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Staff Matters

Legal News from Union Syndicale

This issue of Staff Matters deals with a recent decision of the Court on pension rights, particularly on the question whether there is a continuity of service for the EU and – related to this – whether previous, more beneficial, provisions on pension apply, although the official during most of her career has not worked in the Commission, but within EU agencies with new temporary contracts.

You can continue to send us your suggestions for new subjects or your questions and comments : **StaffMatters@unionsyndicale.eu**.

Pension rights, entry into service, continuity in career, Art. 2 Annex VIII SR, Art. 21, 22 Annex XIII SR, Art. 83 SR, Art. 40 SR, CCP, agencies

The Court acknowledged that an official benefits from the pre-reform pension as EU Commission official even though she had worked during considerable periods as temporary agent in EU agencies

Case T-128/17, Isabel Torné / Commission, of 14 December 2018 (not yet available in English)

Waiver

Although this newsletter is accurately prepared, it cannot replace individual legal advice. Legal situations are manifold and require both complex analysis and strategic action. You should therefore not rely on general presentations or former case-law alone to draw conclusions for your concrete situation. Please turn to us timely, should you require individual legal advice and/or representation.

Background

The pensionable age is 66 years for staff entering service as of 1 January 2014. Pensions are paid as a percentage of the final basic salary, with a ceiling of 70%, at an accrual rate of 1.8% per year of service. In a simplified description, for those staff members who entered service between 1 May 2004 and 31 December 2013 a higher accrual rate of 1.9% per year and a lower pensionable age of 63 years applies (for details see the transition rules in Art. 21, 22 Annex XIII SR). Thus, the provisions that apply to the pension of a staff member are more beneficial if the entry into service took place at an earlier date.

Facts and arguments:

The applicant became an official of the European Commission in 2006 and was – while being on leave on personal grounds (CCP) - transferred to an EU agency in 2012 where she worked under a contract as temporary agent.

In 2015 she was engaged by another agency, again as temporary agent. Subsequently, the applicant requested to have her pension accrual rate and her retirement date fixed at the terms that applied to her as EU official having been in service since 2006, thus before the reform of 2014 entered into force and irrespective of the changes brought about by this reform. Seven EU agencies intervened on the side of the applicant.

The Commission took the view that the transfer of a member of the temporary staff covered by Art. 2(f) of the CEOS to another EU agency entailed the conclusion of a new contract, separate from the previous contract, which showed a discontinuity in the career of that member of temporary staff and therefore entailed the application of the new rules under the Staff Regulations concerning retirement pensions, namely a pensionable age of 66 years and a pension accrual rate of 1.8%. The Commission argued that the applicant had entered service at the time of signing her last contract at the EU agency in the year 2015, which was after the changes brought about by the reform of 2014, and that thus the provisions for pension applied to her situation as if she had entered service after the reform took place. The Commission refused to recognise a principle of career continuity for temporary agents who change the institution or agency, and refused a principle of continuity of service for temporary agents in general.

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Court decision

The General Court annulled the Commission decision that had refused the calculation of the pension rights applying to the applicant as EU official having been in service since 2006. In the opinion of the Court, the applicant has to benefit from the conditions of pension as a staff member having entered service between 2004 and 2014, with an accrual rate of 1.9% per year and a pensionable age of 63 years. A central question to decide was whether the applicant has to be treated as if she entered service afresh in the year 2015 (when starting to work at the second agency), or whether there is a continuity in service referring back to the start of work at the Commission in the year 2006.

The Court found that the meaning of **entering service** as used in Art. 21 and 22 Annex XIII SR has to be interpreted in line with the objective pursued and taking into account that the pension scheme of the EU is the same for officials, temporary staff and contract staff. The applicant had continuously contributed to the pension scheme and was continuously affiliated to this scheme. Further, she had during all the time continued to be an official of the Commission since 2006. The different ways of terminating service under the Staff Regulations are conclusively listed in Art. 47 to 52 SR, amongst which leave on personal grounds (CCP) does not figure. The reform of 2014 respected the acquired rights and legitimate expectations of staff already employed in the institutions and agencies. Therefore, despite her work for the agencies and her CCP from the Commission, the applicant had maintained her continuous affiliation to the EU pension scheme in accordance with Art. 83 SR since her appointment as an official in 2006.

Comments

This judgment clarifies an important question of continuity of EU service for determining which provisions under the pension scheme apply in the transition rules of Art. 21, 22 Annex XIII SR. The applicant had been transferred to agencies while she was on leave on personal grounds, in total for 9 years at the moment of her request to fix her pension factors. The total length of leave on personal grounds is in general limited to 12 years in the course of the entire career (reduced from 15 years before the 2014 Staff Regulations reform), Art. 40(2) SR. The specificity of the case was that during this leave period, and while working for an agency, a reform of the pension scheme took place.

Case law determined already that new employment contracts with other agencies or with the same agency but in a different category or with material change in the type of duties mark an interruption of the career path (cf. Case F-116/14, **Murariu** / EIOPA, para. 132). This would e.g. require temporary agents to demonstrate adequate professional abilities for the new post, as is the case for external candidates. In the present circumstances, the Court did however not take account of any disruption that might be deducted from the staff member being on leave or pursuing a career path in other agencies, but focussed on the continuity of the pension system to which the applicant belonged since her entry into service in 2006.

This legal development is supporting the "inter-agency mobility" and the mobility of transfers from the EU institutions to the agencies and vice-versa. In terms of the pension scheme, the various EU institutions or agencies belong to the same "family".

In regard to the **admissibility** of the action, it is important to note that in accordance with the case-law, an information on how the institution will later decide is regularly considered as a preparatory measure and not reviewable by the Court. Only acts with binding legal effects are reviewable which are held to occur when the measure is "binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in his legal position". In the present case, the Court accepted that the Commission's refusal of the applicant's request for confirmation concerning the pension factors that will be applicable at the date of retirement can be considered as an act adversely affecting the legal situation of the official. The Court found that the act determining the date of the **entry into service** adversely affected the legal situation of the applicant, not the determination of future pension entitlements related to that date, once the staff member actually retires. Thus it can be retained that the decision on a request to confirm future pension rights may be a reviewable act.

On the potential future development of the case law on pension rights

In the present Case, two combined considerations led the General Court to conclude that the entry into service of the applicant was at the time of her recruitment as an official in the year 2006: (1) she became an official and remained an official while on leave on personal grounds and (2) she remained affiliated without interruption to the pension scheme of the EU. An interesting question is whether each of these circumstances alone would suffice to justify the same result for the staff member.

In the first scenario (an official remaining on leave on personal grounds, may it be without job or with an occupation not covered by the EU pension scheme, before returning to the previous EU institution at the end of the leave), there is good reason to assume that the same pension provisions would apply throughout, because there is no new "entry into service".

In the second scenario (continuously remaining affiliated to the EU pension scheme), previous case-law that recognised interruptions of the career caused by employment contracts with other EU agencies or within the same agency, could be seen to be overruled by the present judgment in Torné. In other words, the continuous affiliation to the pension system would not be affected by circumstances that used to be considered interruptions of the career. In this case, it does not appear to be of relevance if the staff member was on leave on personal grounds or not.

Union Syndicale will no doubt build on this ruling in order to have solid case-law confirming that it also applies to staff members who were not on leave on personal grounds.

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