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Staff Matters

Legal News from Union Syndicale

This newsletter on a decision of the General Court of 8 May 2019 treats a question with considerable practical significance for all staff approaching or having reached their retirement age. The Court decided that it is not allowed to place an official on leave in the interests of the service if the person has already reached his/her pensionable age[1] .

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Leave in the interests of the service, automatic retirement, pensionable age / retirement age, compulsory retirement, Art. 42 c (1) SR, Art. 47 SR

Art. 42c SR is not any more applicable to staff who have reached the retirement age

Case T-170/17 R, RW / Commission, of 17 May 2017

Case T-170/17, RW / Commission, of 8 May 2019

1 "Pensionable age" is 66 (Art. 52 SR) but, for officials and servants in service before 1 January 2014, pensionable age ranges between 60 and 65 according to the age on 1 May 2014 (Art. 22 (1) of Annex XIII).

Background

Art. 42c (1) SR stipulates:

"At the earliest five years before the official's pensionable age, an official with at least ten years of service may be placed by decision of the appointing authority on leave in the interests of the service for organisational needs linked to the acquisition of new competences within the institutions."

The Article explains in more detail by which rules the leave in the interests of the service shall be governed and makes clear that such leave shall not constitute a disciplinary measure. It further reads: "The duration of the leave shall correspond in principle to the period until the official reaches pensionable age. However, in exceptional situations, the appointing authority may decide to put an end to the leave and reinstate the official. When the official placed on leave in the interests of the service reaches pensionable age, he shall automatically be retired."

Art. 47 SR describes how service shall be terminated: next to resignation, compulsory resignation, dismissal for incompetence, removal from post, retirement and death, it lists the **retirement in the interests of the service**.

In accordance with Art. 52 SR an official shall be retired either automatically on the last day of the month in which he reaches the age of 66, or at his own request on the last day of the month in respect of which the request was submitted where he has reached pensionable age.

Facts and arguments:

In March 2017, the appointing authority had placed the applicant on leave in the interests of the service. At the same time - with the argument that he had reached the pensionable age - he was compulsorily retired.

After rejection of his complaint against this decision, the applicant filed an action and also applied for interim measures upon which the President of the Court decided in May 2017 to stay the execution of the

Commission's decision against the applicant (Case T-170/17 R). Recently, with its judgment of 8 May 2019 (Case T-170/17), the Court annulled the Commission's decision.

On the admissibility

The Commission argued that since the execution of the decision challenged had been suspended by an interim measure, the applicant had the possibility to effectively spend the maximum possible time in service, until the age of 65. He received the full remuneration as if he had not been retired earlier. Case-law stipulates that a legal interest of the applicant has to exist at the time of filing the action and that the applicant has to maintain a personal interest in the annulment of the decision against him. In the present case, the applicant had a persisting interest in a court decision because he needed certainty that the difference in amounts paid to him during the period of suspended execution of the retirement decision by way of interim measure of the Court was not going to be claimed back from him by the Commission afterwards. In that respect, the Court did not accept the assurance offered by the Commission not to claim back the difference in amounts, because - even with the assurance given - a source of uncertainty would remain that justifies a persisting legal interest of the applicant.

On the substance

The Court quashes the decision against the applicant on the grounds that **Art. 42c SR is not applicable to staff who have already reached the pensionable age**. In its reasoning, the Court interprets the clause by looking at its wording, context and purpose.

The Court welcomes the argument of the applicant that in view of the wording of Art. 42c SR the leave in the interests of the service **must have a certain duration**, because it says that the "duration of the leave shall correspond in principle to the period until the official reaches pensionable age", and also because an automatic retirement shall take place when the official who is on leave in the interests of the service reaches pensionable age.

The Court concluded that, if the leave in the interests of the service must have a certain duration, it follows that it is not possible in one single decision to place an official on leave in the interests of the service and at the same time to compulsorily retire him or her. The normative context confirms this because the Staff Regulations foresee certain administrative "positions" in which an official may be, but they do not foresee to place him/her in a 'automatic retirement in the interest of service' against his/her will. Such a new method would go beyond the catalogue of different ways how service of staff shall be terminated, as defined in Art. 47 SR (see above).

In regard to the purpose of Art. 42c SR, the Commission argued that it would be paradoxical that - if the clause was meant to optimise the human resource management and to give flexibility to the administration - an official cannot be placed on leave in the interests of the service once he/she has reached the pensionable age. However, the Court decided otherwise and found that, in a hypothetical case of a simultaneous automatic retirement and leave in the interests of the service, the official would not benefit from an allowance foreseen during the leave period (decribed in Art. 42c SR), because the duration of the leave in that case would be zero. Secondly, the Court found that the possibility foreseen by Art. 42c SR to end the leave and to reintegrate the official into work would run idle as well.

Comments

This judgment clarifies that there is no such thing as an "automatic retirement in the interest of service" against the will of the staff member. The most striking general conclusion from the judgment is probably that staff members who have reached the retirement age, but not yet the age at which the appointing authority is required to retire them, cannot be placed into leave in the interests of the service. In other words, the pensionable age marks the limit for the application of Art. 42c SR. Secondly, leave in the interests of the service must have a certain time duration. Thirdly, an official may not be placed simultaneously on leave in the interests of the service and be compulsorily retired. The General Court finds these conclusions mainly by applying the premiss that existing provisions established as such by the legislator shall not run idle. Despite the fact that the Court decided the case in a staff-friendly way, it may be questioned whether this methodological approach leads to balanced results in a normative environment with a plenitude of rules in place to cover all kinds of living situations.

As a practical consequence, the judgment narrows the flexibility of the administration in the management of staff who are close to or have already reached their retirement age. For this group of staff, the new judgment is good news: they may not be placed into leave in the interests of the service any more.

Another recent annulment decision of the second Chamber of the General Court regarding Art. 42c SR was taken on 14 December 2018 in Case T-760/16, FV / Council. When placing the staff member on leave in the interests of the service, the institution had misapplied Art. 42c SR by focussing entirely on the assessment of the applicant's ability to acquire new competences, without taking into account objective considerations for its 'organizational needs' linked to the acquisition of new competences within the institution.