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EDITO

Dear readers,

In this edition, we focus on the subject of "unpaid" leave which can be requested by officials and staff of the European Union.

As far as case law is concerned, the President of the Court of First Instance recently issued an interim ruling on the obligation to reside at the place of employment in the context of the COVID-19 pandemic. This order is not only highly topical but also ambitious.

On a daily basis in Belgium, you can find out more about co-ownership in the context of the health crisis.

Finally, the "Human Rights: an Insight" section, which was inaugurated in our last edition, will deal with a judgment concerning Bulgaria, on the discriminatory nature of the allocation of family allowances.

We wish you an excellent reading!

The DALDEWOLF team

OUR TEAM

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FOCUS

UNPAID LEAVE FOR OFFICIALS AND OTHER SERVANTS OF THE EUROPEAN UNION

. Under the Staff Regulations, officials and other servants may apply for "unpaid" leave on personal grounds for a given period and then to return to the institution to which they were attached.

Indeed, pursuant to Article 40 of the Staff Regulations, an official may, exceptionally and at her/his own request, be placed on unpaid leave for reasons of personal convenience ("leave on personal grounds"). This right is also provided for in Articles 17 and 91 of the CEOS for contract and temporary staff, for compelling personal reasons ("unpaid leave"). These provisions were supplemented by the general implementing provisions adopted by the European Commission on 16 December 2013 (C(2013) 9054 final).

In both cases, such leave is granted at the request of the person concerned by the Appointing Authority, after consultation with his/her superior and examination of the reasons, duration and needs of the service.

Similarly, the Appointing Authority may consider that, in the interests of the service, an official or other servant who intends to stand for public office should also apply for leave on personal grounds (Article 15).

The duration of the leave may range from one month to one year. It may be granted for a fortnight only if justified by family reasons. For civil servants or officials elected or appointed to public office, the duration is equal to their mandate.

For civil servants, the leave may be renewed several times for a maximum of one year, up to twelve years over the entire career. In cases listed in the Staff Regulations (caring for a dependent child with a serious disability, joining a spouse who is also an official or other servant of the Union, helping a relative with a serious illness or disability), leave may be renewed without limit.

For other staff members, the duration of leave may not exceed one quarter of the length of service, nor may it exceed three months where the staff member has less than four years' seniority, or twelve months in other cases.

During the period of leave and until the date of reinstatement, the official or other servant shall remain without pay. He shall cease to participate in advancement to a higher step and promotion in grade. Their membership of the social security scheme and coverage of the corresponding risks are suspended, but they may ask to continue to benefit from it under certain conditions if they are not engaged in gainful employment. As regards staff members, maternity leave and its payment are guaranteed to women for whom this leave started before the end of their contract.

However, the Staff Regulations remain applicable to them and they continue to benefit from the rights deriving from them, such as the obligation to provide assistance to the institutions (Article 24 of the Staff Regulations; see Gozi / Commission F-116/10).

The links with the institution are not completely cut, and the institution must remain informed of any changes and requests for renewal of the leave.

In this respect, it is possible to carry out a professional activity or to change it during the leave, provided that prior authorisation is obtained from the Appointing Authority, pursuant to Article 12b of the Staff Regulations and in accordance with the rules laid down for external activities and missions. In any case, such authorisation shall not be granted if the official or other servant intends to engage in any professional activity, whether paid or unpaid, involving lobbying or advocacy in relation to their institution, which is likely to give rise to an actual or potential conflict with the legitimate interests of the institution.

During his absence, the post of an official who has taken leave on personal grounds for more than six months is considered vacant. He/She may be replaced in his/her post. At the end of his/her leave, he/she shall return to the institution at the first or second vacancy in a post in his function group corresponding to his grade, provided that he has the requisite aptitudes for the post. In case of refusal of the second vacancy, he/she may be required to resign after the Joint Committee has been consulted.

The other servants are reinstated in the post they occupied before their departure. EU institutions enjoy a wide margin of appreciation in organising their services, and the interests of the service may justify not reinstating a temporary staff member at the end of his unpaid leave in the post occupied

before his departure, unless there was a previous commitment on the part of the institution to do it(Psarras / ENISA, F-118/10).

In all cases of reinstatement, the Appointing Authority shall determine whether the official or other servant has a personal interest, in particular a family or financial interest, or represents any other interest of third parties, which is such as to compromise his or her independence in the performance of his or her duties in the specific post, and which could give rise to an actual or potential conflict of interest.

CASE LAW

Duty station residence requirement and pandemic

In an order for interim measures issued on 13 April 2021, the President of the General Court of the European Union ruled on the interim measures requested in the context of a case raising a "novel and delicate question relating to the obligation to reside at the place of employment in the context of the COVID-19 pandemic".

Indeed, as part of the adaptation measures to the COVID-19 pandemic, including a gradual return to the premises of the European Institute of Innovation and Technology (EIT), line managers were asked to ensure that staff are present in the office at least half of the month and that teleworking from abroad remains exceptional and is only allowed if certain conditions are met. One of the exceptions to justify a request to telework from abroad is the case of a separated family: the member of staff whose dependent children reside permanently in another Member State can telework from abroad. However, in view of the situation in Hungary, permanent teleworking abroad is not considered justified.

In this case, the applicant is a temporary agent at the EIT. She requested to telework from Germany, her place of origin and the place of residence of her children and spouse. She argued that the travel restrictions and quarantine requirements applicable to her travel to and from Germany and Hungary did not allow her to see her family.

However, the Director of the EIT refused to grant her permission and asked her to confirm her plans to return to Budapest. The applicant then lodged a complaint against this refusal, followed by an action for annulment and an application for interim measures requesting the European Union Tribunal to stay the execution of the contested decision and to order the EIT to allow her to telework from her place of origin until the restrictions imposed by the German and Hungarian national authorities were lifted.

In his order of 13 April 2021, the President of the General Court examined whether the conditions for granting the requested interim measures had been met. He recalls in this respect that their grant must be prima facie justified in fact and in law (fumus boni juris) and be urgent, in the sense that it is necessary, in order to avoid serious and irreparable damage to the interests of the party seeking them, that they be issued and take effect before the decision in the main case. These conditions are cumulative.

As regards the existence of a fumus boni juris, the President of the General Court considered that the applicant's allegations revealed an important legal dispute which did not require immediate resolution. Although the Commission's guidelines were not intended to apply automatically by analogy within the EIT, the President of the General Court considered that the applicant's arguments based on disregard for the duty to have regard for the welfare of officials, an error of assessment in balancing the interests of the service against her own interests, the disproportionate nature of the infringements of her rights, and the erroneous interpretation of Article 20 of the Staff Regulations remained relevant. Above all, the President of the General Court noted that: "the main dispute raises a novel and delicate question relating to the interpretation of the obligation of residence at the place of employment under Article 20 of the Staff Regulations in the particular circumstances imposed by the COVID-19 pandemic".

As regards the condition of urgency, the President considered the applicant was obliged to return to her place of employment and that, because of the travel restrictions in force, it might make it impossible for her to see her two children regularly for an indefinite period (which was not the case before the pandemic).

Finally, the President of the General Court weighed the interest of avoiding serious and irreparable harm to the applicant due to the impossibility for her to maintain regular contact with her minor children while carrying out her professional activity "in the distressing context caused by the COVID-19 pandemic" against the interest of the EIT in having the applicant work at her place of employment (within the EIT premises or by teleworking) at least half the month.

The President noted that the granting of an interim measure had no administrative or pecuniary impact on the EIT. Also, the applicant's presence on site as a member of the EIT's management team was only necessary for "certain meetings". He concluded that the balance of interests was in the applicant's favour, who should be allowed to telework from her children's place of residence in so far as the situation relating to the COVID-19 pandemic justified it and without prejudice to the applicant's obligation to travel to the place of employment on an ad hoc basis in the interests of the service, at the request of the EIT.

The application for interim measures was therefore upheld and the EIT was ordered to suspend the implementation of the contested decision and to authorise the applicant to telework from her children's place of residence during the pandemic, travelling to her place of employment on an ad hoc basis in the interests of the service.

DAY-TO-DAY IN BELGIUM

Coronavirus and property ownership

As regard real estate co-ownerships, the COVID-19 pandemic had an impact on meetings required by law, including "assemblées générales" of co-owners.

A Royal Decree of 9 April 2020 had decided to postpone the "assemblées générales" that were supposed to be held before 30 June 2020, due to the health measures.

The postponement period ended on 30 November 2020.

A law of 20 December 2020 authorises the postponement of "assemblées générales" of co-owners and introduces new possibilities to convene these meetings.

This law had retroactive effect on co-ownership of immovable property from 1 October 2020 and for a limited period, until 9 March 2021 in principle.

However, by also amending the Civil Code with a one-sentence article, this law now allows "assemblées générales" of co-owners to be held remotely, i.e. by videoconference.

The law of 20 December 2020 distinguishes between certain meetings and thus targets

- "assemblées générales" that could not be held before 1 October 2020, due to a postponement decided by the syndic on the basis of the Royal Decree of 9 April 2020, which can again be postponed;
- the ordinary "assemblées générales", i.e. the meetings that are held once a year to examine the management of the syndic and the accounts of the condominium, which were not held by 1 October 2020 and which must be held before 9 March 2021, according to the internal regulations of the condominium, which can be postponed.

It is up to the syndic to decide on this possible postponement. This postponement, if decided, is for a maximum of one year. Nevertheless, prudence recommends that the syndic convene the postponed general meeting as soon as the sanitary measures allow it, if he has not organised it remotely.

Indeed, this law also modifies article 577-6, § 1, paragraph 1 of the former Civil Code.

This legal provision now reads as follows:

> Each owner of a lot is part of the "assemblée générale" and participates, physically or if the convening notice so provides, remotely, in its deliberations.

By providing for remote participation, the legislator is clearly aiming at the holding of "assemblées générales" by means of a platform allowing co-owners to meet virtually, to hear the syndic but also the other participants and to vote on the items on the agenda.

This is in line with the changes made to meetings in associations and companies, first with the Code of Companies and Associations, then with the Royal Decree of 9 April 2020 (which went much further for associations and companies than for condominiums) and finally with the law of 20 December 2020, which perpetuated, for associations and companies, the possibility for the administrative body to organise "assemblées générales" by videoconference if the articles of association do not prohibit it.

This brings real estate co-ownerships up to standard. The managing agent must ensure that the procedure is explained in the notice of meeting to avoid any subsequent dispute.

For the sake of completeness, it should also be mentioned that the law of 20 December 2020 has temporarily relaxed the written decision procedure.

The Civil Code provides that decisions of general meetings of co-owners may be taken in writing provided that (i) they do not have to be the subject of an authentic instrument and (ii) they are taken unanimously by the co-owners.

In the period from 1 October 2020 to 9 March 2021, written general meetings were possible, subject to the participation of half of the co-owners holding together half of the units in the common parts. Decisions could no longer be taken unanimously, but by the same majorities as for each item on the agenda of a physically held meeting.

There is no doubt that this method of participation, which is more archaic and does not allow for debate, was not as successful as expected and will give way to the remote general meetings that the trustees did not hesitate to adopt.

HUMAN RIGHTS: AN INSIGHT

Discrimination in the granting of family allowances

For the second edition of this new column, it is a recent judgment concerning Bulgaria that has caught our attention (ECHR, 11 May 2021, Yocheva and Ganeva v. Bulgaria, applications 18592/15 and 43863/15. Link to the judgment: *http://hudoc.echr.coe.int/fre?i=001-209866*)

The European Court of Human Rights condemns Bulgaria for having discriminated and violated the respect due to private life (Art. 14 and 8 of the Human Rights Convention) in the granting of family allowances.

The judgment is interesting and could be applied in all circumstances where allowances are granted in a discriminatory manner, in this case to minor children. The Strasbourg Court demonstrates that it interprets the right to such allowances broadly to avoid discrimination. The applicant is a single mother, the father of her minor child is unknown.

A 2002 Bulgarian law on child allowances provides for special payments of allowances to families "in which there is only one living parent". The Bulgarian authorities denied the applicant access to the allowances, as she had not provided proof that her child had been recognised by her father and that the father had died.

The applicant invoked Art. 14 (prohibition of discrimination), combined with Art. 8 (violation of privacy) of the European Convention on Human Rights, to consider that the conditions of access to benefits infringed her right and that the Bulgarian State's interpretation that the phrase "in which there is only one living parent" should read "in which only one parent is deceased", discriminated against her family, in which one of the parents is unknown.

The Court found a violation of the Convention by Bulgaria in this case and granted equitable relief.