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NEWSLETTER
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Staff Matters

Legal News from Union Syndicale

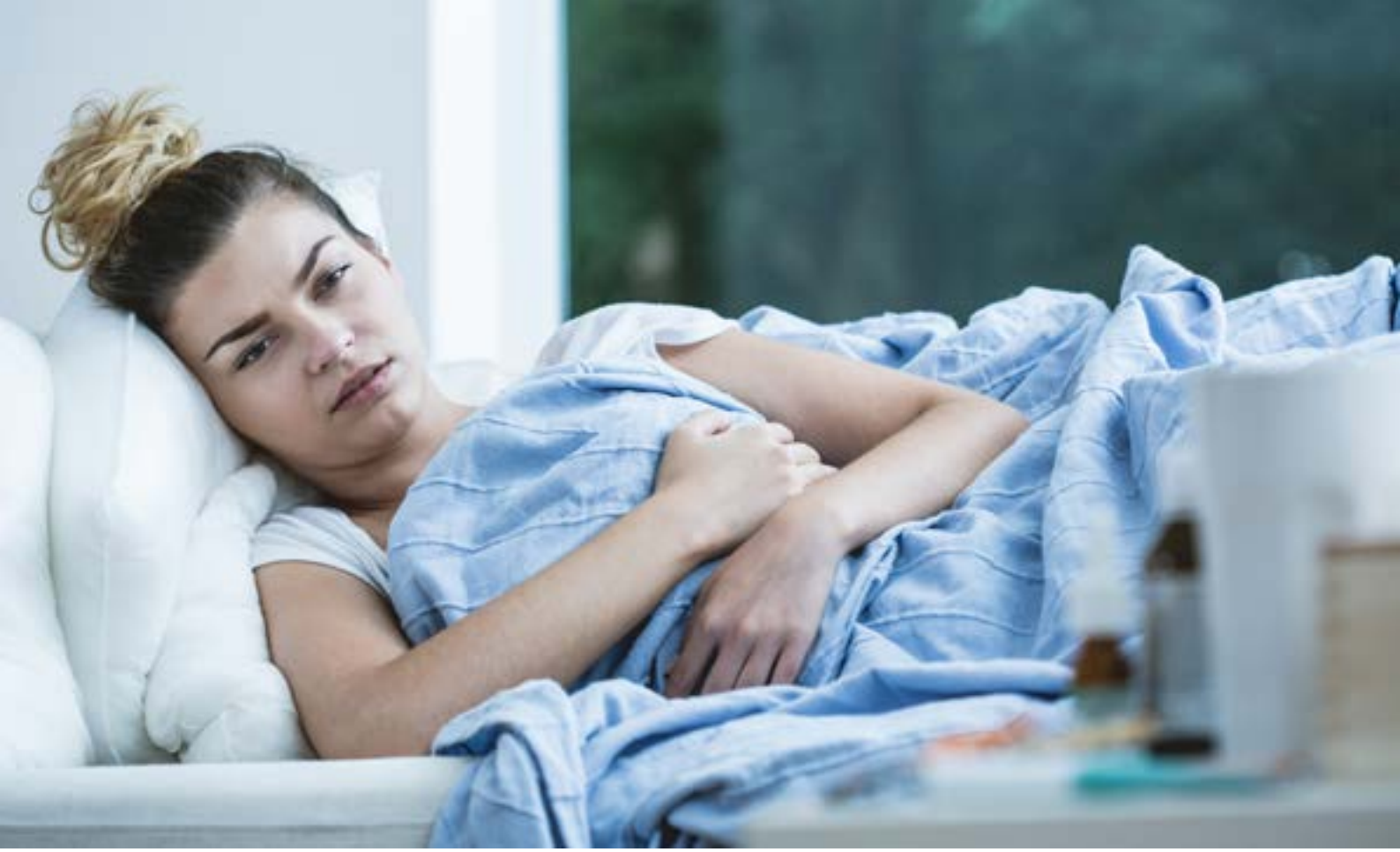
Termination of contract - sick leave - Art. 16 (2), Art. 48 (b) CEOS, Art. 8 FR Charter, Art. 12 Reg No. 45/2001, protection of personal data – damages

This newsletter treats a recent case on **contract termination during sick leave**. The General Court annulled the dismissal decision of the European Environment Agency and awarded certain allowances to the applicant as well as compensation of 6,000 Euro for non-material damage suffered.

When terminating a contract without notice on the basis of Art. 48 (b) CEOS, an institution cannot just assume that a member of staff is unable to resume duties, but has to **verify such an inability itself**.

Dismissal without notice during sick leave: the employer must verify the inability of a staff member to resume his/her duty

Case T-462/17, TO / EEA, of 11 June 2019



Facts

The applicant was a contract agent at the European Environment Agency (EEA) with a fixed-term contract and a nine-month probationary period.

After some disputes relating to the real estate agency engaged by the EEA, the applicant reported sick. She received a negative report on her probationary period and the EEA dismissed her without notice on the grounds that the period of her paid sick leave had exceeded the period provided for in Art. 16 CEOS and that in line with Art. 48 (b) CEOS, the applicant was not able to resume her duties at the end of the period of paid sick leave and also because her behavior during her probationary period had deteriorated the relationship of trust between her and the EEA.

Arguments and Decision

1. Calculation of sick leave duration

Art. 48 (b) CEOS stipulates that employment, whether for a fixed or for an indefinite period, may be terminated by the institution without notice "if the servant is unable to resume his duties at the end of a period of paid sick leave as provided for in Article 16". The provision is intended to permit the dismissal of an official who, although having exhausted his rights to sick leave, is unable to resume his duties because of his state of health, and thus limits for the institution the consequences of a sick leave whose duration exceeds that of the services performed by the agent.

First, the Court clarifies that for the purposes of applying Art. 16 (2) CEOS, interruptions of the periods have to be disregarded - in other words: the cumulative duration of the services performed by the agent must be compared with the cumulative duration of sick leave.

2. The obligation of the EEA to verify the inability for the applicant to resume her duties

A central part in this judgment is that the dismissal decision was annulled because the EEA had not verified on its own the inability of the staff member to resume her duties at the end of the period of paid sick leave. Under Art. 16 (2) and Art. 48 (b) CEOS, a contract may be terminated only where two cumulative conditions are met, namely the period for paid sick leave was exceeded and the staff member was unable to resume her duties at the end of the said period. The Court deduces the institution's obligation to verify itself the health status of the staff member - which is not explicitly stated in the text - from the objective of the provisions and also by referring to Art. 34 (1) EU Charter of Fundamental Rights (the recognition of social security benefits).

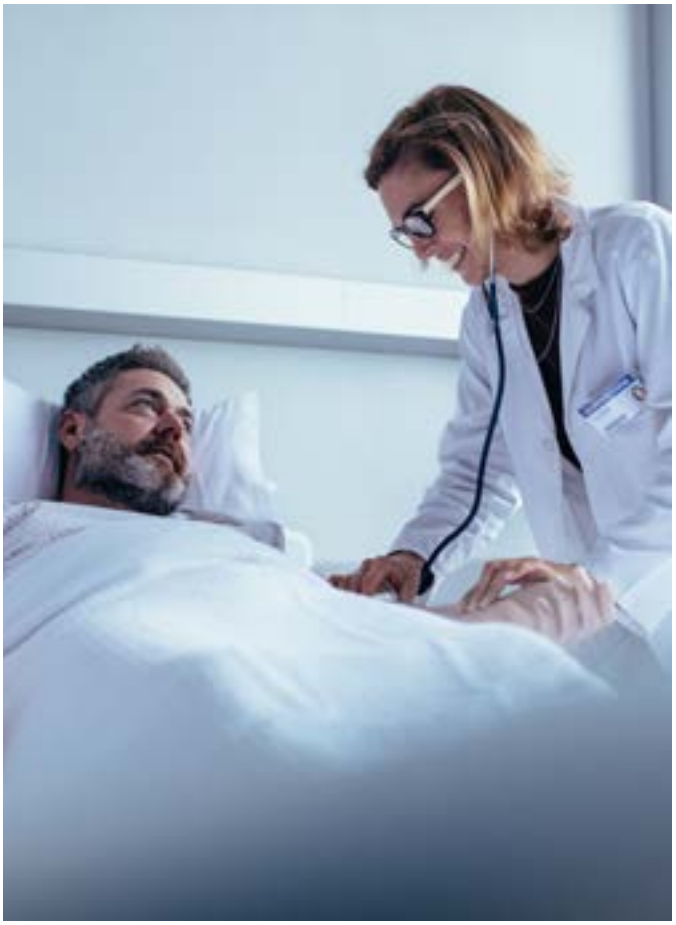
Where the administration exercises its discretion to adopt a decision of dismissal, it must take into consideration all the factors which may determine its decision. Particularly, it has to take into account the interest of the service, but also, in order to satisfy its duty of care, the interest of the agent concerned.

3. Damages

As to the damages, the Court reasoned that also the parallel procedure initiated by the EEA against the applicant in accordance with Art. 84 (2) CEOS could have led to the applicant's dismissal. In that logic, the Court orders the EEA to pay to the applicant a sum equal to one month's salary and one third of her basic salary per month of the probation period completed, less the dismissal allowance already received under Art. 48 (b) CEOS.

Where the EEA complained in the dismissal decision about the applicant's conduct in excessive terms, the Court awarded a compensation for non-material damage, ex aequo et bono, of 5,000 Euro to the applicant, yet also acknowledged responsibility of the applicant in the dispute.

The Court further awarded compensation to the applicant at the amount of 1,000 Euro for non-material damage sustained, because the EEA had infringed Art. 8 FR Charter (protection of personal data) and Art. 12 of Regulation No. 45/2001 on the protection of individuals with regard to the processing of personal data. Factual background was that some private data of the applicant relating to the dispute about the services provided by the real estate agency had been circulated within the EEA and were found by the Court to have affected the reputation of the applicant.



Comments:

1. On the application of Art. 48 (b) CEOS, it is indeed understandable that an employer cannot take an evidence-based decision on the pertinence of a dismissal based on health grounds where the factual background (the sickness) has not been verified by itself.

2. For the employing institution it is good to note that the reasons used by the EEA to describe the behaviour of the applicant in the dismissal decision were found excessive by the Court and therefore led to compensation for damages.

3. The Court applied a remarkable (rare) hypothetic argumentation in order to justify the award of the allowance foreseen under Art. 84 (4) CEOS: the dismissal proclaimed by EEA under Art. 48 (b), Art 16 CEOS was not successful for the reasons displayed above (lack of verification of health status). In order to match the situation, the Court reasoned that it cannot be ruled out that the EEA had dismissed the applicant on the basis of Art. 84 (2) CEOS. This led the Court to apply the legal consequence stipulated in Art. 84 (4) CEOS in favour of the applicant. The method resembles the labour law dogmatic according to which the judge can award compensatory allowances to the employee where a dismissal was found illegal at court, but the employment has de facto ended. It shall be further monitored, if this logic is continued to be applied in the case-law of the General Court and the Court of Justice.

4. The applicant was not successful with her assertion that the sickness had a professional origin in harassment and stemmed from the treatment at her workplace. She had never requested recognition of the professional character of the disease. In line with former case law (cf. Case F-40/12, para 33) in order to obtain such a recognition, the respective procedure has to be completed with a decision based on medical assessment. In this sense, the court applies the same reasoning of verification of health status towards the applicant as it did above towards the employer EEA.

5. Finally, it is important to remark that both Art. 8 FR Charter and Art. 12 of Regulation No. 45/2001 have been operationalized in this judgment to justify the award of damages for non-material harm suffered for divulging personal data within the organisation.