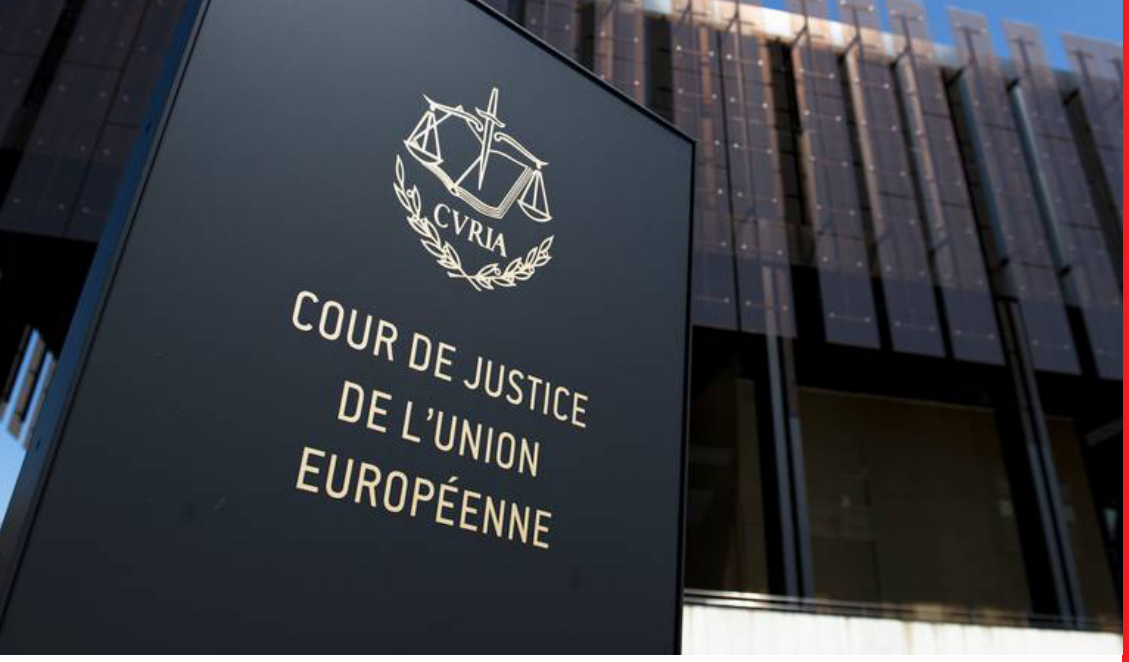

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NEWSLETTER
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Staff Matters

Legal News from Union Syndicale

In this issue, we will be looking at actions brought following the reform of the Staff Regulations which entered into force in 2014.

Please continue to send us your suggestions for topics to address, or your questions and comments, at **StaffMatters@unionsyndicale.eu**.

Travel expenses, travelling time, annual leave, career capping, salary adjustment, increase in retirement age.

Articles 45, 52, 65 and 66a of the Staff Regulations, point A of Annex I, Article 7 of Annex V, Article 8 of Annex VII, Article 6 of Annex X, Article 22 of Annex XIII

Five years after the reform entered into force, many actions have not yet been definitively settled

Direct actions brought before the General Court: cases T-17/14, T-20/14, T-22/14, T-23/14, T-75/14 and T-456/14

Pensions: cases F-3/15, T-232/16 P

Salary adjustment: cases T-530/16, T-543/16 and T-544/16, T-527/16

Careers: cases T-525/16, T-539/16, F-81/15, T-526/16, T-540/16 and F-80/15

Travelling time and leave: cases T-516/16 et T-536/16, T-523/16 et T-542/16, T-537/16, T-518/16

1 It should be noted, however, that while all OSPs agreed at the outset, some have never paid their contribution and funding for actions is ultimately being provided in full by a few trade unions, including Union Syndicale, which has continued to support all colleagues.

The 2014 reform introduced a number of provisions into the Staff Regulations which, according to most trade union and professional organisations (OSPs), were an infringement of fundamental rights. The trade unions decided to challenge these provisions before the Court of Justice, in some instances in direct actions before the General Court (cases T-17/14, T-20/14, T-22/14, T-23/14, T-75/14 and T-456/14) and in others by coordinating and deciding to jointly fund actions brought on behalf of individual colleagues before the Civil Service Tribunal and subsequently transferred to the General Court following the dissolution of the CST.

Most of these individual actions were suspended pending judgments in the direct actions brought by the OSPs. All of the actions brought by the OSPs have been dismissed, partly because of issues of admissibility, and partly because the judges considered that the consultation with the Staff Regulations Committee (see Article 10 of the Staff Regulations) was sufficient to comply with the workers' right to information and consultation provided for in Article 27 of the Charter of Fundamental Rights of the European Union.

It was therefore only in 2018, four years after the contested provisions entered into force, that most of the individual actions started to be examined by the EU courts.

1. Increase in retirement age

The only case not to have been suspended, and thus the first to result in a judgment, concerns the retirement age (F-3/15). The applicants asked for their pension contributions and transfers of pension rights to be recalculated in view of the change in their retirement age. The Civil Service Tribunal found in their favour on the second point but the Commission appealed against that judgment (T-232/16 P) and the General Court ruled in its favour. In conclusion, the increase in the retirement age has not been declared invalid by the Court of Justice.

2. Salary adjustment

Concurrently with the 2014 reform, the Council of the EU refused, on the basis of the exception clause in Article 10 of Annex XI, to adopt the annual salary and pension adjustments for 2011 (1.7 %) and 2012 (also 1.7 %). The Commission brought two actions in view of this refusal (C-63/12 and C-196/12), which were dismissed by the Court. The legislator (Council and Parliament) subsequently adopted adjustments of 0.0 % and 0.9 % for these two years on the basis of the exception clause. In view of these insufficient adjustments, the OSPs brought actions T-530/16, T-543/16 and T-544/16, arguing in particular that the conditions for applying the exception clause had not been met and that the adjustment percentages had been set by the Council and Parliament with no justification or statement of reasons.

On 13 December 2018, the Court rejected these arguments and therefore definitively confirmed the adjustments for 2011 and 2012.

3. Career capping

The amendment to Article 45 and Annex I of the Staff Regulations means that it is now no longer possible to be promoted from AST 9 to AST 10 and that promotion beyond AD 12 is limited to colleagues in management or advisory posts. Complaints were lodged and actions subsequently brought against the Commission, challenging classification in a post 'not eligible for promotion', the lack of posts available for promotion, and the lack of promotion for AST 9, AD 12 and AD 13 colleagues (T-525/16, T-539/16, F-81/15, T-526/16, T-540/16 and F-80/15). A number of arguments were put forward in support of these actions: unlawfulness of Article 45 and Annex I; failure to respect acquired rights, the duty of care and the duty to state reasons; failure to comply with Article 45 and promotion rates; lack of compensatory transitional provisions; manifest error of appreciation; infringement of the principles of equality of treatment, proportionality, good administration and entitlement to reasonable career prospects, etc.

In the different judgments, the Court swept all these arguments aside, essentially on the grounds that the legislator had the right to modify the essence of the career system by limiting access to certain grades on the basis of the duties performed.

4. Travel expenses, travelling time and annual leave

(a) Annual leave outside the EU

The first judgment on this matter concerns annual leave days for officials and other staff serving outside the European Union, in countries where working conditions can be very difficult. Though the Commission had not proposed an amendment on this point, the Council and the Parliament decided to reduce such leave from 3.5 to 2 days per year. In its judgment in case T-518/16, the Court found that, given such a significant deterioration in the health and safety conditions for staff, it was in any event necessary to assess the consequences of reducing leave for the health of the staff concerned. Noting that such an assessment had not been carried out, the Court concluded that the institutions could not rely on the new Article 6 of Annex X to the Staff Regulations.

As this judgment was in principle applicable only to the applicants, the OSPs then advised all colleagues concerned to lodge a complaint against the reduction of their leave days for 2019. The complaints were rejected, and will be the subject of an action. Alongside the initial action supported by all the OSPs, contract staff also brought an action (T-517/16), which unfortunately was dismissed even though the contested decision was also based on the new Article 6 found to be inapplicable in case T-518/16. On the basis of their initial complaint, these staff members are now requesting the leave days denied to them since 2014.

The Commission has appealed the judgment in case T-518/16 (C-119/19 P). It is likely that the judgment on appeal will also be decisive for the more recently lodged requests and complaints.

(b) Annual travel expenses and travelling time

The 2014 reform restricted the reimbursement of annual travel expenses and the granting of travelling time to beneficiaries of the expatriation or foreign residence allowance. Taking a common stand, the OSPs decided to challenge this restriction which, in their opinion, discriminates on the basis of nationality and infringes the right to respect for family life. The complaints lodged with the Commission and the Council contesting the setting of annual leave days (and the lack of travelling time), and contesting the payslips on which the reimbursement of travel expenses should have appeared, were rejected. In the judgments in actions T-516/16, T-536/16, T-523/16 and T-542/16 brought against the rejection of these complaints, the Court found that there had been neither discrimination nor infringement of the right to respect for family life. The OSPs are currently considering an appeal. Union Syndicale and several other trade unions have already given their consent and hope the OSPs that have not yet paid their contributions will agree to do so.

In addition to abolishing the reimbursement of annual travel expenses (from the place of origin to the place of employment) for colleagues who are not entitled to the expatriation or foreign residence allowance, the 2014 reform also included a change for colleagues whose place of origin was outside the EU: the reimbursement would be calculated on the basis of the capital of the Member State of which they were nationals, and for those who were not nationals of a Member State there would be no reimbursement. The action that was brought on this matter (T-537/16) is still pending.

Five years after the reform entered into force, what conclusions can be drawn from the legal battle we have undertaken as a common front? First of all, it must be noted that the European courts have interpreted the guarantees and protections afforded to workers by the Charter of Fundamental Rights in a very restrictive manner. The conditions imposed by the Court in order to invoke the right to information and consultation of workers are such that it is unlikely that this right can ever be successfully relied upon by officials and other servants of the EU.

In addition, a wealth of legal information can be obtained from these judgments, in particular with regard to the concept of an act adversely affecting an official and to the room for manoeuvre available to the legislator. In this respect, the EU courts have established that:

• the Staff Regulations may be amended at any time by the legislator and that, unless otherwise provided, the new provisions will apply to the future consequences of previous situations, except in the case of situations becoming definitive under the previous rule, which create acquired rights (T-526/16, paragraph 51);

• in the absence of any order of precedence between the Staff Regulations, the annexes thereto and a Directive, the fact that an annex to the Staff Regulations does not comply with an article in the Staff Regulations or in a Directive is not grounds for declaring that annex unlawful; on the other hand, if it does not comply with the Charter of Fundamental Rights, the Court may consider it unlawful (T-518/16, paragraphs 64 and 69);

• if a general principle of EU civil service law derives solely from the will of the legislator responsible for the Staff Regulations, that legislator has a wide power of discretion in determining the rules (T-523/16, paragraph 48);

• in order to justify a measure of general application, it is sufficient to indicate the overall situation which led to its adoption (T-530/16, paragraph 72);

• a provision which has not yet been applied may be called into question by challenging a decision based on a transitional provision (T-518/16, paragraph 39);

• if the person concerned has not been formally notified, in accordance with Article 25 of the Staff Regulations, of a decision which is visible in the IT system (Sysper), it cannot be said that the decision has not been challenged within the time limit laid down in the Staff Regulations (T-526/16, paragraph 35);

• while the principle of proportionality requires the least onerous measure to be used to achieve an objective, a measure cannot be declared unlawful because it does not comply with this principle unless it is manifestly inappropriate in view of the objective pursued (T-523/16, paragraphs 78-79);

• the 'identical conditions of ... service career' guaranteed by Article 5 of the Staff Regulations are guaranteed only within the same grade and not throughout the entire career (T-526/16, paragraph 58);

• the lack of a transition for AST careers did not constitute inequality in relation to the transition for the careers of AD colleagues, who perform different duties (T-525/16, paragraph 106);

• contrary to Article 6 of the Staff Regulations, the promotion rates set out in Annex I for grades AD12 and AD13 do not require the institutions to make the corresponding number of posts available for promotion (T-526/16, paragraph 96).

Finally, the main lesson to be learned from these actions is perhaps not a legal but a political one, and therefore does not fall within the scope of this article. However, we cannot help but note that the fight to uphold the Staff Regulations cannot be limited to the legal sphere, which has so far produced belated and unconvincing results. Although the pooling of the various OSPs' resources to fund these actions (with the abovementioned exception of the OSPs who have refused to pay their contributions) has made it possible to organise this fight and thus contest all the problematic aspects of the reform, it is in fact prior to the adoption of the reform that this joint effort would have been indispensable.