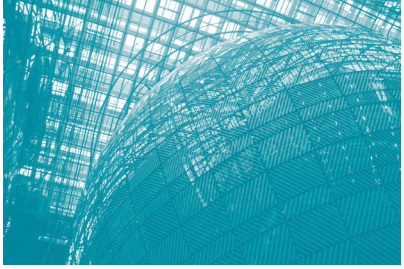

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DALDEWOLF

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EDITO

Dear readers,

We are pleased to welcome you to this first issue of the year 2022. We are happy to inaugurate this month our brand-new family law column, in partnership with Candice Fastrez of Perspectives law firm, who will share her expertise in this area with you every two months. You will find the usual Belgian law column next month!
For the first edition of this collaboration, we will focus on the treatment of social benefits received by parents who are officials or other servants of the European Union in the event of separation.
This issue will also be taken up and illustrated in the case law section, with a judgment of the EU General Court handed down on 21 December last.
In the focus section, we will deal with the independence of European officials and other agents, particularly with regard to the prevention of conflicts of interest.
Finally, the "Human Rights" section will deal with a judgment concerning another case of adoption against the mother's will, this time against Italy.
We wish you an excellent reading!

The DALDEWOLF team

OUR TEAM

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FAMILY LAW

THE TREATMENT OF SOCIAL BENEFITS RECEIVED BY PARENTS WHO ARE EU OFFICIALS OR OTHER SERVANTS IN THE EVENT OF SEPARATION

In the event of separation, each parent has an obligation under Belgian law and pursuant to article 203 of the Civil Code to participate in the maintenance, education, and training of his/her child(ren).

This obligation is of public order (it cannot be derogated from).

A parent may be required to pay a maintenance contribution to the other parent either to compensate for the imbalance between their respective incomes or to counterbalance the disproportion in the day-to-day care of the child between the parents (an accommodation arrangement other than strictly equal).

In order to evaluate the participation of each party, article 1321 of the Belgian "Code judiciaire" requires that account be taken of the accommodation arrangements put in place and the contributory capacities of each parent, and finally invites the parents/legal professionals to evaluate the needs of the child (or his/her monthly budget), after deducting the amount of family allowances and other social and tax benefits received by each parent for the child. These should indeed be "allocated in full to their needs and are therefore not taken into account in the estimation of the parents' contributory capacities but in the estimation of the net cost of the children" (see LOUIS, S., « Calcul des parts contributives des père et mère au profit de leurs enfants – Analyse bisannuelle de décisions de jurisprudence », R.T.D.F., 2019/2, p.223).

For employees subject to the Belgian legal regime, these benefits are easily identifiable so that this question does not, in principle, pose any difficulty. However, the situation is different for European Union (EU) officials and agents, since they receive various benefits, the remunerative or parenthood-related nature of which is not immediately identifiable.

In the context of the collection of the benefits described as family allowances (by article 67 of the Staff Regulations), the question of whether they are necessarily paid for the daily maintenance of children is therefore fundamental:

- As for the dependent child allowance

This allowance is paid to an official who is responsible for all or part of a child's basic needs (accommodation, maintenance, education, etc.) or to an official who has a maintenance obligation towards a child. As a result, this allowance must be assimilated to the family allowances referred to in article 1321, 5° of the "Code judiciaire" and must be allocated exclusively to the daily maintenance of the child (see Brussels, 11 January 2016 (41st Family Court), R.T.D.F., 2/2017, p.362). It is not a part of the remuneration.

- As for the household allowance

This allowance is payable to an official who is: (1) married; (2) widowed, divorced, legally separated or single, with one or more dependent children; (3) and to an official registered as a stable non-marital partner under certain conditions (see Annex VII of the Staff Regulations).

In other words, this allowance is paid regardless of the presence of a child in the official's household. Thus, it is not paid for the day-to-day maintenance of the child and cannot be equated with family allowances under Belgian law. It is part of the salary of the EU official, which is confirmed by Belgian case law (see Trib. Fam. Brussels, 11 January 2016 (41st ch.), R.T.D.F., 2/2017, p. 362; Trib. Fam. Brabant-Wallon, 9 May 2019, Unpublished): "The household allowance received by European civil servants constitutes a premium paid by the employer under certain conditions but does not necessarily require the existence of dependent children. It cannot be equated with family allowances, even if both allowances appear together in the pay slips. The household allowance is part of the salary of the parent who receives it" (see Trib. Fam. Brussels (126th ch.), 24 November 2016, rev. Trim. Dr. Fam. 2017/2 p.415 to 425).

- As for the education allowance

This third allowance is granted to the official for (1) Education allowance A: each of his dependent children under five years of age or not attending a primary or secondary school (with an age limit of 8 years); (2) Education allowance B: each of his dependent children over five years of age provided that they attend a primary or secondary school which charges fees or an institution of higher education.

FAMILY LAW

This allowance is paid on the basis of the child's schooling. It is therefore exclusively for the benefit of the child and cannot be considered as part of the EU official's remuneration.

However, the cost of a fee-paying school or higher education institution is not included in the child's ordinary monthly budget but constitutes an extraordinary expense that must be borne in proportion to the contributory capacities of the parties and therefore independently of any maintenance contribution paid by one parent to the other. The school allowance will therefore be deducted from the gross cost invoiced by the school and only the balance not covered by the allowance will have to be paid by the parents, in proportion to their income.

CASE LAW

The treatment of the family allowances of a divorced agent who has lost custody of his children

On 21 December, the EU General Court ruled on the following question: what happens to family allowances in the case of a divorced staff member who has lost custody of his or her children? (GCEU 21 December 2021, MG v. European Investment Bank (EIB), T-573/20). This was the opportunity to review the principles applicable to the treatment of family allowances in the event of divorce or separation of two EU officials or agents.

At the time of the divorce proceedings before Luxembourg national jurisdictions, the applicant was notified of the loss of the family allowance, which his employer, the EIB, had decided to pay to his wife, since she had obtained custody of the children. He decided to contest this decision and applied for conciliation proceedings to have the withdrawal of his allowance reconsidered. The procedure was unsuccessful, following which the EIB confirmed that the allowance was being paid to the applicant's ex-wife, who was also a member of the Bank's staff.

He therefore brought an action for annulment before the General Court of the European Union against the decision to pay the allowance to his ex-wife.

The applicant considers, firstly, that the EIB did not sufficiently explain its position when it took its decision. However, the case law provides that the family allowance must benefit the parent to whom custody was entrusted, and that in the case of an unmarried, separated, or divorced parent having custody of the child, the member of staff who must benefit from the allowance is that parent, even when the other parent is also employed by the EIB and receives a higher monthly salary. The Court of First Instance considers that in this respect the Bank's position was therefore perfectly clear.

The applicant also criticizes the EIB for not having carried out a concrete examination of the elements relating to the maintenance of the children. In essence, his argument is that the two officials or agents are potentially eligible for the dependent child allowance if their children are dependent on each of them simultaneously. The General Court rejects this argument and points out that the parent under whose roof the child lives does not need to prove maintenance costs to be considered a parent who actually maintains his or her child, and therefore eligible for family allowances.

In the light of the social objective of the allowance, the General Court considers that the costs of a periodic stay which the applicant invokes in support of his argument do not characterise the actual maintenance of the children.

Finally, a last part of the applicant's argument is based on the EIB's lack of diligence towards him. He argues that he suffered unreasonable delay and anxiety because of his employer's actions and omissions. He describes the very abrupt and significant reduction in his remuneration, the EIB's position in favour of his ex-wife, and the unjustified delay in setting up the consultation procedure.

The infringement of the reasonable time requirement is rejected, but it is acknowledged that the EIB, by the delay in replying to the applicant and by its conduct during the consultation procedure, kept the applicant in a state of prolonged uncertainty and caused him non-material damage. In this respect, the applicant is nevertheless awarded compensation for his prejudice in the amount of EUR 500, as well as an equitable share of the costs.

FOCUS

Independence of European officials and prevention of conflicts of interest

Article 11a of the Staff Regulations, which is also applicable to contract staff under article 3a of the CEOS, is intended to guarantee the independence, integrity and impartiality of officials and other servants and, consequently, of the institutions they serve.

It follows from the provisions of the Staff Regulations that officials must be guided solely by the interests of the Union in the performance of their duties. This principle implies that in the performance of their duties, officials shall not deal with any matter in which they have, directly or indirectly, a personal interest, in particular a family or financial interest, such as to impair their independence.

The assessment of the reality of the conflict of interest is the responsibility of the Appointing Authority and article 11a of the Staff Regulations does not allow officials and other servants to make such an assessment themselves. On the contrary, it provides for a duty to inform the Appointing Authority or the AECC of any risk of conflict of interest. All officials and other servants must therefore declare to their superiors the presence of a member of their family, especially if it is an ascendant, descendant or direct collateral, in an entity outside the institution which has direct relations with the said institution and which falls within the scope of the functions of those officials and other servants (judgment of the Civil Service Tribunal of 10 June 2016, HI v Commission, F-133/15). This duty to inform is specifically intended to enable both the official and the Administration to take appropriate measures, if necessary.

The case-law recognises that article 11a of the Staff Regulations has a broad scope, covering any situation in the light of which the person concerned must reasonably understand, in view of the duties he or she performs and the circumstances, that it is likely to appear to third parties as a possible source of impairment of his or her independence (see, in this respect, the judgment of the Civil Service Tribunal of 28 March 2012, BD v. Commission F-36/11).

Thus, the mere appearance of a conflict of interest in the eyes of a third party may be sufficient to characterise a breach of the official's duty of independence and loyalty.

Indeed, the independence of officials and other servants in relation to third parties should not only be assessed from a subjective point of view. It also implies avoiding, particularly in the management of public funds, any behaviour likely to affect objectively the image of the institutions and to undermine the confidence which they must inspire in the public (BD v. Commission judgment cited above).

In any event, it is irrelevant that the institution concerned has not suffered any financial loss because of the failings in question, since the obligations in question are also intended to preserve the independence and image of the institutions.

Article 11a of the Staff Regulations is also intended to apply to situations internal to the institutions. In this case, the case law seems to be more restrictive since it has considered that the fact that a member of staff has lodged a complaint of harassment against the official who is to assess his professional performance cannot, in itself, apart from any other circumstances, be such as to call into question the impartiality of the person against whom the complaint is made (judgment of the General Court of 30 January 2020 in Joined Cases T-786/16 and T-224/18 PV v Commission). Similarly, the fact that a candidate in a competition appears as a friend on the Facebook account of a member of the selection board cannot reveal the existence of direct links between them (Order of the General Court of 25 February 2014, Garcia Dominguez v Commission, F-155/12).

Finally, the functions and grade of the person concerned are also important, since the case law considers that an official must demonstrate, all the more so if he or she has a high grade, a behaviour above suspicion, so that the bonds of trust existing between the institution and himself or herself are always preserved (see in this sense the judgment of the Civil Service Tribunal of 19 November 2014, EH v Commission, F-42/14).

HUMAN RIGHTS: AN INSIGHT

Adoption against the mother's will, condemnation this time of Italy

In our last edition of the OFFICI@L, we commented on a judgment of the European Court of Human Rights condemning Norway for not having considered, in breach of article 8 of the Convention, the wishes of a mother in the context of the adoption of her child (*https://bit.ly/theOFFICIAL72-en*).

The subject remains particularly sensitive, since this time it is Italy that is the subject of a condemnation by the Strasbourg court. In a case D.M. and N v. Italy (ECHR, D.M. and N v. Italy, 20 January 2022, application no. 60083/19), the European Court of Human Rights unanimously found a violation of article 8 (right to respect for private and family life) by Italy in a case related to adoption. The Court recalls that the fact that a child may be taken into an environment more conducive to his or her upbringing cannot justify forcibly removing the child from the care of his or her biological parents. In this case, a three-year-old child was removed from the mother's care after the mother herself complained of abuse by her partner and the risks to her child. The child had been placed in foster care and given the mother's incapacity, recognised by experts, to bring up the child, declared adoptable by the Italian courts. The application was filed by the mother of the minor child and by the child herself, represented by her mother. The applicants alleged that the reasons given by the domestic courts for declaring the child adoptable did not correspond to the quite exceptional circumstances that could justify a break in the family relationship. They argue that the Italian authorities failed to fulfil their positive obligations as defined by the Court's case-law and that these authorities did not take all the measures that could reasonably be required of them to maintain their family ties and strike a fair balance between the interests at stake, particularly since no psychological examination was ordered for either of them.

The Court observes that in the present case it has not been shown that the child was exposed to any situations of violence or abuse. The expert reports available in the file do not establish any psychological or psychic imbalance of the child or the parents, nor of the mother. The Court thus concludes that the decision to sever the family link was not preceded by a serious and careful assessment of the first applicant's capacity to exercise her role as a parent, nor by any psychological expertise, and that no attempt to safeguard the link was envisaged. The national judicial authorities merely took into consideration the existence of certain difficulties, although these could have been overcome by means of targeted social assistance. The domestic courts thus proceeded to declare the child adoptable, thereby causing the mother to be permanently and irreversibly removed from the family, even though less radical solutions were available. The Court considers that it is essential to maintain as much as possible the bond between the applicant and her daughter and that this was not taken into consideration, especially as it was the mother who had requested assistance following the domestic violence to which she was subjected by her partner. It was for the domestic authorities to demonstrate convincingly that, despite the existence of less radical solutions, the contested measure, namely adoption, was the most appropriate option corresponding to the best interests of the child. The interference with the applicant's family life was not proportionate to the legitimate aim pursued. The Court further considers that the procedure at issue was not surrounded by safeguards proportionate to the seriousness of the interference and the interests at stake. Over and above the violation of article 8, the Court asks the Italian authorities, which it did not do in the Norwegian judgment, to re-assess the situation of the two applicants promptly in the light of its judgment and to consider the possibility of establishing contact between them, considering the child's current situation and his or her best interests, and to take any other appropriate measures in accordance with the latter. It awarded the applicants €52,000 in just satisfaction. With this judgment, the Court once again demonstrates its attachment to biological ties, which may be questioned only if the best interests of the child are convincingly demonstrated, which is not the case in the present case.