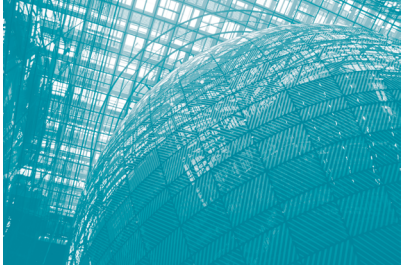

the OFFICI@L
legal newsletter on european civil service law
newsletter juridique de la fonction publique européenne

DALDEWOLF

March 2020 - number 56 - 7th year
contact: theofficial@daldewolf.com — www.daldewolf.com

EDITO

Dear readers,

These are challenging times as we are currently on lockdown in an effort to contain the coronavirus pandemic. This crisis acts as a reminder that our health and the health of our loved ones, friends and colleagues is the most precious asset we have. So let's stay at home.

In any case, the coronavirus will in no way prevent the publication of your monthly newsletter, as any reading should be welcomed during this lockdown.

In the case law we look into a recent judgment by the General Court clarifying the contours of the notion of "psychological harassment" and the restrictive interpretation that should be given to its constituent elements.

Our Focus is devoted to the financial liability of officials and other servants in accordance with Article 22 of the Staff Regulations.

In Belgian law, we provide an overview of the emergency measures aimed at limiting the spread of the new coronavirus.

We wish you an excellent reading!

The DALDEWOLF team

OUR TEAM

Contributors:
THIERRY BONTINCK,
ANAÏS GUILLERME
and LIVIA DUBOIS.

Stay informed by subscribing to our newsletter
> *https://bit.ly/theOFFICIAL*

This newsletter is published in collaboration with RENOUVEAU & DÉMOCRATIE

CASE LAW

THE CHARACTERIZATION OF A CONDUCT AS PSYCHOLOGICAL HARASSMENT DOES NOT REQUIRE PROOF OF ANY INTENT TO CAUSE HARM

In its judgment of 30 January 2020 *(joined cases T-786/16 and T-224/18)*, the General Court reconsidered the contours of the concept of psychological harassment.

The case at hand involves an official of the European Commission, initially assigned to the DG for Employment, Social Affairs and Inclusion, before his transfer to the DG for Interpretation, within the Financial and Budgetary Management unit.

The DG lodged a disciplinary complaint against the applicant for behavioral problems, failure to apply the procedures in force and lack of performance.

As of 8 May 2014, and up to 31 July 2016, the applicant was away from work, claiming to be incapable of working as a result of the psychological harassment he suffered. The applicant submitted two requests for assistance in that regard.

The Commission considered that the applicant was fit to return to work.

In 2016, a first disciplinary procedure was opened against the applicant for repeated insubordination in the performance of his duties, inappropriate conduct and unjustified absences.

The applicant was removed from his post upon completion of the disciplinary proceedings and upon delivery of the Disciplinary Board's reasoned opinion.

The Appointing Authority eventually reconsidered and informed the applicant, in July 2017, of its decision to withdraw the penalty of removal from post. As a consequence, in September 2017, the applicant was reinstated in the DG Interpretation as part of the IT and Conference Systems unit. The applicant challenged the authority's withdrawal decision in light of the harassment allegedly suffered.

In October 2017, a second disciplinary procedure was opened against the applicant, on the same grounds as those referred to above. The applicant was eventually removed from his post in October 2019.

Before the General Court, the applicant relied in particular on a plea alleging infringement of the provisions enshrining the prohibition of psychological harassment (Articles 1, 3 and 4 and Article 31(1) of the EU Charter; Article 1(2) and Article 12a of the Staff Regulations).

Certain acts adopted by the Commission over the years (deductions from salary, debit and compensation notes) had been challenged by the applicant through various complaints, in which he reported the psychological harassment he was allegedly subject to.

In his action brought before the General Court, the applicant therefore requests the annulment of the various decisions taken by the Commission as they are based on the definition of psychological harassment included in the Commission's decision of 26 April 2006. Point 1.1 of that decision provides that *"according to the Staff Regulations, psychological harassment means <u>any improper conduct that takes place</u> over a period, is repetitive or systematic and involves physical behaviour, spoken or written language, gestures or other acts that are <u>intentional</u> and that <u>may undermine</u> the personality, dignity or physical"*.

The applicant alleges in that regard that the definition referenced by the Appointing Authority forces an unreasonable burden of proof on him owing to two cumulative requirements: *(i.)* the proof of conduct, *(ii.)* and proof of the intent to harm.

The General Court firstly states that the definition of the concept of "psychological harassment" incorporated in the Commission's decision is identical to the definition currently contained in Article 12a(3) of the Staff Regulations.

The General Court further points out that the definition of psychological harassment developed in the case law before the entry into force of Article 12a of the Staff Regulations required that the conduct in question be objectively intentional, i.e. that it be objectively aimed *"at discrediting or at deliberately impairing [the] working conditions"* of the person towards whom such conduct had been shown *(EU General Court, judgment of 29 June 2018, HF v Parliament, case T-218/17, under appeal,*

§ 118). The definition of psychological harassment incorporated in the Staff Regulations however makes no reference of such requirement.

Besides that, the two cumulative requirements for psychological harassment, namely *(i)* the existence of *"physical behaviour, spoken or written language, gestures or other acts that are intentional"* that *(ii.) "may undermine the personality, dignity or physical"* can be found both in the Staff Regulations and in the Commission's decision.

The General Court further notes that none of these provisions require the existence of an "intent to harm" as a constituent element of psychological harassment. Indeed, while the common definition contained in these provisions requires that the harasser must be acting voluntarily, it is not necessary that there be a deliberate intention to cause harm through their actions aimed at discrediting the victim or deliberately undermining his or her working conditions. It is sufficient that their actions, when committed voluntarily, have objectively led to such consequences *(EU General Court, judgment of 6 June 2019, Bonnafous/EACEA, case T-614/17, § 220)*.

The General Court therefore considered that no unreasonable burden of proof was forced on the victim of harassment.

FOCUS

Financial liability of officials and other servants

Pursuant to Article 22 of the Staff Regulations, *"an official may be required to make good, in whole or in part, any damage suffered by the Union as a result of serious misconduct on his part in the course of or in connection with the performance of his duties (...)"*. This provision shall apply by analogy to other servants of the Union.

Article 22 of the Staff Regulations gives effect to Article 340, fourth indent of the TFEU regarding the personal liability of its servants towards the Union.

It might be so in certain cases that the Union suffers (serious) financial harm following the conduct of an official or agent in the course of or in connection with the performance of their duties.

Should such behavior give rise to disciplinary proceedings, the official or agent involved might be required to make good any damage suffered as a result of serious misconduct on his part. This will be decided upon completion of the disciplinary proceedings and on the recommendation of the Disciplinary Board (if any), following the delivery of the Appointing Authority's reasoned opinion.

The obligation to make good any damage is closely linked to the obligation of loyalty of officials in respect of the Union, which is imposed in a general and objective manner *(EU Civil Service Tribunal, judgment of 23 October 2013, Gomes Moreira v ECDC, case F-80/11, § 66)*. This obligation of loyalty is intended to ensure that officials not just refrain from conduct likely to prejudice the dignity and respect due to the institution and its authorities, but also conduct themselves in a manner that is beyond suspicion in order that the relationship of trust between that institution and himself may at all times be maintained *(EU Civil Service Tribunal, judgment of 8 November 2007, Andreasen v Commission, case F-40/05, § 233)*. This is especially so if the official is of senior grade.

In view of facilitating the implementation of Article 22 of the Staff Regulations and the financial liability of EU staff, the European Commission has adopted guidelines in this regard. The latter notably set out the three requirements to entail financial liability of the EU staff.

The first condition laid down in the guidelines requires that there be a breach of a statutory or any other legal obligation incorporated in a text that EU staff are urged to observe. Sometimes EU staff may be held liable even in the absence of any specific text. This is the case when the Union suffers harm resulting from the destruction of its property, e.g. the destruction of accommodation the institution provides to an official or other servant to reside in.

Regarding the second condition, the Union must have suffered harm from the breach of this statutory/legal obligation.

Lastly, the financial liability of an official or other staff member requires serious personal misconduct on their part (i.e. willful misconduct or gross negligence). Gross negligence is measured by reference to the behavior of any normally diligent official or servant.

It stems from the wording of Article 22 ("may be required") that the obligation to make good any damage is not mandatory.

The Commission also gives guidance in its guidelines as regards the extent of compensation. Furthermore, since the CJEU has unlimited jurisdiction in respect of disputes arising under Article 22, the General Court may determine the extent of the harm to be made good in cases brought before it.

The following principle stems from the Commission guidelines: *(i.)* full compensation in case of willful misconduct; *(ii.)* partial compensation in case of gross negligence, based on various indicators such as the financial capacity of the official or servant.

In exceptional circumstances, the official or servant may be required to offer full compensation for the harm suffered by the Union, even in cases of gross negligence. The EU Civil Service Tribunal clarified this in recent case-law (*judgment of 19 July 2016, HG v Commission, case F-149/15, § 163* – the fact that the judgment was set aside on appeal on the grounds of irregularity in the composition of the formation of the court does not change the lessons it contains as regards compensation for damage).

As a rule, Article 22 will only apply where disciplinary proceedings have concurrently been initiated insofar as such proceedings are always conditional on misconduct or gross negligence.

Finally, it should be noted that the Appointing Authority may also refer the matter to the competent Courts of the official or servant's Member State of origin, so that he may be held personally accountable in accordance with the existing rules *(EU General Court, judgment of 10 September 2019, DK v EEAS, case T-217/18, § 42)*. Thus, in the event of criminal misconduct (theft, fraud, etc.), the institution or agency which suffered harm may bring civil proceedings before the criminal court.

Overview of the emergency measures aimed at limiting the spread of the new coronavirus COVID-19

As is the case in most EU Member States, the majority of residents on Belgian territory remain on lockdown since the adoption of the Ministerial Decree of 18 March 2020 on emergency measures aimed at limiting the spread of the new coronavirus COVID-19[1], which has since been supplemented and repealed by Ministerial Decree of 23 March 2020[2].

The federal Government has been granted special – and temporary – powers to deal with the pressing coronavirus crisis. The special powers conferred upon the executive allow for legislation to be passed by Royal or Ministerial Decree, without the need to follow the ordinary and time-consuming legislative procedure. These powers were granted for a period of 6 months after a vote of confidence in Parliament. In a federal State such as Belgium, this also means that in view of extraordinary circumstances and for a limited time-period, certain competences of the federated entities are now exercised by the Federal Government in consultation with the former.

We provide a short summary of the various measures prescribed in the latest version of the decree, which apply until 5 April and will most likely be extended for a new period.

People are on lockdown and are required to stay at home (Art. 8). All public gatherings are banned (art. 5) and people's comings and goings are strictly controlled. Only so-called "emergency" outings are allowed such as for food purchases (see hereunder), going to the doctor, going to the post office/bank, helping people in need, or going to work – provided homeworking is not an option and that the social distancing rules are respected. Outdoor exercise (either walking, jogging or cycling) with family members living under the same roof and together with one friend is still allowed, again provided that the social distancing instructions are respected (minimum 1.50 m) (Art. 5, para. 2) and only where the family home acts as point of departure for these exercises. These activities cannot involve car rides or rides on public transport. All comings and goings relating to child custody between divorced or separated parents are allowed.

People may continue to obtain their supplies from food shops (including pet food shops). Pharmacies and bookshops remain accessible, always on condition that they comply with social distancing measures. All non-essential shops are closed (art. 1). Hairdressers closed as from 24 March 2020[3]

High schools, colleges and universities offer online lectures, which will be extended until the end of the term. Preschools, primary and high schools shall be kept open only for children whose parents work in healthcare or public security, or children who would otherwise be dropped off at their grandparents' house (art. 6). Creches remain open until further notice although it appears that many day-care centers located in Brussels have decided to close.

Businesses are obliged to organize working from home for every position where this is possible (art. 2). Businesses that are unable to organize working from home for certain employees must scrupulously respect the social distancing instructions. Business failing to meet these obligations must close.

Public transportation is maintained for people in need of transportation for "emergency" outings, although it should be organized in such a way as to ensure social distancing (art. 4).

Non-essential travel outside of Belgium is banned (art. 7). The borders are closed to non-essential traffic until further notice.

Compliance with all these measures is ensured by the Police. People and businesses caught ignoring social distancing instructions will be fined (art. 10 and 11). These fines vary between 250 EUR and 1500 EUR. In the event of renewed breaches, the Prosecutor is entitled to take the case to criminal court.

[1] *https://bit.ly/theofficial_56_annexe_01*
[2] *https://bit.ly/theofficial_56_annexe_02*
[3] *https://bit.ly/theofficial_56_annexe_03*

the OFFICI@L — CORONAVIRUS

The next issue of the OFFICI@L will be published the week of April 20, 2020. It will be a special COVID issue taking up and updating the subjects covered during our Webinar of April 02. We will also be happy to answer any new questions you send to us. > *theofficial@daldewolf.com*