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DALDEWOLF

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EDITO

Dear readers,

In this appraisal period, we propose to dedicate a substantial part of our newsletter to this issue. Our focus will be on the appraisal procedure and we will comment a recent judgment of the General Court of the EU which clarified the impact of a non-renewal of a staff member's contract based on a non-finalised appraisal report.

In our "Day to day in Belgium" section, we will discuss the request for assignment of remuneration by an employer in the context of a consumer credit agreement.

If you would like us to address specific topics in future issues of the **OFFICI@L**, please send us your questions or suggestions (theofficial@daldewolf.com). We look forward to hearing from you.

We wish you an excellent reading!

The **DALDEWOLF** team

FOCUS

SOME CONSIDERATIONS ON THE APPRAISAL PROCEDURE

The appraisal process has already begun in the EU institutions and agencies, so we take this opportunity to focus on this topic. The appraisal exercise has a major impact on the careers of officials and other staff, as the reports are used to assess the merits of officials and other staff in the context of promotion (or reclassification in the Agencies) exercises. The Staff Regulations provide very few indications as to how the reporting procedure needs to be conducted. Each institution has adopted GIPs (general implementing provisions) which describe the procedure to be followed (the steps, deadlines and appeal procedures). The prescribed deadlines must be respected by the Administration.

Self-assessment: this is the first stage of the procedure, the official or agent is invited to assess himself/herself. This is an important step to which particular attention should be paid. The General Court has recently recalled that the official/agent must be able to express himself/herself freely in the self-assessment without prejudice to the duty to show discretion, which must be interpreted more flexibly in this context (Walle/ECDC, T-33/20). The General Court considers that the limits are exceeded when the self-assessment contains statements that are seriously insulting or seriously undermines the respect due to the reporting officer.

The dialogue: the official or staff member will be invited to an interview called the "dialogue" or "appraisal interview" with the first reporting officer/assessor. The dialogue is an essential phase, which the Administration is obliged to organise. The General Court considers that it is a condition for respecting the right to be heard of the official reported and insists on the fact that "direct contact between the official reported on and the appraiser is such as to encourage a frank and thorough dialogue, enabling them to ascertain exactly the nature of, the reasons for and the extent of any differences of opinion and to achieve better mutual understanding, particularly in a situation where it is necessary to remedy a very damaged personal relationship" (QB/ECB, T-827/16). It is therefore very important at this stage not to leave negative remarks unanswered if you disagree and to make your views known. Even if the official or staff member is apprehensive about having a dialogue, for whatever reason, we always recommend participating in this interview, if necessary accompanied.

The appraisal report: the GIP prescribes the rules for appointing the first reporting officer, usually a person close to the official/agent who is in a position to assess his/her merits (often the head of unit) and the second reporting officer, who will have a more global view. The General Court has already clarified that the existence of differences between an official and his/her hierarchical superior (first reporting officer) does not imply as such that the latter is not able to assess objectively the merits of the person reported (DD/FRA, T-470/20). However, where an official has serious reasons to doubt the impartiality of the appointed reporting officer, the appropriate approach seems to be to submit a request to the Appointing Authority (based on Article 90(1) of the Staff Regulations) that the reporting be assigned to another person (CWIK/Commission, T-155/03).

The first assessor then completes the appraisal report. The assessment contained in the report must be clearly individualised and not impersonal (TA/EU Parliament, T-314/21). However, the General Court considers that it is sufficient to state the "salient features" of the performance of the person reported in terms of objectives and competencies without the assessors being obliged to specify all the relevant factual and legal elements supporting their appraisal (SV/EIB, T-311/21). The official or other staff member may then agree or comment and engage in a process of exchange with his/her assessors, the second assessor being essentially in charge of ensuring the consistency of the report and compliance with the rules of procedure laid down by the GIP.

Finalisation of the report: at the end of these exchanges, the draft report is then sent to the person reported, who can decide to accept or reject it within a period of time prescribed by the GIP of each institution or agency (generally between 5 and 10 working days). If he/she accepts it, the report becomes final. If he/she rejects it, the procedures to be followed differ according to the applicable GIP. In general, an appeal body is involved and examines the situation (e.g. the Reports Committee in the Council, an appeal assessor in the Commission and the President in the Parliament). If the official or other staff member disagrees with the final report issued by the appeal body, he or she has two options: to lodge a complaint on the basis of Article 90(2) of the Staff Regulations or, by way of derogation from the Staff Regulations, to lodge an appeal directly with the General Court of the Union.

CASE-LAW

NON-FINALISED APPRAISAL REPORT AND NON-RENEWAL OF THE EMPLOYMENT CONTRACT

In a judgment delivered on 14 December 2022 (*SU v. European Insurance and Occupational Pensions Authority (EIOPA)*, T-296/21), the General Court of the European Union recalled the principles that apply to the Administration in the event of non-renewal of an agent's contract whereas its appraisal report has not been finalised.

The General Court recalls that the Administration must ensure that periodic reports are drawn up on the ability, efficiency and conduct of staff members in the service, both for reasons of sound administration and to safeguard their interests. This report is to be taken into consideration when deciding whether or not to renew the staff member's contract. In this case, the decision not to renew was based on an appraisal report that was not finalised. The jurisdiction considered that this report could not be used as a basis for the Administration's decision not to renew the contract.

In this case, the Executive Director of EIOPA, who is also the appeal assessor, did not take into consideration the staff member's comments disagreeing with the assessment of the first assessor. The Agency argued that this was due to a technical issue of the Administration, which claimed not to have received notification of the agent's refusal.

According to the General Court, the appeal assessor's failure, despite the strong disagreement on the appraisal report, due to an internal organisational error of the Administration, cannot be considered as an implicit confirmation of the report, which would have had the effect of making it final and triggering the time limit for lodging a complaint against it.

Therefore, such a procedural irregularity can only be sanctioned by the annulment of the non-renewal decision if it is clear that the content of the report could have influenced the content of the decision (*Wahlström v Frontex*, F-87/11). The mere fact that the staff member's personal file is incomplete, when assessing his performance, is not sufficient to annul a decision of non-renewal, unless it is established that this circumstance may have an impact on the decision of the renewal procedure (*WD v EFSA*, C-167/20).

In this case, if the assessor had been aware of the applicant's disagreement with his appraisal report and comments, he could have taken his or her observations into consideration and, possibly, amended the report or its statements of reasons. In this respect, the General Court recalls that the Administration is under an obligation to provide sufficient reasons for any appraisal report and to give the staff member the opportunity to comment on those reasons. These requirements must be complied with even more strictly where the appraisal is less favourable than the previous assessment, as in the present case.

Hence, since the applicant's comments on its appraisal report were not taken into account and the report did not become final, these irregularities could have had a decisive impact on the renewal procedure. Therefore, the General Court concluded that the decision not to renew must be annulled.

The judges, considering that the applicant was definitively deprived of a serious chance to have her contract renewed, ordered the payment of a compensation of EUR 10,000 to the applicant, as well as EUR 5,000 for the non-material damage suffered.

HOW CAN YOU OPPOSE A REQUEST FROM THE BANK TO YOUR EMPLOYER TO ASSIGN YOUR EARNINGS IN THE CONTEXT OF A CONSUMER CREDIT AGREEMENT?

The consumer protection provisions in relation to the conclusion of a credit agreement are contained in Book VII of the Code of Economic Law.

The financial institution granting consumer credit asks the consumer (borrower) to sign a remuneration assignment document as a guarantee. This document will allow the bank to be reimbursed for unpaid loan instalments by collecting the funds from the borrower's earnings.

The signature of this document cannot be imposed but, in practice, it will often be the mandatory condition without which the loan cannot be granted by the bank.

Failure to pay two successive loan instalments exposes the consumer-borrower to

the risk of having this guarantee invoked by the bank. The provisions of the Code of Economic Law as well as those of the Remuneration Protection Act (*Loi relative à la protection de la rémunération*) offer the borrower the possibility to object to the implementation of this guarantee or at least to limit its detrimental effects.

The following conditions must be met to make a valid assignment of remuneration:

- The remuneration assignment document must:
 - be separate from the credit agreement,
 - reproduce [articles 28 to 32 of the law of 12 April 1965 on the protection of remuneration](#).
- The bank must, before taking any action against the employer, inform the borrower by a registered letter or by a writ of summons of its intention to execute the assignment of remuneration.

If the request for assignment is addressed to the employer, the borrower may object to the lender's request (either because he disputes the amount claimed or because he prefers to negotiate payment facilities). The borrower needs to do that by a registered letter, or a letter sent by a bailiff to the employer within a maximum of ten days from the date of the lender's letter. Then, the employer informs the lender of the objection that has been notified to him.

In this case, the dispute will be brought by the bank before the Justice of the Peace that may, at the request of the borrower, grant payment facilities, limit the assignment to a specific amount or increase the amounts that cannot be assigned.

These provisions also apply to European officials and agents, who remain subject to national law for private activities and relations with third parties, like any other private individual.

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