Staff Matters

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NEWSLETTER

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Case C-68/22 P, EIB / KL of 22 December 2022

Case T-370/20, KL / EIB of 24 November 2021

Invalidity – fitness to work – unjustified absence – Art. 78 SR – Art. 46-1 TPSR EIB - Art. 48-1 TPSR EIB

"Invalidity": to be determined solely in relation to the own institution, not as validity to work on the general labour market

This newsletter is about the important subject of invalidity, at the example of a recent judgment of the Court of Justice which confirms that the term invalidity in the context of the entitlement of staff to an invalidity allowance can only be interpreted as an incapacity to fulfil the duties within the own institution. If found invalid there, the staff member cannot be referred to the general labour market with the argument that he/she would be "not invalid" outside the institution. In other words, an invalidity allowance has to be granted independent of the capacity of the staff member to perform work on the general labour market.

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Legal Background

Art. 78 staff regulations (SR) provides that an official shall be entitled to "an invalidity allowance in the case of total permanent invalidity preventing him from performing the duties corresponding to a post in his function group." Art. 46 1 of the EIB transitional pension scheme (TPSR) defines that a staff member shall be "incapacitated if, by reason of sickness, accident or disability, he is unable, physically or mentally, permanently to fulfil his duties or any other similar duties at an equivalent level and if invalidity has been established in accordance with Article 48."

Facts of the Case

The applicant was employed by the EIB. The EIB's medical officer recommended that he be regarded as suffering from partial temporary incapacity (50%). This assessment was confirmed by the independent medical practitioner appointed by the EIB further to a medical arbitration procedure to assess the alleged total incapacity of the applicant for resuming his duties. Subsequently, at the request of the applicant's lawyer, a procedure before the Invalidity Committee was carried out; it concluded with the statement of the Committee that the applicant was "unfit to return to his former post and to his former employer. He is therefore invalid in relation to the EIB, but not invalid in relation to the general labour market." Further to this, the EIB declared the applicant first: "fit to work" and shortly after: "absent without justification" since the date from which the applicant should have resumed work. The applicant requested review of these decisions, but instead the EIB approved them. Finally, a conciliation procedure was initiated and led to the confirmation of these two decisions by the Conciliation Board, and a confirmation of this result by the President of the EIB. The applicant did not accept this outcome and challenged the decisions in an action for annulment at the General Court.

Decision of the General Court and the Court of Justice

The **General Court** annulled the contested decisions of the EIB and ordered the EIB to pay an invalidity pension and default interest on that pension. The applicant's claim for compensation of the non-material damage was dismissed by the Court. The Court found that the EIB had infringed Art. 46-1 TPSR (and Art. 11.1 of the administrative provisions) because the EIB was required to declare KL **invalid** but instead declared him "fit to work" and "absent without justification".

The **concept of the term "invalidity"** in Art. 46-1 TPSR, stated the Court, is to be assessed **solely in relation to the body EIB**, while the EIB followed the assessment of the Invalidity Committee that KL was allegedly "valid" because he was still capable of carrying on a professional activity on the open labour market. The Court found that the EIB also infringed Art. 48-1 TPSR (and Art 11.3 of the administrative provisions), under which, in the event of dispute, it is the Invalidity Committee which is competent to establish invalidity, not the medical practitioner further to *medical arbitration*.

The Court provided three motivations for its decision: first, that, by analogy with Art. 78 SR, the EIB rules on invalidity referred to the classification of functions within that same body. Secondly, the Court noted that the Invalidity Committees established by the EIB are organs of that body and therefore do not have, from a legal point of view, competence to assess the capacity of EIB staff members to pursue professional duties outside that body. Thirdly, the Court rejected the EIB's interpretation of Article 51 1 of the TPSR, according to which that provision applies only to those rare situations in which a person declared invalid within the EIB pursues, outside that body, an activity different from that which he or she pursued within it. This provision, explains the Court, just shows that it is possible that a person declared invalid may pursue an activity outside of the EIB, the only limit being the ceiling of income as indicated in that provision.

In its judgment, the **Court of Justice** dismisses the appeal filed by the EIB and thus confirms the judgment of the General Court, in favour of the applicant. The Court of Justice does not find that the General Court erred in law when in interpreting the concept of invalidity. Where Art. 46-1 TPSR speaks about an incapacity to fulfil "his duties or any other similar duties at an equivalent level" the word "duties" refers to the duties within the institution EIB. The EIB had argued that Art. 46-1 TPSR does not distinguish invalidity declared with regard to duties performed within the EIB from invalidity declared with regard to the open market, nor does it impose a strict limit on the competence of the Invalidity Committee when assessing invalidity. The Court of Justice explains on this that the provisions in the TPSR can only be understood in the way that the term "invalidity" is an incapacity to resume the duties or similar duties at an equivalent level within that body, here the EIB. Where the EIB had argued that the task of the medical practitioners within the Invalidity Committee only was to provide a medical opinion and not to comment on the working environment, the Court of Justice refuses this argument by deciding that especially where psychological problems are the cause of the invalidity, also the working environment has to be taken into account for the medical opinion. In result, the invalidity of the applicant in the present case was recognised and the corresponding invalidity pension acknowledged.

COMMENTS:

1. The judgments clarify a central criterion of the term invalidity, to be applied by the Invalidity Committee and the institutions. A staff member is entitled to an invalidity allowance (here called invalidity pension) in the case of total permanent invalidity that prevents him/her from performing the duties corresponding to a post in his or her function group. It refers to a physical or mental incapacity to permanently fulfil the duties or any other similar duties at an equivalent level. The judges made clear that both under Art. 78 SR and under Art. 46-1 TPSR for the EIB, the invalidity is to be assessed **solely in relation to the own institution of the staff member.**

2. This means that, where an invalidity to perform the duties within the institution is diagnosed, the Courts have banned the possibility for the institutions and their Invalidity Committees to avoid the recognition of invalidity by asserting that the staff member is still fit to work "somewhere else", i.e. on the general labour market.

3. It is useful to note that - in the event of dispute - procedurally it is up to the **Invalidity Committee** as **competent body** to establish invalidity, cf. Art. 1 Annex VIII SR; Art. 33(2), 100, 102(1) CEOS, a competence confirmed in the present case both by the General Court and the Court of Justice.

4. Invalidity and occupational diseases are serious threats for the professional and private lives of staff. Art. 78 SR (invalidity allowance) is related to the incapacity to work, while Art. 73 SR (insurance coverage) looks at the physical and psychological harm for the integrity of the person. Their scope and pre-conditions are therefore not identical. As already recommended in our **Staff Matters newsletter No. 4,** in order to claim the related entitlements, the timely and accurate action by the staff member is needed, once the disease is known and the staff member has all elements available to claim his/her rights.

5. The assessment of the Invalidity Committee will include the examination of the links between the disease and the professional activity exercised. As the Court of Justice confirms in the present case, the medical opinion has to take into account the **working environment for this assessment.**