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NEWSLETTER
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Staff Matters

Legal News from Union Syndicale

This newsletter deals with the entitlement of the surviving spouse of an official to receive a pension after the death of the official. Such a survivor's pension was denied in a case recently decided upon by the European Court of Justice (ECJ). The ECJ confirms that the Commission was right in refusing a survivor's pension to the husband of an official with whom he had not been married for the required time of one full year. A status as cohabitant (i.e. their status for the period before being married) does not fulfil the strict requirements of "marriage" in the sense of the Staff Regulations.

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

Survivor's pension - spouse –
non-discrimination –
Art. 17 Annex VIII SR

ECJ applies the conditions
for a survivor's pension
strictly

Case C-460/18 P, HK / Commission,
of 19 December 2019

Case T-574/16, HK / Commission,
of 3 May 2018

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.

Legal Background

Article 17 of Annex VIII to the Staff Regulations (SR) reads as follows:

"Where an official dies having one of the administrative statuses set out in Article 35 of the Staff Regulations the surviving spouse shall be entitled, provided that the couple were married for at least one year at the time of his death and subject to the provisions of Articles 1(1) and 22, to a survivor's pension equal to 60% of the retirement pension which the official would have been paid if he had qualified, irrespective of length of service or of age, for such pension at the time of death.

The duration of the marriage shall not be taken into account if there are one or more children of the marriage or of a previous marriage of the official provided that the surviving spouse maintains or has maintained those children, or if the official's death resulted either from physical disability or sickness contracted in the performance of his duties or from accident."

Facts of the Case

HK, the appellant, and Ms. N. had been living together since 1994. Ms. N. was an official of the European Commission, assigned to the Joint Research Centre. The appellant and Ms. N. were married on 9 May 2014. Ms. N. died on 11 April 2015, so just four weeks before their marriage could have reached the age of one year. The appellant requested to be paid a survivor's pension, which the Commission refused to grant.

The Parties' Arguments and Decision of the Courts

The appellant brought an action for the annulment of the contested decision and for compensation for the material and non-material damage allegedly suffered. In his action, the appellant pleaded that Article 17 (1) of Annex VIII to the SR was unlawful, claiming, first, that the criterion of marriage or non-marital partnership, of more than 1 year, is arbitrary and inadequate having regard to the purpose of the survivor's pension, and that that article is unlawful in so far as it infringes Article 21 of the Charter of Fundamental Rights of the European Union ('the Charter') and Article 2 of Directive 2000/78.

The General Court dismissed the action in its entirety. In second instance, the European Court of Justice (ECJ) set aside the decision of the Court and handed down its own decision on the substance matter.

The ECJ found that the Court has infringed the obligation to state reasons, because the Court had given ambiguous grounds. It had namely not made clear and understandable which persons were coming within the scope of Art. 17 (1) Annex VIII SR when first

it considered that it applies only to a person who had entered into a civil marriage recognised by law, but later – without giving reasons for that assessment – stated that Art. 17 (1) covered not only married persons but also registered partners. The General Court further considered that 'it is not the loss of the deceased official's remuneration which constitutes the condition for granting the survivor's pension, but the legal nature of the relationship between the official and her surviving spouse or partner'.

In its own decision on the substance, the ECJ also dismissed the action and decided that the Commission was right in refusing the benefit of a survivor's pension. The ECJ justifies this in the following way: the grant of the survivor's pension depends solely on **the legal nature of the ties between the person concerned and the deceased official**. Although de facto unions and legally recognised unions, such as marriage, may display similarities in certain respects, such similarities do not necessarily mean that those two types of union must be treated in the same way. Marriage is characterised by rigorous formalism and creates reciprocal rights and obligations between the spouses of a high degree.

The ECJ clearly differentiates between non-marital partnerships and cohabitation. Non-marital partnerships are to be treated as marriage provided that all the conditions listed in Article 1(2)(c) of Annex VII SR are fulfilled. The conditions provided for in that article include in particular the fact that the couple provide an official document recognised as such by a Member State or by any competent authority of a Member State, certifying their status as non-marital partners, and that





the couple does not have access to legal marriage in a Member State. A de facto union, such as cohabitation, on the other hand, does not satisfy those characteristics in so far as a de facto union is not, in principle, the subject of a statute laid down by law. Cohabitants are not in a situation comparable to that of married persons or to that of partners who have entered into a registered partnership. Treating them differently does therefore not infringe the principle of non-discrimination.

Finally, the appellant had claimed that the condition of a minimum duration of one year of marriage in order to be entitled to the survivor's pension was arbitrary, inadequate and discriminatory. In the appellant's view, having been married for almost a year to Ms. N., he should be entitled to a survivor's pension. Also Advocate General Pikamäe had opined that the requirement of a one-year of minimum duration of the marriage as a cut-off period was disproportionate (because it went beyond what is necessary to achieve the objectives of general interest pursued by the legislature) and thus had to be declared invalid. In his view, the applicant was entitled to the survivor's pension and to a reparation of the non-material damage suffered.

Yet, the ECJ decided otherwise and welcomed the argument brought forward by the Commission that the purpose of the requirement of a minimum duration of marriage at the date of death is to avoid that it is merely a pact on future successions, motivated more by financial considerations than by a plan for living together. That condition of duration made it possible, *inter alia*, to combat fraud. In order to combat abuse or even fraud, the Union legislature has a margin of discretion in establishing the entitlement to a survivor's pension. The condition that the marriage must have lasted for at least one full year for the surviving spouse to receive the survivor's pension, said the ECJ, is intended to ensure the reality and stability of the relationship between the persons concerned. Such condition did not appear to be discriminatory or manifestly inadequate in relation to the objective of the survivor's pension.

Comments:

1. The judgment of the ECJ follows the line of case-law in two main strands: (1) that a grant of the survivor's pension depends solely on the legal nature of the ties between the person concerned and the deceased official (cf. Case C-122/99 P and C-125/99 P, D and Sweden / Council), (2) that de facto unions and legally recognised unions, such as marriage, do not have to be treated in the same way, despite their similarities (cf. Case C-485/08 P, Gaultier / Commission)
2. The ECJ did not touch the legislative choice that consists in setting up a minimum period of one year of marriage that is required to be entitled to a survivor's pension. It was enough for the ECJ to have a rationale which is not manifestly inadequate. The rationale is that the principle to prohibit fraud and abuse has to be complied with. The rule entails a sharp differentiation based on time between those couples who have and those who have not reached the "marriage age" of one full year, without being able to refute the assumption that in their case any fraud or abuse would actually have to be avoided, or that fraud or abuse does not exist in their case.
3. It is important to bear in mind that in many practice cases – further to Art. 17 (2) Annex VIII – the duration of the marriage is not to be taken into account if there are one or more children of the marriage or of a previous marriage of the official provided that the surviving spouse maintains or has maintained those children. Also where the official's death resulted either from physical disability or sickness contracted in the performance of his duties or from accident, the duration of the marriage does not count.
4. Art. 17 Annex VIII is not the only clause referring to a minimal duration of marriage. Also Art. 17a, 18, 18a and 19 Annex VIII contain such minimum periods. Art. 20 Annex VIII balances these provisions by stipulating that the "duration of the marriage shall not be taken into account where the marriage, though contracted after termination of the official's service, has lasted at least five years". For the calculation of this period, also the time of being married before retirement has to be counted (cf. Case F-104/15, RN / Commission).