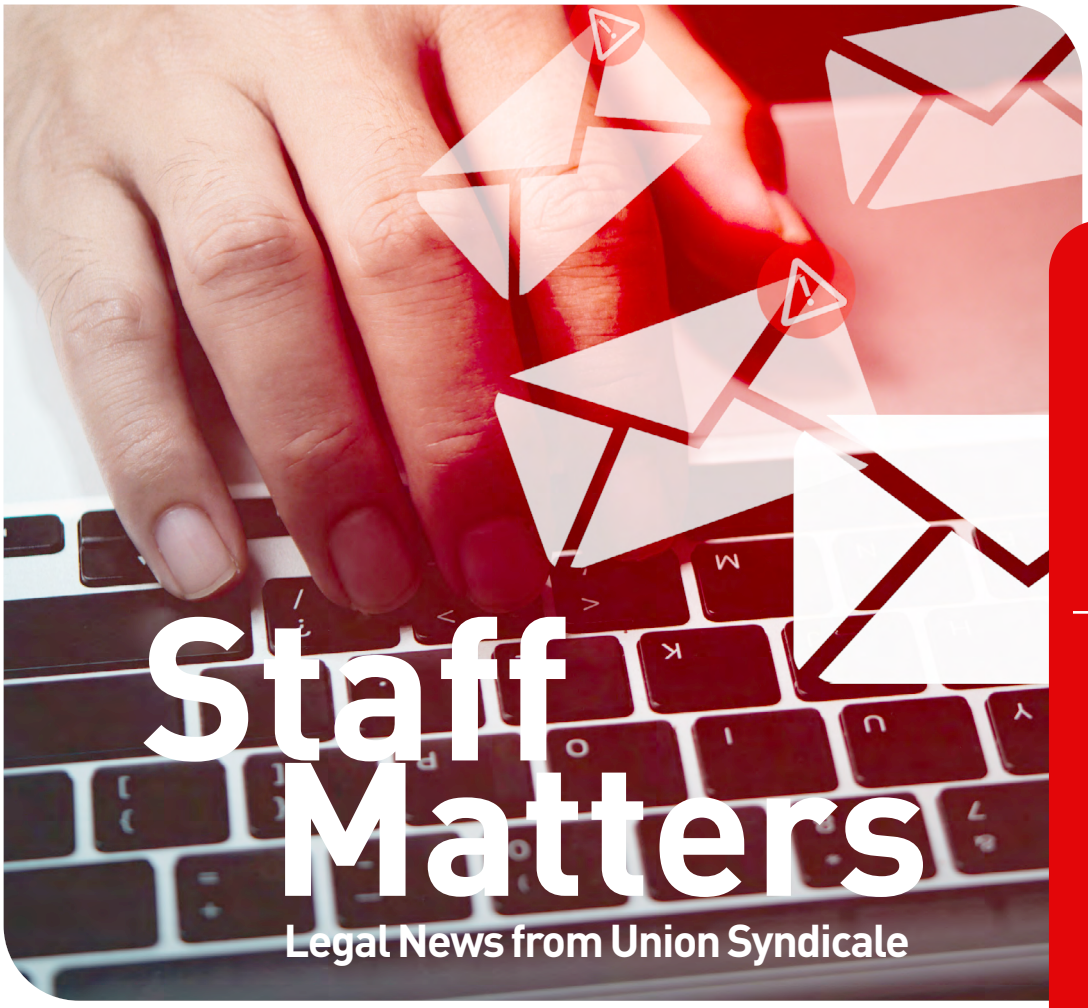

Staff Matters

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Pre-litigation procedure – complaint Art. 90(2) SR – act adversely affecting an official – tax abatement for a dependent child – email disclaimer

The act to be contested can be hidden in an email – despite a disclaimer telling that it is "for information only"

Case C-137/24 P, Heßler v Commission, judgment of 27 November 2025
Case T-369/22, Heßler v Commission, judgment of 20 December 2023

In a recent judgment the Court of Justice clarifies the preconditions for lodging a complaint under Art. 90(2) Staff Regulations (SR). The determination of the act that is to be contested depends on its content and context, not solely on its form. Also an email that claims to be „for information purposes only" might be the decision that can be and therefore must be contested in a complaint, i.e. that is the "act adversely affecting" the staff member under Art. 90(2) SR. Where this is disregarded, an action might easily be inadmissible and the entitlement lost. The substance of this case related to a tax abatement for a child receiving training: this right ends at the latest on the child's 26th birthday. The wording of an internal Commission directive had suggested that the abatement could be granted beyond that time. An internal directive cannot, however, apply if it is contrary to a binding and higher-ranking EU act (here the SR).

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Facts of the Case

The appellant received a dependent child allowance for his two daughters until they reached the age of 26, and also the tax abatement provided for in Regulation No 260/68. The appellant requested an extension of the tax abatement in respect of one daughter. By an email of 29 June 2021, a case manager in the Rights and Obligations unit of the PMO replied that "any request for the grant or extension of the tax reduction in the absence of entitlement to the dependent child allowance [...was] suspended" and added in a second email that the tax reduction could no longer be granted because it had been cancelled. Each email also contained a note at the end, under the case manager's signature, stating that the email in question was sent for information purposes only and did not constitute a decision of "the Appointing Authority AIPN/AHCC" that could give rise to a complaint under Art. 90 SR.

In July 2021, the appellant sent a note to the PMO, in which he disputed the information contained in the emails of 29 June 2021 and asked the PMO to grant him the tax abatement for his daughter. The appellant did not receive an explicit response to that note. In August 2021, the appellant requested the PMO to grant him the extension of the tax abatement in respect of his second daughter. Similarly, he received the reply that "any request or extension of the tax reduction in the absence of entitlement to the dependent child allowance [... could] no longer be accepted, it [had] been cancelled". That email again contained a note stating that it was sent for information purposes only and did not constitute a decision that could give rise to a complaint. In November 2021, the appellant lodged a complaint against the refusal by the PMO, arising from the PMO's "failure to reply", to grant the extension of the tax abatement sought for his two daughters. In March 2022, the appointing authority rejected the complaint. In June 2022, the appellant brought an action at the General Court.

Decisions of the General Court and of the Court of Justice

The General Court (GC) found that it was the implied rejection decisions that constituted the initial acts adversely affecting the appellant. When the GC for that purpose counted the respective dates of the implied rejections and checked the time limits for the pre-litigation (complaint) procedure, the GC found that one complaint was lodged in time but the second was too early, i.e. before the implied decision was calculated to have taken place. The action insofar was found inadmissible, and the GC dismissed the action in its entirety.

In its recent judgment, the Court of Justice (ECJ) sets aside the judgment of the GC in first instance in so far as the GC dismissed as inadmissible the claim for annulment brought by the appellant against the implied decisions; then, the Court dismisses the remainder of the appeal and, on the merits, rejects the requested tax abatement.

(1) Admissibility

The action is admissible. The ECJ recalls that only acts or measures which produce binding legal effects capable of directly and immediately affecting the appellant's interests by bringing about a distinct change in his or her legal position are acts adversely affecting him or her within the meaning of Art. 90(2) SR. In order to determine whether an act produces such effects, it is necessary to examine the substance of that act and to assess its effects on the basis of objective criteria, such as the content of that act, taking into account, as appropriate, the context in which it was adopted and the powers of the institution which adopted the act. The ability of an act to directly affect the legal position of a natural or legal person cannot be assessed solely by reference to the fact that that act takes the form of an email, since that would amount to "giving precedence to the form of the act [...] over the actual substance of that act".

The ECJ continued to hold that while the email contains elements indicative of the competent PMO service's wish to classify it as being purely by way of information, it also contains elements suggesting that the appellant would not receive the tax abatement. The ECJ concludes that the email was capable of directly and immediately affecting the appellant's interests by bringing about a distinct change in his legal position (i.e. determining the amount of tax). That reply should have been classified by the GC as an 'act adversely affecting' the appellant. In view of the ECJ, the GC erred in law when deciding that the email did not constitute an 'act adversely affecting' the appellant and that the claim for annulment was inadmissible in so far as it concerned the alleged implied decision.

(2) Merits

The ECJ rejects the appellant's claim against the PMO's refusal to grant the tax abatement. The ECJ states that where Art. 3(4) of Regulation No 260/68 stipulates an

to the opinion of the GC, the entitlement to the tax abatement is not conditional upon payment of the dependent child allowance. Nevertheless, the ECJ holds that there is a link between the two: both are of social nature and there is a need to maintain the child, both depend on the existence of a child to care for. The concept of 'dependent child', within the meaning of Art. 2 Annex VII SR, must be interpreted by taking into account the age limits. The tax abatement only applies in situations where the person concerned also satisfies the conditions for entitlement to the dependent child allowance.

The appellant had argued that a certain internal Commission directive (transposing conclusions of the heads of administration) foresaw that tax abatement can be approved for dependent children over 26 years of age, albeit only under certain conditions. The ECJ reminds that under its case-law internal acts by an institution such as the internal directive of the Commission constitute "rules of conduct, indicating the practice to be followed, which the administration imposes on itself and from which it may not depart without specifying the reasons which have led it to do so" and that "such internal acts may not in any circumstance derogate from binding and higher-ranking acts, such as, in the present case, the provisions of the Staff Regulations or of Regulation No 260/68". Since the conditions for approving the tax abatement beyond the child's age of 26 were not fulfilled here, the appellant could not rely on the internal directive where this was contrary to the stipulations of the higher ranking Staff Regulations and Regulation No 260/68.

Comments:

1. In its judgment on Case Heßler, the ECJ effectively rejects the requested tax abatement for a dependent child. The entitlement is linked to compliance with the conditions for the right to obtain a dependent child allowance. Where its conditions are not fulfilled (any longer), both abatement and child allowance end at the latest on the 26th birthday.

2. Hence, on the substance, the **hierarchy of norms** prevails: an internal directive cannot apply if it is contrary to a binding and higher-ranking EU act, i.e. here the SR. It is a solid line in case-law on staff matters that a norm of lower rank than the SR and, more generally, than a regulation, cannot lawfully lay down rules which derogate from the provisions of the SR or of a regulation.[1]

3. For the appellant, the result of the ECJ decision is thus the same as in front of the GC in first instance, however it comes with a lesson of general interest for staff as to the admissibility, exemplifying how difficult it is to choose the right act that can and therefore must be contested within the time limits. An email or other "informal" act of an institution can amount to an 'act adversely affecting' the member of staff against which the complaint under Art. 90(2) SR can be lodged. For the same reason, the complaint must be lodged against such email, should the entitlement not get lost for reason of time-limitation (three-month period).

4. In our earlier StaffMatters newsletter #26 of February 2023 (Case C-366/21 P, Picard) we had pleaded that the concept of clarifying uncertainties about the legal situation of staff should also apply to other rights than pension entitlements (as was the subject in Picard). Now, Case Heßler is another example where the email reply by the administration relating to an entitlement has binding legal effects with the consequence that the addressee was able to challenge the decision at court. In the scenario leading to case Picard, the PMO had used the same email disclaimer and also there the ECJ considered it to be the decisive 'act adversely affecting' the recipient of the email.

5. The ECJ with its new judgment reinforces **legal certainty** and **legal clarity**. The GC in first instance was about to blur the pre-litigation phase when it wanted to give leeway to the administration for choosing the method of implied decision-making even in a case where an email had already announced the discontinuation of an entitlement. The opinion of the GC would lead to more doubt, which in practice is unsatisfactory. In the appeal decision, the ECJ instead continues its case-law Picard according to which it is the content and context of an act (not only the form) to determine the 'act adversely affecting' an individual.

6. As the applicant had correctly argued in front of the GC, the fact that a disclaimer classifies an email to be for information only and not to constitute a decision of the Appointing Authority that could give rise to a complaint, amounts at least to an irritation, if not to a manipulation of the recipients based on a misleading representation of the applicable law, with the effect that those who do not know (better) the ECJ case-law must believe that they cannot and must not contest the decision, because they trust the self-declaration of the email that it is not an act amenable to contestation.

7. The Commission in Case Heßler admitted during the court procedure that the contested email decision by the PMO should have been classified as a 'decision' and should have informed the appellant of his right to lodge a complaint. This could be the moment for the PMO (and others) – if not yet done - to consider the **removal** or **modification** of their **disclaimers** in email signatures.

8. For the staff as recipients of messages and information it is key to bear in mind: an 'act adversely affecting' the individual within the meaning of Art. 90(2) SR is identified by its **content** and **context**, not solely by its form.[2]

[1] S. examples in Mader, EU Civil Service Law (2024), page 6; Case T-398/03, Castets v Commission, ECLI:EU:T:2005:159, para. 32.

[2] Mader, EU Civil Service Law (2024), pages 49-56.

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