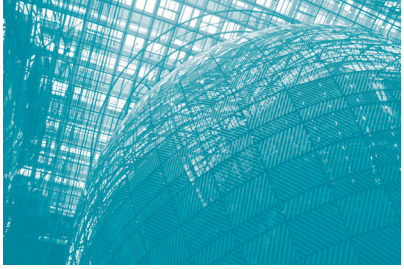

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EDITO

Dear readers,

It's back to school time and we are looking forward to seeing you in our newsletter!

In this edition, we focus on the conditions under which whistleblowers are protected by the Staff Regulations.

In addition, General Court recently ruled on the duty of care owed by the Administration to civil servants in a situation of invalidity, and we take a look at this important judgment.

In the day to day in Belgium section, we deal with the behaviour to adopt in case of suspicion of an erroneous gas bill.

Finally, the recently inaugurated "Human Rights – an insight" section concerns a judgment concerning the condemnation of Poland by the European Court of Human Rights for discrimination based on sexual orientation.

We wish you an excellent reading!

The DALDEWOLF team

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The protection of whistleblowers by the Staff Regulations

Following the lead of many Member States, the 2004 reform of the Staff Regulations introduced Articles 22a, 22b and 22c. The reform sets out on the one hand an obligation for officials to report illegalities or serious breaches of statutory obligations of which they are aware, and, on the other hand, it guarantees the protection of "whistleblowers".

It is not up to the official to establish the illegality of the act reported. The whistleblowing procedure, and in particular the transmission of information and evidence, is therefore strictly regulated by the Staff Regulations, so that the information is transmitted to the hierarchy and to the European Anti-Fraud Office (OLAF). Only if these conditions are met can the official benefit from the protection granted to whistleblowers.

The whistleblowing procedure

Any official who, in the course of or in connection with the performance of his duties, becomes aware of facts which give rise to a presumption of the existence of possible illegal activity, including fraud or corruption, detrimental to the interests of the EU or of conduct relating to the discharge of professional duties which may constitute a serious failure to comply with the obligations of officials of the EU, shall without delay inform either his immediate superior or his Director-General or, if he considers it useful, the Secretary-General, or the persons in equivalent positions, or the European Anti-Fraud Office (OLAF) direct (Article 22a(1)).

Whistleblowing may also refer to a serious breach of a similar obligation by a member of an institution, any other person in the service or any service provider acting on behalf of an institution. However, whistleblowing may not relate to documents, papers, reports, notes or information used in connection with the handling of a court case.

All information must be in writing and all evidence must be transmitted to OLAF, either directly by the official or by the person receiving the information.

Additional conditions apply where information is disclosed by the official to the President of the Commission, the President of the Court of Auditors, the President of the Council, the President of the European Parliament or the European Ombudsman. In this case, the official must ensure that the information or allegations are substantially true and must have informed OLAF or his/her institution in advance (Article 22b).

Each institution is therefore required to set up a procedure for handling complaints guaranteeing the confidentiality of complaints and the protection of the legitimate interests of these officials and their private lives.

Whistleblower protection (good faith and restraint)

In addition to the procedural requirements, an official willing to disclose information must act with caution and restraint.

The disclosure of information by an official may have harmful effects either as regard colleagues or the smooth running of the service. Protection must then be granted without any formality, simply by having transmitted relevant information. Article 22a(3) provides that the official who has communicated "shall not suffer any prejudicial effects on the part of the institution, provided that he has acted in good faith".

The assessment of good faith is based on the seriousness of the facts reported, the authenticity or plausibility of the information transmitted, or the means of communication used.

Thus, a denunciation cannot be motivated by a personal grievance or animosity or by the prospect of a personal advantage, in particular a pecuniary gain (judgment of 25 September 2012, Bermejo Garde / EESC, F-41/10).

Similarly, the communication of implauvsible information or of unfounded facts cannot justify the granting of the protection provided for in Article 22a of the Staff Regulations (judgment of 2 June 2016, Bermejo Garde / EESC, F-41/10 RENV).

An official who takes the decision to disseminate his allegations to his unit's staff cannot benefit from this protection either. In this case, the judge considers that he or she has not used the whistleblowing procedure, which excludes the application of Article 22a(3) (see judgment of 5 December 2012, Z / Court of Justice F-88/09 and F-48/10).

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More broadly, in order to prevent abuses, the Court of the Union requires officials to act with discernment and to show the reserve required by the duties of objectivity and impartiality, respect for the dignity of the office, respect for the honour of persons and presumption of innocence (Judgment of 13 January 2011, Nijs v Court of Auditors, F-77/09). Indeed, the General Court has recalled that the principle of the presumption of innocence applies to an official accused of a serious breach of his statutory obligations (Judgment of 4 April 2019, Rodriguez Prieto v Commission, T-61/18).

Scope of protection

Finally, even if the official acts in good faith, the protection granted only applies to decisions relating to the report he or she has made. The benefit of Article 22a cannot be extended to all decisions which may adversely affect him or her (judgment of 30 June 2015, Z v Court of Justice (F-64/13).

Similarly, the Tribunal has ruled that this protection and the status of whistleblower are not intended to protect the official against investigations into his possible involvement in the facts reported. At most, the initiative of the official may constitute a mitigating circumstance in the context of sanction proceedings (judgment of 4 April 2019, Rodriguez Prieto v Commission, T-61/18).

CASE LAW

Periodic medical examinations: substantial reinforcement of the Administration's duty of care towards officials in a situation of invalidity

In a judgment dated 30 June 2021, the General Court focused on the scope of the obligations arising from the duty of care regarding the situation of officials suffering from occupational disability in terms of periodic medical examinations.

Case T-709/19 involves a former official at the European Court of Auditors who is receiving a disability pension. Her illness was caused by recognised harassment by her former head of cabinet. The doctors diagnosed her at the time with post-traumatic stress disorder following a long-term persecutory work situation.

It was after a prolonged period of sick leave that the Administration referred the matter to an Invalidity Committee in order to determine whether the official could be granted a pension. Various doctors who had been accompanied her in her treatment had since concluded that she was suffering from a major post-traumatic depressive disorder, which could only be expected to stabilise at best, making any return to work unthinkable.

Doctors also note that the obligation to undergo periodic medical examinations to ensure that she still qualifies for a pension contributes to the post-traumatic situation and has a damaging effect on her illness.

It was in that context that the applicant asked the Appointing Authority to refer the matter to the Invalidity Committee so that she could challenge the way in which the periodic examination of her state was carried out. The Appointing Authority, confining itself to a literal reading of Article 15 of Annex VIII to the Staff Regulations, which provides for the possibility of periodic medical examinations, rejects her request, and does not refer her to the Invalidity Committee.

The applicant brings an action for annulment before the General Court against the rejection decision.

General Court recognises in its decision that Article 15 of Annex VIII of the Staff Regulations allows the Court of Auditors, if the former official in receipt of an allowance has not reached retirement age, to have her periodically examined to ensure that she still fulfils the conditions for receiving the allowance.

General Court notes however, that Conclusion no. 273/15 "Medical check-up after invalidity", adopted as an internal measure by the Administration itself, opens the possibility for the Invalidity Committee to shorten or extend the frequency of medical examinations, or even exceptionally to accept the report of an official's own doctor rather than carry out the check-up itself.

It concludes that by refusing to refer the case to the Invalidity Committee, the Appointing Authority misinterpreted the former official's request and rejected Conclusion no. 273/15 without providing a reason compatible with the principle of equal treatment.

In this respect, General Court considers that the obligations arising for the Administration from the duty of care are substantially reinforced when the situation of an official whose physical or mental health is proven to be affected is at stake. In such cases, the Administration must examine the request of the official in an open-minded manner.

The Appointing Authority is therefore criticized for failing to take due account of the circumstances of the applicant's situation, namely the anxiety and stress she has suffered since the onset of her illness, as well as its non-reversible and stationary nature, and more generally her psychiatric condition as described in the various medical reports drawn up.

In these circumstances, General Court finds that the Court of Auditors disregarded the obligations arising from the duty of care, and therefore decides to annul the contested decision to refuse to refer the case to the Invalidity Committee.

DAY-TO-DAY IN BELGIUM

What to do if you suspect that your gas bill is based on incorrect consumption data

In view of the large increases in gas prices that have been announced, it seems useful to mention a few points.

In the Brussels-Capital Region, the procedures for metering the consumption of gas supplies between the distribution system operator (SIBELGA) and the gas supplier are defined by the technical regulations for the management of and access to the electricity distribution network in the Brussels-Capital Region, as approved by the decree of the Brussels-Capital Region government of 23 May 2014.

The gas supplier draws up the consumption bill for the private individual on the basis of the indexes communicated to him by the network operator. The metering and calculation methods set out in the above-mentioned regulation are technical and complex and, as a result, make it difficult (if not impossible) to check the billing sent to him by the consumer.

It is important to know that the adjustments to the metering data, and therefore to the billing, that may be made by the network operator and the supplier respectively are subject to certain limits and may not relate to a period of more than five years preceding the date of the last reading.

In addition, the regularisation bill must be drawn up on the basis of the tariff applicable in the year of consumption in question.

Any suspicion of a manifest error in billing or in estimating consumption must be communicated by the consumer to the energy supplier as soon as possible. The dispute must in any case be lodged within two years of the date of the reading or the communication of the estimate.

In the first instance, the consumer must try to settle the dispute by contacting the energy supplier. After a first amicable attempt, the dispute should be formalised by means of a registered letter.

If this approach does not give satisfaction, the consumer can contact the mediation service for energy (dependent on the Federal Public Service Economy): *https://www.mediateurenergie.be/fr/introduire-une-plainte*.

If mediation fails, an appeal to the ordinary courts remains possible.

HUMAN RIGHTS: AN INSIGHT

Homophobic discrimination and custody rights

For this back-to-school edition, it is a recent judgment concerning Poland that has caught our attention this month (ECHR, 16 September 2021, X. v. Poland, application 20741/10. Link to the judgment: *http://hudoc.echr.coe.int/fre?i=001-211799*).

The European Court of Human Rights condemns Poland for having discriminated and violated the respect due to private life (Art. 14 and 8 of the Human Rights Convention) in a judicial procedure to modify the conditions of child custody.

The judgment is interesting and could be applied in all circumstances where the modification of custody rights is based on a discriminatory criterion, in this case, to the detriment of a mother who is accused by the domestic courts of having a relationship with a woman. The Strasbourg Court recalls its competence to deal with violations of guaranteed rights in domestic court proceedings to avoid any discrimination. It upheld the applicant's claim. The applicant is a mother of four children, divorced from her husband, who now lives with a woman.

The Polish courts, at various stages of the proceedings, focused on the mother's homosexuality, including intrusive questions about her intimate life and expert reports and other recommendations questioning her ability to care for her youngest child because of her sexual orientation.

The applicant invoked Art. 14 (prohibition of discrimination), combined with Art. 8 (violation of privacy) of the European Convention on Human Rights, to find that the proceedings in which her custody rights were withdrawn violated her right by differential treatment between her and her ex-husband.

The Court found that Poland had violated the Convention in this case and granted equitable relief.