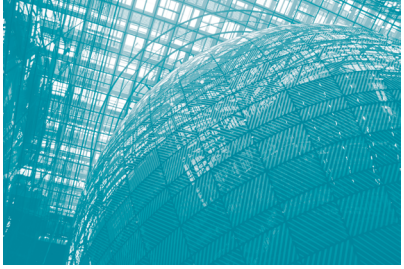

the OFFICI@L
legal newsletter on european civil service law
newsletter juridique de la fonction publique européenne

DALDEWOLF

May 2020 - number 58 - 7th year
contact: theofficial@daldewolf.com — www.daldewolf.com

EDITO

Dear readers,

We greatly thank you for your questions, comments and encouragements. We see this newsletter as a tool for communication. Feel free to contact us to ask question and make suggestions (*theofficial@daldewolf.com*).

After our special issue on the legal consequences of the health crisis related to Covid-19, The Offici@l is back with its classic format.

Our focus is dedicated to leave, an important and topical subject, especially with relax lockdown measures and the development of the health crisis.

Regarding the case-law, we look into a judgement of the General Court regarding the correction coefficients in the places of employment.

In the field of Belgian law, the Belgian Court of Cassation delivered two interesting decisions in road traffic matters, one relating to the use of mobile phones while driving and the other relating to the liability of the owner of the vehicle when the accident is partly caused by the driver who is not the owner.

We wish you a very pleasant reading!

The DALDEWOLF team

OUR TEAM

Contributors:
Thierry BONTINCK,
Anaïs GUILLERME
Thaïs PAYAN
and Lauren BURGUIN.

CASE LAW

The General Court dismissed an action relating to a request for an increase in the correction coefficient applicable in Paris

In two judgements of 29 April 2020 (T-497/19 et T-496/19), the EU General Court upheld the decisions of the EEAS and the European Commission refusing to grant a request for, among other things, an increase in the correction coefficient applicable in Paris.

In the first case, the applicants are servants and officials of the EEAS and in the second case officials of the European Commission. All were assigned to the Delegation of the EU to the OECD and Unesco in Paris.

Since they considered themselves as victims of financial discrimination, they submitted a request to the competent authorities of the EEAS and the Commission under Article 90 (1) of the Staff Regulations for such discrimination to be remedied. Their requests were subject to two implied rejection decisions.

The applicants lodged two complaints under Article 90 (2) of the Staff Regulations against the rejection decisions, which were both rejected by the competent authorities. They requested to adopt a correction coefficient specific to Paris, to take measures to ensure equivalent purchasing power for officials employed in Paris and to put an end to the discrimination between them and other officials in Paris.

In each case, the applicants seek annulment of decisions rejecting their requests.

First, the applicants raised, among other things, a plea alleging breach of the principle of equivalent purchasing power of officials since the correction coefficient would not reflect the standard of living. In particular, they contested the fact that the correction coefficient is the same in Paris, Strasbourg, Valenciennes and Marseille whereas the costs relating to rent are higher in Paris than in those cities.

The judges recalled that the purpose of correction coefficients is to ensure that officials enjoy equivalent purchasing power, irrespective of their place of employment.

However, the General Court points out that neither the EEAS nor the Commission, at least in its capacity as employer, is competent to increase correction coefficients. Therefore, the applicants could not request them to take such a decision. To contest the updating of the correction coefficients, the applicants should have lodged a complaint as per Article 90(2) of the Staff Regulations against their salary statements, in which case the General Court could have assessed the validity of the updating.

The judges specify that, in accordance with Article 1(3)(a) of Annex XI to the Staff Regulations, the correction coefficients are calculated by reference to the cost of living in the capital of the Member State. Therefore, a capital such as Paris cannot be subject to a specific correction coefficient since it is calculated on the basis of the cost of living in the capital city for the whole country.

Furthermore, the applicants were not entitled to request the creation of a correction coefficient specific to their place of employment. Indeed, only appropriate authorities of the Member States concerned, the administration of an institution of the Union or the representatives of officials of the Union in a given place of employment can request the creation of a correction coefficient specific to that place.

Second, the applicants also raised a plea alleging a breach of the principles of equal treatment and non-discrimination vis-a-vis the officials assigned to the Representation of the European Commission in Paris. Unlike the applicants, they receive a flat-rate allowance for representation (EUR 750 per month) and accommodation (EUR 500 per month).

Regarding the applicants employed at the EEAS, the judges stated that the situation of European Commission officials does not fall within the EEAS's statutory power but within that of the Commission. Consequently, the EEAS cannot be responsible for treating officials falling within its statutory power in a discrimination way.

In any case, the General Court criticises the applicants for not having submitted information enabling their situation to be compared with that of the officials serving at the Commission's Representation in Paris.

The General Court also held the other pleas alleging breach of the duty to state reasons and the duty to have regard for the welfare of officials to be unfounded and dismissed the action.

Should the rules for setting correction coefficients not be reviewed? The situation in the present case is quite obvious. Setting a correction coefficient on the basis on the cost of living (and, but not only, the cost of housing) in a city such as Paris but applicable for the entire French territory creates an unbalanced situation which is at odds with the philosophy of the system of coefficients.

FOCUS

The leave, a complex typology!

Pursuant to Article 22 of the Staff Regulations, "an official may be reWe will focus here on leave provided for in Articles 57 to 61 of the Staff Regulations, which apply by analogy to agents (Article 16 of the CEOS), and in Annex V to the Staff Regulations. General implementing provisions (GIPs) adopted within the institutions supplement these provisions.

The annual leave

Article 57 of the Staff Regulations provides that officials are entitled to annual leave of 24 to 30 days per year.

Officials may choose to take their annual leave at once or in several periods, taking account of the requirements of the service. However, their leave must include at least one period of two consecutive weeks. In the context of the current health crisis, the resumption of activity may require significant attendance during this summer period. Therefore, on the basis of the requirements of the service, the administration may exceptionally be unable to respond favourably to all requests for annual leave issued at the end of the lockdown.

Of relevance during annual leave, if the official contracts an illness which would have prevented him from attending for duty if he had not been on leave and if he produces a medical certificate, his leave is extended by the duration of his incapacity.

Where the official has not used up all his annual leave during the reference period, leave is carried over to the following year up to a maximum of 12 days (Article 4 of Annex V). If he had not used up his leave due to requirements of the service, such as an excessive workload, the 12-day limit does not apply. The case-law adds another exception where an official is prevented from using his annual leave because of long-term sickness. In such case, the total amount of leave which is not used up must be carried over to the following year (TFEU, 15 March 2011, Strack / Commission, F-120/07). Finally, if for service reasons the official is recalled to duty while on annual leave or had his leave cancelled, he shall be reimbursed the costs incurred and substantiated (Article 5 of Annex V).

In addition, Article 7 of Annex V of the Staff Regulations provides for the granting of 2,5 days of supplementary leave for officials entitled to an expatriation or foreign residence allowance.

During the period of strict confinement that we have lived, some institutions have encouraged their staff to take annual leave during this period. It is not impossible that different institutions may try to adjust the annual holiday periods according to the increased activity following the exit from the crisis. This should be decided in concertation regarding the interest of the service on one hand and the duty to have regard for the welfare of officials on the other hand.

The maternity leave

Article 58 of the Staff Regulations sets out the rules on maternity leave. Pregnant women are entitled to 20 weeks' leave that they take not earlier than 6 weeks before the probable date of delivery and ending no later than 14 weeks after the date of delivery. The maternity leave period is extended to 24 weeks in some cases. The official may return to work before the end of the 20 weeks' leave providing that she produces a medical certificate proving that she is fit to do so (CFI, 26 October 1999, Burrill and Noriega Guerra v Commission, T-51/98).

It is important to clarify that when an official is on sick leave for pregnancy-related reasons during the six-week period before the probable date of delivery, this does not affect her entitlement to 20 weeks' maternity leave. The Appointing Authority may not convert sick leave into maternity leave, as this would discriminate between pregnant women who have had a pregnant without difficulty and do not need to take sick leave and those who are forced to take sick leave before their maternity leave because they are prevented from working (CFI, 10 May 2007, Negenmann v Commission, T-255/04).

Finally, this leave is limited to women and cannot be shared between the two parents (CFI, 26 October 1999, Burrill and Noriega Guerra v Commission, T-51/98). However, every official, regardless of sex, is entitled to take a 10-day special leave during the 14 weeks following the birth of a child (Article 6(8) of Annex V).

The special leave

Article 6 of Annex V to the Staff Regulations sets out a list of special leave to which officials are entitled in some special circumstances (marriage, removal, birth or adoption of a child, serious illness or death of a family member, etc.).

Officials may request special leave for other reasons than those provided for in the Staff Regulations. However, in such cases, the administration is not required to grant it and may exercise discretion to decide whether to comply with this request.

The institutions' GIPs supplement the relevant provisions of the Staff Regulations (conditions, entitlement to travelling time, etc.). For example, Decision No. 1/2014 of the Council Secretariat, which deals with the implementing rules for the provisions of the Staff Regulations on leave, provides for other circumstances in which special leave may be requested, such as medical examination abroad or a thermal cure (with the authorisation of the medical officer), voting in elections away from the place of employment, breastfeeding etc. The Commission's GIPs (16-12.2013-(C/2013) 9051) provide for special leave on grounds of force majeure (please, refer to our No. 57 on this point).

The sick leave

Finally, Article 59 deals with leave due to illness or accident. Without going into detail, the official must inform his institution as soon as possible of his incapacity and of the place where he stays. If he wishes to spend his sick leave in a place different from his place of employment, he must submit a request to the Appointing Authority. As from the fourth day of absence, the official must produce a medical certificate. The institution can decide to subject the official to a medical examination.

Article 59 (5) states that an official may be required to take leave after examination by the institution's medical officer if his state of health so required or if a member of his household is suffering from a contagious disease. In the current context of the health crisis, this provision could, for example, apply when members of an official's household are suffering from Covid-19 and it is not possible to work remotely.

Other leave

The Staff Regulations provides for other specific types of leaves such as leave on personal grounds (Article 40), leave for military service (Article 42), parental leave (Article 42a) and family leave (Article 42b).

DAY-TO-DAY IN BELGIUM

Latest road traffic news

The Court of Cassation has recently considered two questions relating to road traffic matters.

Firstly, in a decision of 14 January 2020 (judgement No. F-20200114-5 (P.19.1046.N)), delivered on appeal against an appeal judgement of the Brussels Criminal Court (Dutch-speaking chamber), the Court of Cassation clarified the notion of "use" of mobile phone held in the hand while driving referred to in Article 8.4 of the Highway Code.

This provision stipulates that "unless his vehicle is stationary or parked, the driver may not use a mobile phone while holding it in his hand".

In this case, the driver had been convicted on the basis of this provision. She contested the conviction arguing that she could not be accused of having used her mobile phone while holding it in her hand since the police had not expressly established such a "use".

The Court found that the concept of "use of a mobile phone while holding it in the hand" was not defined in the above-mentioned provision and that it must, therefore, be interpreted in its usual meaning.

According to the Court, this notion should not limit "use" to a specific action (e.g. making a call or sending a message).

The mere fact of holding one's mobile phone while driving, without necessarily performing a specific action, already implies use within the meaning of Article 8.4 of the Highway Code and is liable to be punished.

Secondly, in a decision of 7 February 2020 (ruling No. F-20200207-2 (C.18.0344.F)), the Court of Cassation analysed the importance of the distinction between "owner" and "driver" of a vehicle involved in a traffic accident.

In this case, the appeal judge held the concurrent faults of two drivers involved in a traffic accident (overtaking at an inappropriate speed). He had also retained the liability of the owner of one of the vehicles, by simply referring to his status as owner, even though he was not involved in the accident.

The Court of Cassation held that the liability of the owner of a vehicle cannot be automatically engaged by reference to his capacity of owner, while another driver was at the wheel of the vehicle at the time of the accident.

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

This newsletter is published in collaboration with
RENOUVEAU & DÉMOCRATIE