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Staff Matters

Legal News from Union Syndicale

This newsletter treats a very recent interim measure handed down by the General Court in which it ordered that the EIT (in Budapest) has to allow the applicant to do telework from her place of origin in Germany, until the time of lifting of the restrictions linked to the health crisis imposed by the authorities in Germany and Hungary. Yet, she is obliged to visit her duty station ad hoc for reasons related to the interest of the service. The Court explicitly orders the interim measure to be applied, namely to allow telework from Germany. This is substantially justified by the EIT's duty of care for the applicant, also taking into account her personal and family situation. We believe that this order of interim measures is of relevance for all staff who seek to work from their places of origin during the pandemic, and can justify this by their personal/family situation.

You can continue to send us your suggestions for new subjects or your questions and comments :
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Work organization measures during the Covid-19 pandemic – duty of care - home office / teleworking outside the country of employment - suspension of measures - interim measures - Art. 278, 279 TFEU – Art. 20 SR – Art. 7 Charter

Covid-19 pandemic: Court orders telework at place of origin

Case T-12/21 R, PJ / EIT, of 13 April 2021

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.

Facts of the Case and Procedure

The applicant is a temporary agent of the European Institute of Innovation and Technology (EIT), where she is Head of Unit and part of the EIT Management Team. Her place of employment and usual residence is in Budapest, but she has regularly travelled on weekends to Cologne, which is her place of origin and where her children of minor age and her spouse permanently reside. Since the beginning of the COVID-19 pandemic, the EIT adopted a number of measures, in accordance with the policy of the European Commission. The instructions included, in particular, the implementation of general teleworking. After a number of changes of the rules incl. permanent telework and a weekly rotational system, staff was ordered to do teleworking at the duty station, namely Budapest. The EIT laid down that telework from abroad can only be authorized exceptionally, e.g. in case of a separated family. In application of this exception, the member of the personnel whose spouse, partner or children permanently reside in another Member State, can telecommute from abroad to be with their family. Line managers had to ensure that there were no negative consequences on staff performance. The applicant requested to work from abroad and relied in particular on the existence of travel restrictions, closure of schools and quarantine requirements in Germany, which did not allow her to be in contact with her family on her return, as well as on the high risks related to travel. This request was refused with the argument that permanent telework was not possible, that several tasks required the physical presence of the applicant and that her absence could be prejudicial to the management of her team. The applicant brought an action for annulment against the decision, by which the Director of the EIT refused her request for teleworking from the place of origin; she also filed an application for interim relief.

The Decision of the Court

With its order of 13 April 2021, the President of the General Court first decided to suspend the decision of the Director of the EIT who refused that the applicant may telework from her place of origin (Cologne). Secondly, the President of the General Court ordered that the EIT will authorize the applicant to do telework from the place of residence of her children (Cologne) as long as the situation relating to the COVID-19 pandemic warrants and without prejudice to her obligation to visit her duty station (Budapest) for reasons related to the interest of the service.

The Arguments of the Parties and the Reasoning of the Court

The Court describes the preconditions for suspending the application of a contested act (Art. 278 TFEU), and for interim measures (Art. 279 TFEU). If a decision is only denying the desired act (a negative administrative measure), the suspension of its application is in principle inadmissible, because it cannot have the effect of modifying the applicant's situation. Secondly, interim measures are ancillary to the main proceedings and they must not fall outside the framework of the final decision likely to be taken by the Court in the main proceedings. The Court reminds that in exceptional circumstances and in order to ensure effective judicial protection, interim measures may anticipate the possible consequences that the administration would have to draw from an annulment judgment.

As to the merits of the request of interim measures the Court tests the precondition of a "fumus boni juris", which means that at least one of the pleas relied on appears, at first glance, not devoid of serious foundation. This is the case when one of these pleas reveals the existence of an important legal or factual dispute the solution of which is not immediately clear and therefore merits a detailed examination (which must be the subject of the main proceedings on the merits). The applicant claims a failure to comply with the obligation to balance the interests of the service against her interests in accordance with the duty of care. She states that the director of the EIT did not take into account the circumstances which she had invoked, never explained to her the real, concrete and legitimate reasons which would prevent her from teleworking from abroad. The complainant states that she was willing to travel and work at the EIT premises if she was informed in advance of an important meeting justifying her presence there. The applicant alleges that the contested decision constitutes an infringement of her right to private and family life provided for in Art. 7 of the Charter of Fundamental Rights, taking into account the rights of the child under Art. 24 Charter, as well as her right to fair working conditions, Art. 31 Charter.



In the opinion of the Court it was not harmful to the applicant that she based her arguments relating to health measures in the Covid-19 pandemic on the assumption that Commission rules apply by analogy to the EIT, instead of the rules adopted by the EIT.

The Court notes that the main dispute raises a novel and delicate question relating to the interpretation of the obligation of residence at the place of employment arising from Art. 20 SR (Staff Regulations) in the particular circumstances imposed by the Covid-19 pandemic. The Court reminds that the institutions have a wide discretion in the organization of their services and the organization of the working conditions of the staff according to the constraints linked to the health situation, but that the exercise of this power must be carried out in accordance with the duty of care.

This principle reflects the **balance of rights and reciprocal obligations** that the Staff Regulations have created in the relations between public authority and public service officials. The balance implies that the authority also takes into account the interests of the agent concerned. Interim measures require not only a “fumus boni juris” but also urgency. Urgency means a need for a provisional ruling in order to avoid serious and irreparable damage being caused to the party requesting the claim.

The EIT argues that the applicant has not demonstrated damage attributable to the application of the contested decision. She had signed an employment contract by which she accepted that her place of employment is in Budapest and in this regard notably benefits from a

expatriation allowance. The constraints concerning the applicant’s possible trips are inter alia closely linked to her **personal choice** to work in Budapest without her family, the consequences of which are momentarily exacerbated by the current pandemic. The Court refuses this argumentation of the EIT that the situation is due to a “personal choice” of the applicant, stating that the EIT had put in place rules to adapt to the pandemic situation on a case-by-case assessment. When applying these rules to the applicant’s particular situation she risks compromising her ability to maintain regular contact with her children, something she had managed to achieve before the pandemic despite the distance between her place of employment and the place of residence of her family.

Finally, the Court balances the risks associated with each of the possible solutions of the interim proceedings: whether or not the interest of the party seeking interim measures in obtaining the suspension of the execution of the contested act prevails over the interest of its immediate application. The balance of interests tilts in favor of the applicant

The EIT – so states the Court - did not put forward any argument of an administrative or pecuniary nature, based in particular on the expatriation or other allowance, aimed at demonstrating the negative impact that the granting of a possible interim measure could have on the proper functioning and organization of the service. However, it cannot be excluded that the applicant’s presence at her place of employment for important meetings on site may be necessary and justified in the interests of the service.

Comments :

1. In its order on interim measures, the Court took a decision in favour of the applicant's request to do telework from her place of origin (Germany), where she can be with her partner and children. This is, in essence, based on the **duty of care** of the EIT towards the applicant and her obligations vis-à-vis her family.

2. It does not become fully clear from the order to which extent these conclusions are all drawn from the duty of care or also from Art. 7 Charter of Fundamental Rights (right to family life), or the other Charter rights quoted (Art. 24, 31 of the Charter). Case law states that an institution has to protect the health and security of its staff (cf. Case F-157/12, BN/EP, para. 107; Case C-84/94, UK/Council, para. 15). The Covid-19 pandemic provides evidently a scenario for the need of health protection measures in favour of all staff. In the case at hands, the Court balanced the interests of the service and the interests of the agent in view of the Covid-19 pandemic and concluded that the **duty of care embraces measures of greater care and support measures** to respond to personal situations that entail special difficulties for the staff. In our view, it will be hard to separate a personal situation from the family situation of that same person. Therefore, the concept of the duty of care might include protectional measures relating to the **family situation of the applicant**. It remains to be seen in the judgment of the main proceedings if the Court is going to elaborate on this point. A reason to do so would be – in our opinion – that a complete separation of the personal situation (physical, mental and social health) of a staff member from his family situation would be unnatural: on the contrary, family has a major impact on all these health aspects.

3. The order does **not only suspend** the application of the contested decision of the EIT, **but specifically prescribes the interim measures for the EIT to be adopted**: namely to allow the applicant to do telework from her place of origin. Although this is rare, one has to bear in mind that - fully in line with earlier case law - the judge hearing an application for interim relief (Art. 279 TFEU) has powers whose impact vis-à-vis the institutions of the European Union goes beyond the effects of a judgment annulling a measure, provided that those interim measures apply only for the duration of the main proceedings, do not prejudice the decision on the main application and do not undermine the

practical effect of that decision (cf. Case T-198/12 R, Germany / Commission, para. 33).

4. Admittedly, in the case at hands it cannot be denied that the President of the General Court accepted that the interim measure (even if it is for a limited period of time) somehow produced the final result where it ordered that the telework shall be practically allowed up to the end of the pandemic situation. The President will have considered that a decision in the main proceedings might take a year or more, thus at a time when the pandemic situation is presumed to be over or at least much different. Effective judicial protection warrants that the Court provides for an explicit order that the applicant is allowed to do telework from her place of origin.

5. It can only be speculated why the Court wanted to ensure that the applicant can immediately work from her place of origin and without having to go through further requests and potential hindrances from the side of the EIT. On the other hand, in line with the interim measure, the applicant will have to present herself in Budapest where this is required in the interest of the service.

6. One of the provisions that will have to be interpreted in the main proceedings is **Art. 20 SR** on the **obligation of residence** of an official at the place of employment. This will have to be done in light of the duty of care, the respective fundamental rights and the other rules applicable to health protection and telework. It is important to note (as the Court did) that up to date, Art. 20 SR has not yet been interpreted in the light of the pandemic, so that a profound assessment of this legal matter will be required in the main proceedings.

