and greater transparency. However, even within this framework, the absence of a right to renewal remains: the final decision still depends on the interest of the service and the agent's performance, based on available evaluation reports.

Procedure

When an administration considers not renewing an agent's contract, it is expected to respect a reasonable period between the notification of the intention not to renew and the actual adoption of the decision (Judgment of 14 July 2021, IN/Eismea, T-119/20, para. 170-171).

This period must allow the person concerned to be informed sufficiently in advance so that they may submit observations, present arguments, or provide additional elements that could influence the final decision. Thus, the non-renewal decision should only be taken after the agent has had the opportunity to be heard regarding the administration's intention. (Judgment of 7 June 2023, KD/EUIPO, T-650/20, paras. 59–60)

Impact of a negative evaluation report

It should be noted that the administration's decision not to renew may be based on a negative evaluation report. It is therefore always advisable to be attentive to the content of evaluation reports.

Impact of procedural irregularities

In the event of procedural irregularities (e.g., if a decisive evaluation report has not been finalized), the non-renewal decision may be annulled if the irregularity could have had a decisive impact on the outcome. However, this does not create an automatic right to renewal: the contractual relationship remains marked by the nature of fixed-term agent status

Article 90(2) complaint against non-renewal

A decision not to renew an agent's contract may be subject to a complaint under Article 90(2) of the Staff Regulations within three months of the adoption of the decision.

Such a complaint will primarily verify that all procedural rules were properly followed and that no manifest error was committed.

Appeal before the Court

If the complaint fails, it remains possible to bring an action before the General Court of the European Union. The Court will examine any legal errors or manifest errors of assessment in the non-renewal procedure. Under penalty of inadmissibility, only arguments already raised during the complaint procedure may be debated before the Court.
Legal representation by a lawyer is required for proceedings before the Court.

Case-law - The judgment *Stanecki* (T-108/24)

This is a noteworthy judgment that strengthens the rights of the individual concerned not to self-incriminate and not to acknowledge the alleged facts without such refusal to do so being treated as an aggravating circumstance.

Case background

In December 2021, the applicant sent an email from his personal address to the Permanent Representative of the Republic of Poland to the European Union (hereinafter "the Polish Ambassador"), accusing him of anti-European and pro-Russian positions and of working toward the destruction of democracy and free media.

The ambassador replied, copying the Secretary-General of the Commission and the Head of Cabinet of the President. The matter was referred to the Commission's Investigation and Disciplinary Office (IDOC), which conducted an administrative investigation. On 3 July 2023, the Commission imposed a disciplinary penalty on the applicant: suspension of step advancement for 12 months.

The applicant brought an action before the EU General Court seeking annulment of the decision and compensation.

He alleged, among other things, manifest errors of assessment in the disciplinary procedure, a violation of Article 12 of the Staff Regulations (dignity of the function), an infringement of his freedom of expression, and improper balancing of aggravating and mitigating circumstances.

Identified violations

Regarding the violation of Article 12 of the Staff Regulations, the Court confirmed that the applicant's conduct, even in a private context, could undermine the dignity of the European civil service. He was identifiable as an official, and his statements were hostile and disrespectful. His behaviour could be perceived as likely to create confusion about the interests pursued by the Union, which he is meant to serve, and as damaging the image of proper and respectful conduct that is legitimately expected from an EU official toward a Permanent Representative of a Member State.

Next, on the issue of freedom of expression, the Court recalled that officials' freedom of expression may be limited to preserve the relationship of trust with the institution. In this case, the sanction was not imposed for expressing an opinion, but rather for the manner in which it was expressed.

On the question of proportionality of the sanction and the weighing of aggravating and mitigating circumstances (Article 10 of Annex IX of the Staff Regulations), the Court first examined the aggravating factors, including the applicant's attitude during the disciplinary procedure, his seniority, and professional experience.

As for his attitude, the Appointing Authority (AIPN) reproached the applicant for not acknowledging the inappropriate nature of his emails, not offering an apology, and not committing to refrain from

repeating such behaviour. The Court held that this constituted a legal error: an official cannot be compelled to admit guilt or to commit not to reoffend when contesting the facts, as this would amount to forcing him to acknowledge the alleged misconduct. Moreover, the absence of a commitment not to reoffend cannot be considered an aggravating circumstance, since an official is in any case required to refrain from any conduct that could undermine the dignity of his function. (See judgment of 19 April 2023, OQ/Commission, T-162/22, para. 60)

Accordingly, the Court annulled the contested AIPN decision insofar as the tripartite AIPN had erroneously relied on the applicant's attitude during the disciplinary procedure as an aggravating factor. For the remainder, the Court rejected the applicant's other pleas concerning the assessment of mitigating or aggravating factors and his seniority.

It is worth noting that the opinion of the Disciplinary Board—which had not been followed by the tripartite AIPN—recommended a simple warning. The Court also criticized the unfortunate tendency of the AIPN, and particularly the Commission, to disregard the Disciplinary Board's opinions by relying specifically on the presumed attitude of the individual during the disciplinary procedure, thereby violating his strict right not to self-incriminate.

A significant judgment that is now under appeal before the Court of Justice!

Belgian Law – The elements of private international law that influence the divorce of two spouses

Transnational marriages are increasingly common. Spouses, whether of the same or different nationalities, may celebrate their union in a country other than their own, settle in another, and eventually establish themselves permanently elsewhere. This mobility raises important questions when one spouse, facing the breakdown of the relationship, wishes to initiate divorce proceedings: which court has jurisdiction to hear the case? Which law will apply?

This contribution aims, as far as possible, to answer these two questions by identifying the rules of jurisdiction (1) and applicable law (2) in divorce proceedings—that is, the sole question of whether, in the civil registry, two individuals are considered "married" or "divorced".

It is important not to confuse this issue with those relating to the effects of divorce on the spouses' (or 'ex-spouses') property (see next issue), their maintenance obligations, or the measures that may be taken between them, particularly regarding separate residence and the use of jointly owned property.

Each of these topics is governed by specific rules of jurisdiction and applicable law and therefore requires separate analysis.

1) What are the rules of jurisdiction for divorce?

Article 3 of the so-called "Brussels II ter" Regulation (No. 2019/1111) sets out a series of alternative connecting criteria to determine in which Member State a spouse may file for divorce. These criteria refer to the territory or territories at the time the court is seized:

- The habitual residence of both spouses;
- The last habitual residence of the spouses, provided one of them still resides there at the time of filing;
- The habitual residence of the respondent;
- If the application is made jointly by both spouses, the habitual residence of either spouse;
- The habitual residence of the applicant, provided they have resided there for at least one year prior to filing;
- The habitual residence of the applicant, provided they have habitually resided there for at least six months and are a national of that State;
- The State of common nationality of both spouses.

While the connecting criteria are numerous, it is clear that habitual residence remains the central factor.

In this regard, the Court of Justice of the European Union has had many opportunities to define the contours of the concept of "habitual residence."

For an adult, it is generally the place where they have established themselves on a long-term basis, assessed through a set of factual circumstances specific to each case (Judgment of 8 June 2017, OL, C-111/17 PPU, paras. 42 and 54; Judgment of 28 June 2018, HR, C-512/17, para. 41; Judgment of 10 April 2018, CV, C-85/18 PPU, para. 49. See also N. WATTÉ et R. JAFFERALI, « a) La notion de résidence habituelle », Rép. Not., Tome XVIII, Bruxelles, Larcier, 2019, pp 150-152, P. WAUTELET, « De la résidence à la résidence habituelle : la transsubstantiation appliquée au droit international privé », J.L.M.B., 2018/7, note sous Trib. Fam. Bruxelles (14ème ch.), 25 October 2017, p. 822).
It is "the place where, in fact, the centre of their life is located" (Judgment of 28 June 2018, HR, C-512/17, para. 42).

To determine whether the residence is habitual, "consideration will be given to the duration and continuity of the residence, as well as other personal or professional factors that reveal lasting ties between the person and the residence" (Judgment of 12 May 2022, WJ, C-644/20, para. 66; see also S. PFEIFF., « Titre V - Responsabilité parentale » in Droit des personnes et des familles, 1ère édition, Bruxelles, Larcier, 2011, p. 763).

2) What law applies to a divorce?

The law applicable to divorce is governed by the so-called Rome III Regulation (No 1259/2010), which provides that in the absence of a choice by the spouses: "Divorce and legal separation shall be subject to the law of the State:

1. of the spouses' habitual residence at the time the court is seized; or, failing that,
2. of the last habitual residence of the spouses, provided that this residence did not end more than one year before the court was seized and that one of the spouses still resides in that State at the time of filing; or, failing that,
3. of the nationality of both spouses at the time the court is seized; or, failing that,
4. of the court seized."

These four connecting criteria are hierarchical and not alternative, meaning that only if the first criterion is not met can the next be considered, and so on.

Conclusions

The above analysis, while covering a broad range of situations, cannot be exhaustive.

The jurisdiction of a court or the law applicable to a divorce may vary depending on the date of the application or the States involved. Particular attention must therefore be paid to the specific circumstances of each case.

Moreover, in certain cases, given the diversity of connecting criteria for determining jurisdiction, one spouse may have an interest in quickly seizing the court of a particular State to prevent the other party from doing so elsewhere. This is known as a "*forum race.*"

It is therefore essential to remain vigilant regarding the multiple options offered by the regulation, as well as the consequences that the couple's residence in a given State may have—particularly in matters of divorce.