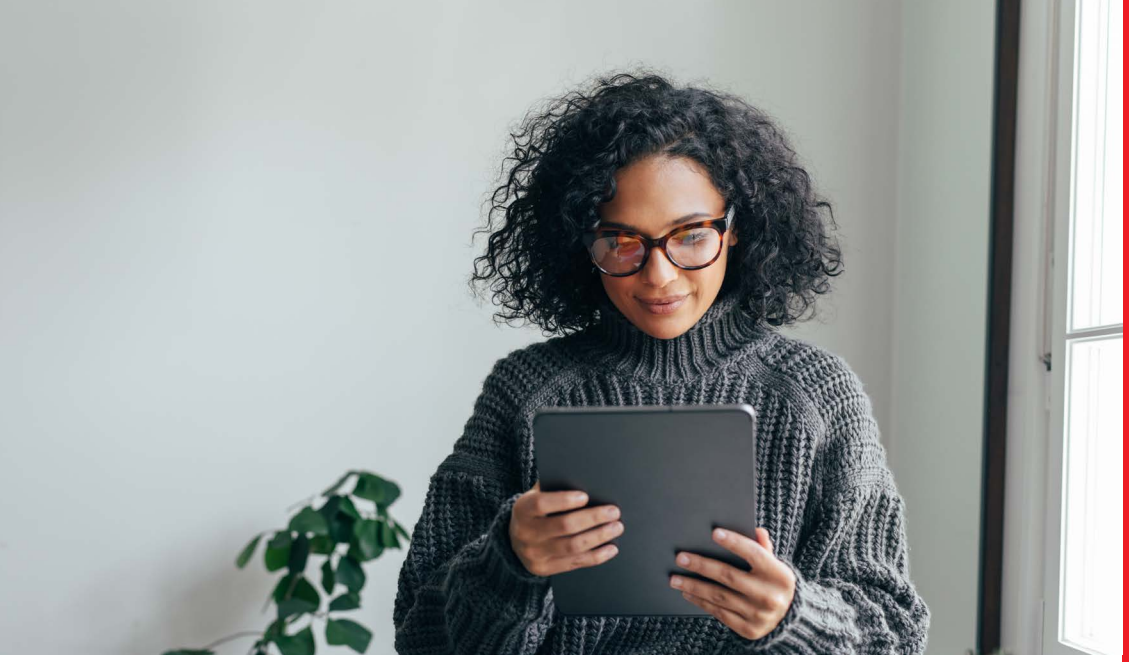

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NEWSLETTER
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Staff Matters

Legal News from Union Syndicale

Unauthorised absence from service – disciplinary proceedings – leave deduction - salary cuts – Art. 60(1) SR – reassignment and transfer

Can the unwillingness to fulfil tasks amount to an "unauthorised absence" from service?

Case C-162/20 P, WV/EEAS of 3 March 2022
Case T-471/18, WV/EEAS of 29 January 2020

In this newsletter we present a recent case in which the European Court of Justice (ECJ) ruled on the term "unauthorised absence" of an official in the sense of Art. 60 SR. As the Court decided, "absence" means physical absence. The provisions for disciplinary measures shall not be bypassed by applying the "unauthorised absence" concept in a too broad sense. Otherwise, a civil servant could be sanctioned for low performance or unwillingness under Art. 60 SR (namely by deducting leave days and/or remuneration), without affording him or her the safeguards foreseen under disciplinary law.

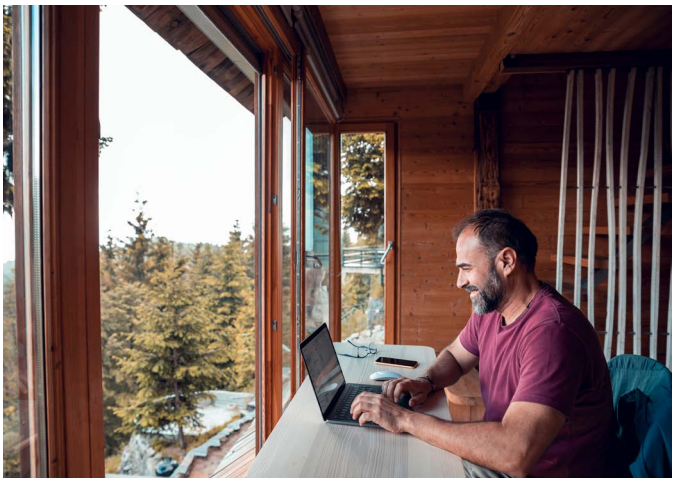
You can continue to send us your suggestions for new subjects or your questions and comments : **StaffMatters@unionsyndicale.eu**.

Legal Background

Art. 60(1) SR stipulates: "Except in case of sickness or accident, an official may not be absent without prior permission from his immediate superior. Without prejudice to any disciplinary measures that may apply, any unauthorised absence which is duly established shall be deducted from the annual leave of the official concerned. If he has used up his annual leave, he shall forfeit his remuneration for an equivalent period." Art. 21 and 55 SR require that the "official (...) shall assist and tender advice to his superiors (...)" and that "officials in active employment shall at all times be at the disposal of their institution".

Facts of the Case

The applicant – an official at the EEAS – was transferred into another unit, and later yet into a third unit, in the interests of the service. She was not in agreement with the transfer and requested to inform her about the reasons for the exclusion from her original unit. She was later told that repeatedly it was impossible to find her in her office and she was hence considered to be in unauthorised absence. The applicant argued that – although she may not necessarily sit the whole day at her desk - she was present at the EEAS to solve the administrative issues related to her transfer. The applicant's head of unit sent her a note in which it was stated that she had accumulated 85 days of unjustified absences which were to be deducted from her remuneration in accordance with Art. 60 SR. The applicant asked for extracts of the time recording data for entering and leaving the building, and was informed that she could not obtain those extracts for reasons of data protection. Later, the calculation of her "unauthorised absences" were revised, in the sense that 9 days would be converted into annual leave and that the equivalent of 72 days would be deducted from her salary. The applicant challenged this decision.



Decision of the General Court

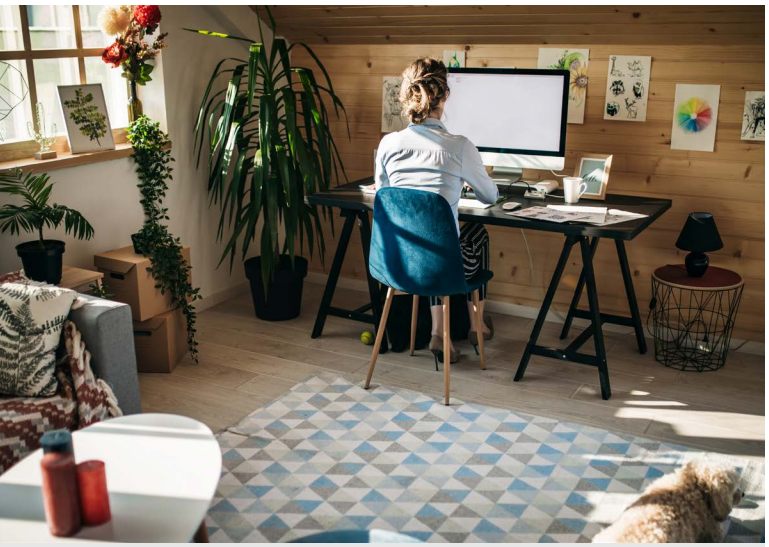
The General Court ordered that the application was partially "manifestly inadmissible", and partially "manifestly unfounded". It ruled that, even if it were established that the applicant was actually present in EEAS office buildings as claimed, the fact remains that, by clearly stating her intention not to work within the new unit on the ground that she wanted to focus solely on the administrative issues related to her transfer, the applicant manifestly failed to comply with the conditions laid down by Art. 21 and 55 SR. The EEAS – said the Court - cannot therefore be criticised for considering the applicant to be in a situation of unauthorised absences. Since the absences had not been authorised in advance by her superiors, the deduction from her pay of 72 calendar days was merely the consequence of non-compliance with the requirements provided for in Art. 60 SR. Further, the General Court stated that its conclusion was not called into question by the fact that the applicant had submitted evidence of her presence in her office. The General Court took the view that the evidence failed to demonstrate that the applicant had assisted her superiors by performing the tasks entrusted to her or that she had made herself available to the EEAS at all times in accordance with her obligations under Art. 21 and 55 SR. Therefore, the General Court found the applicant to be in a situation of unauthorised absence which justified deductions from her remuneration in accordance with the first paragraph of Art. 60 SR.

Decision of the ECJ

In its appeal decision, the ECJ sets aside the order of the General Court and annuls the decision of the EEAS to impose a deduction from salary amounting to 72 calendar days; further the ECJ orders the EEAS to repay to the appellant the amounts wrongly deducted from her remuneration, together with interest at the rate of 5% per annum from the date on which they were deducted. The ECJ first focusses on the meaning of "unauthorized absence" in Art. 60 SR and whether it can be applied to situations in which an official is present but unwilling to fulfil tasks entrusted or otherwise to support his superiors. In line with the definition suggested by Advocate General Richard de la Tour, the ECJ states that the term "absence" in everyday language describes the fact that someone or something is not where it is expected to be, which requires a physical absence. Also, Art. 60 SR does not mention any precondition of a breach of official duties by the official, next to the precondition of physical presence or absence. Secondly, Art. 60 SR is part of rules in the SR that deal with leave and thus situations in which an official is not physically present at his or her place of work. Thirdly, Art. 60 SR explicitly says that deductions due to absences apply "without prejudice to any disciplinary measures", thus separately to disciplinary measures. Absences are quantifiable, but breaches of official duties cannot be quantified. Art. 60 deductions do not have the purpose of substituting a disciplinary sanction for a breach of duty. All this leads the ECJ to conclude that Art. 60 SR relates to situations in which an official is physically absent from his or her place

of work. It would constitute an abuse of the disciplinary procedure to consider that an official present at his place of work who is performing his duties poorly or who is even disobeying instructions is in a situation of "unauthorised absence" within the meaning of Art. 60(1) SR and deductions may therefore be made from his leave or salary. That erroneous classification as "unauthorized absence" means that the official would be subject to a pecuniary penalty which is not provided for in the Staff Regulations, without benefitting from the guarantees of proper disciplinary proceedings.

In result, since Art. 60 SR only relates to situations of physical absence of the official from her place of work and its application would require to correctly determine the physical absence of the applicant from service, the ECJ sets aside the order of the General Court and decided that the decision of the EEAS is to be annulled.



Comments:

1. The ECJ focusses in its judgment on the choice of the legal basis used by the administration (Art. 60 SR) to sanction the applicant for her unwillingness to work in the units she was transferred to. The answer to the question in title of this newsletter is therefore: the unwillingness of an official to fulfil tasks may justify deductions from leave or salary, but must never be construed as an "unauthorised absence" from service. Otherwise the official's protection afforded under disciplinary law would be circumvented.

2. Whilst the EU Courts have earlier already interpreted the concept of "unauthorised absence", their case-law concerned situations in which the official was absent from his or her place of work for supposed or proven medical reasons, for exercising the right to strike, or for the purposes of union representation (s. judgments on Case 44/74, 46/74 and 49/74, Acton; Case T-364/09 P, Lebedef, and our StaffMatters newsletter No. 15 on the right to strike, Case T-402/18, Aquino).

3. The question raised in the Case presented here is new, because the ECJ had to clarify the meaning and scope of the concept of "absence" of an official expressing his or her intention at the place of work not to collaborate within the department, not to carry out the tasks entrusted to him or her, assist his or her superiors, or make himself or herself available in accordance with the requirements set out in Art. 21 and 55 SR. This was an important clarification (1) regarding the concept of physical presence or absence of the person, and (2) regarding the obligation to be available for work at the place determined for the official as well as readiness for reassignment and transfer into other services.

4. The term "absence" in Art. 60(1) SR is strictly about whether an official is physically absent from the place of work.

5. The core of the Case yet is not to define the need of presence at work – a practice which anyway has experienced a development in all institutions due to the pandemic – but to **avoid that the set of rules applicable for disciplinary measures are bypassed by using the specific legal consequences contained in Art. 60 SR** as if it was a disciplinary sanctions regime allowing to punish an official who is not willing to support his superior, is not as available as required, or otherwise not willing to work within the department he/she is attributed to. As a detail, while the ECJ argued that this bypassing would constitute an abuse of the disciplinary procedure, we would rather formulate that this approach would abuse Art. 60 SR in order to bypass the safeguards contained in disciplinary law.

6. When reading the judgment in this perspective, it becomes clear that it cannot be understood in a sense that an official cannot be reassigned or transferred against his or her will into another position or unit. The judgment only says that an unwilling official cannot be sanctioned by treating him or her as being in an "unauthorized absence". Yet bear in mind that both a reassignment and a transfer to a new position, service or task does not require consent of the official (cf. Cases T-468/20, para. 139 subs. – Kühne/Parliament; 19/87, para. 6 – Hecq/Commission).