Social Dialogue in the Agencies

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Promotions in the Agencies

Exercising Social Dialogue

The promotion exercise is a complex procedure which has been reshaped by Commission Decision (2013) 8968, and which places social dialogue at the centre of the procedure for creating the list of colleagues who will be proposed for promotion. The Commission Decision is a modern and innovative instrument for career management in the institutions. While it is still the Appointing Authority that adopts the final lists, the promotion exercise itself takes on features of a social "co-decision". Although based on an individual and potentially quite subjective merit assessment by the managers, the inbuilt steps of social dialogue guarantee a comparative and thus more objective approach in the selection procedure. The possibility of an appeal to a joint committee is an additional tool to ensure a level playing field for those eligible for advancement in grade. The different procedural safeguards against arbitrary decisions make the promotion procedure a potentially effective way to motivate and retain staff.

Agencies were free to opt out of the Commission system and submit their own implementing rules on promotions to the Commission. Agencies who decided not to opt out before the 16 September 2014, needed to adapt the Commission rules to their specific conditions such as size and internal structure. Such adaptation, as long as it respects the spirit of the Commission Decision does not require the authorization of the Commission under Article 110 of the Staff Regulations. Moreover, the Standing Working Party (a committee of Commission and Agencies´ representatives) has drafted a model

Editorial

European Commission President Jean-Claude Juncker declared: "I am a strong believer in the social market economy - and the social market economy can only work if there is social dialogue. Social partners can identify the greatest needs and opportunities – helping us invest, grow and create jobs. Their support and participation is essential. I said that I wanted to be a President of social dialogue and this Commission made a commitment to strengthen social dialogue in Europe and make it an integral part of our jobs and growth strategy."

Although often decentralized and far from the control of the mother administration, agencies are a part of the European Administration to which the same rules as for the central administration should apply. As much as in Brussels, social dialogue is essential to make the agencies an efficient administration. Social dialogue provides initiative, identifies alternatives and functions as a control mechanism for independent administrations. By launching this publication, we would like to foster understanding for the benefits of social dialogue in the Agencies and provide a forum for exchanging opinion and identifying best practice with the aim of strengthening social dialogue at the rim of Europe.

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decision that takes into account those differences in structure with a view to its application in the agencies.

Regardless of the particular structure of the agency concerned, the steps that need to be respected in the promotion procedure are the following: A ~~first~~ dialogue with the staff representatives must take place when the first lists are proposed by the Directors. Those lists are published in the corresponding HR systems to allow staff members to lodge an appeal. Those appeals are forwarded together with the lists to a Joint Committee that will debate and compare merits, examine appeals and then establish a final list for the Appointing Authority to adopt.

In many agencies, this philosophy of social co-decision has been respected. In one agency, for example, the so called deputies (managers) discuss the provisional lists with the Staff Committee before the provisional lists are published. Following this publication, the lists are re-discussed in a reclassification committee composed of two staff committee members and three deputies. The final decision, obviously, is taken by the Director on the basis of the proposal of the reclassification committee.

In other agencies, however, the spirit of the Commission Decision is not followed. The Office for Harmonization in the Internal Market (OHIM)'s work instructions, for example, only implement the Commission system imperfectly and restrict the role of the Staff Committee.

A first step in the promotion procedure is the discussion of the lists of colleagues to be promoted with the Staff Committee representatives. While a meeting was organized for this purpose, the discussion was delegated to the Director of HR who afterwards informed the President of OHIM about the Staff Committee's comments. There was no dialogue between those proposing the lists (Directors) and staff representatives. The President moreover refused to consider the Staff Committee´s comments at that stage of the procedure and instead deferred the matter to the final phase of decision taking, thus quashing social dialogue at this step.

Instead of communicating the proposed lists individually to staff, they were only published on OHIM´s internal website, with the result that many colleagues (for example those who were on holiday) had not seen the lists and missed the deadline for an appeal to the Joint Promotion Committee.

The Joint Promotion Committee (JPC) is requested to decide upon the appeals and to perform a comparative assessment of the merits in order to establish a final list which will be presented to the Appointing Authority. However, the Director of HR, as Chairperson of the JPC, only scheduled meetings of the JPC to decide on the appeals, thus stripping the JPC of its vital responsibility to discuss and propose a final list to the Appointing Authority.

Given the low promotion rates for OHIM officials despite the availability of promotion points, the Staff Committee had advocated the inclusion on the lists of those colleagues who had the necessary seniority in grade and a good appraisal. However, due to the faulty design and execution of the procedure, the staff representatives could not communicate their opinion to the decision takers.

For similar reasons, at the European Food Safety Authority (EFSA), the contribution of the staff representatives was kept at a minimum: the list of "eligible" colleagues was drawn up by Human Resources (preparing the first list of proposals based on a points system) and the comparison of merits was performed by the Management Committee on promotion (preparing the final lists to be proposed to the Appointing Authority). The invitation of a staff representative to participate, as observer, in the dealings of the Management Committee on promotions cannot be considered as a real social dialogue on promotions and cannot compensate for the lack of consultations in the first phase of proposals and the absence of a discussion between staff representatives and administration in a joint committee as foreseen in the Commission Decision.

A thorough examination of the comparative merits of all colleagues within the joint committee is of utmost

importance. It is especially important when you take into account the extremely low overall promotion rate for officials in the agencies in comparison to the institutions in Brussels and the posts which should be available according to annex I(B) of the Staff Regulations At OHIM, this year only 18 % of officials got promoted. In EFSA, it seems that only about 12 % were offered a promotion. The systematic non-respect ~~of~~ for the Annex IB rates over 5 rolling years seems to be a problem in the agencies and could be addressed if the social dialogue foreseen by the Commission Decision was to be taken serious.

A promotion exercise, if thoroughly and fairly conducted, serves to motivate staff and raise morale. If promotions are arbitrary and the career speed is not adapted to the merits of the individual this produces the opposite effect. Social dialogue is not a formality but allows you to receive the input that makes the promotion exercise a just and motivational procedure for staff.

Contract Renewal (ACER)

F-34/14 Judgment of the European Union Civil Service Tribunal of 8 July 2015

A recent judgment of the Civil Service Tribunal analyses the contract renewal rules for contract agents at the Agency for the Cooperation of Energy Regulators (ACER) and gives legal guidance that is of utmost important for other agencies that apply similar rules to contract or temporary agents.

At ACER, the Implementing Rules on the procedure governing the Engagement and Use of Contract Staff contain the following provision: "The renewal of a contract in function groups II, III and IV shall be for [a] fixed period of at least three months and not more than five years. A second renewal without interruption leading to an indefinite-duration contract may only be granted if the first two contracts covered a total period of at least five years."

The applicant was recruited by ACER on 1 January 2011 as a member of the contract staff under Article 3a of the CEOS, in function group II, at grade 5, step 1. The contract was concluded for one year, until 31 December 2011, then, following the addition of an amending clause, was renewed a first time for a two year duration, until 31 December 2013. By e-mail of 15 March 2013, the applicant informed ACER's Human Resources Department ('the Human Resources Department') that she was interested in a second renewal of her contract.

Following an exchange with his legal service and the Commission, the Director, acting as the AECE, informed her of his decision not to renew her contract ('the non-renewal decision'). He stressed that he had taken that decision with regret but added that he had found no solution which would be satisfactory in legal terms, having regard to Article 85(1) of the CEOS and Article 6(2) of the GIP

The Court upheld the plea alleging the illegality of Article 6(2) of the GIP and annulled the non-renewal decision. It even ordered ACER to pay the applicant damages, assessed on equitable principles, of EUR 7,000.

It explained that where an institution or an agency is authorised to lay down general implementing provisions intended to supplement or implement hierarchically superior and binding provisions of the Staff Regulations or the CEOS, the competent authority may neither act *contra legem*, in particular by adopting provisions whose application would be contrary to the aims of the provisions of the Staff Regulations or would render them entirely ineffective, nor fail to comply with general legal principles such as the principle of sound administration, the principle of equal treatment and the principle of the protection of legitimate expectations (see, to that effect, judgment

in Commission v Petrilli, EU:T:2010:531, paragraph 35 and the case-law cited therein).

The Court further pointed out that according to the case-law, the general implementing rules adopted under the first paragraph of Article 110 of the Staff Regulations may lay down criteria capable of guiding the administration in the exercise of its discretionary power or of explaining more fully the scope of provisions of the Staff Regulations which are not wholly clear. However, they cannot lawfully reduce the scope of those regulations or of the CEOS simply by explaining more fully a clear term of the Staff Regulations, or lay down rules which derogate from hierarchically superior provisions, such as the provisions of the Staff Regulations or the CEOS or general principles of law (see also judgments in Brems v Council, T-75/89, EU:T:1990:88, paragraph 29 and Ianniello v Commission, T-308/04, EU:T:2007:347, paragraph 38).

The Court concluded that Article 6(2) of ACER's GIPs restricts the scope of Article 85(1) of the CEOS in so far as it introduces a supplementary condition for the renewal of a contract within the meaning of Article 3a of the CEOS which is not provided for in the CEOS and which hinders the exercise of the discretion conferred on the administration, without such a restriction being objectively justifiable in the interests of the service. The judgment constitutes a landmark decision for all those victims of written or unwritten rules that seek to eliminate the discretion in the renewal decision. The Court clearly underlines that the administration must always consider the possibility of a contract renewal for an indefinite period where this is foreseen in the Staff Regulations.

Health and Safety (OHIM)

Social Dialogue and Risk Prevention

Risk prevention and the promotion of safer and healthier conditions in the workplace are essential to improving job quality and working conditions. This is why a body of E.U. legislation exists to implement and enforce statutory health and safety standards in workplaces across the E.U.

At OHIM members of staff are recently being encouraged to 'get interested in safety' and to ask questions or make suggestions about health, safety and accessibility. Staff members are also obliged to undertake online health and safety training in order to comply with the ISO health and safety certification. There is no requirement to have such ISO certification, but the possession of a certificate purports to confer excellence status on an organisation.

However, what is a vital requirement under E.U. legislation is that employees are informed and consulted about health and safety matters; the applicable Spanish law requires the establishment of health and safety committees in workplaces employing over 50 workers. Health and safety committees consist of staff and management representatives who meet on a regular basis to deal with health and safety issues. They form an essential part of the social dialogue between management and employees which has been E.U. policy for 30 years and is currently being promoted by European Commission President Jean-Claude Juncker, who has characterized himself the 'President of social dialogue'.

In OHIM at present there is no Health and Safety Committee (HSC) in operation. Not since the chairperson of the HSC retired several months ago. The OHIM Staff Committee has twice politely drawn this matter to the attention of the President of OHIM in writing and stressed the urgency of sorting it out. The Staff Committee has however been met with silence.

The HSC had been very active recently in identifying safety issues at OHIM and requesting action in relation to OHIM's recently completed additional building. Health and safety is also becoming a major issue at OHIM as the work environment seems to

become more stressful, sometimes toxic. The health and well-being of staff, wisely managed, can greatly increase morale and efficiency in an organisation, as well as tackling the organisational issues and attitudes that cause unnecessary and counterproductive anxiety.

A well-functioning HSC is a vital part of the interface between staff and management regarding staff welfare. U4U considers it important that any agency has an active HSC headed by a professional and robust chairperson, who will not postpone a debate with the administration when the evidence demands action.

The absence of a functioning Health and Safety Committee breaches the law of the host country and ignores E.U standards. Moreover, the lack of any action in this regards illustrates a blatant refusal of social dialogue at the technical level. It is certainly not what Mr. Juncker seems to have in mind when he talks about social dialogue between management and employee

Professional Incompetence

A sword of Damocles over the head of Agencies' staff

During the last appraisal exercise, a number of staff of the agencies have discovered a new element of appraisal which is the reference to "incompetence" as part of their line manager's assessment. "Professional incompetence" is an important subject that needs to be analysed in an objective and open way. The Staff Regulations have introduced fundamental changes without staff having been properly informed about these changes or given the opportunity to discuss them and there has been no prior dialogue with the unions to formalise procedures.

The Barroso Commission wanted to demonstrate its commitment to reform the European civil service by displaying its determination to sanction incompetence, with measures going as far as dismissal, without a joint review of the situation or genuine prior discussion of the ins and outs of such changes or a dialogue with the unions. This reform took place in a context characterised by the development of a culture of control, forced mobility, and a series of factors which have sparked fears of a challenge to the independence of the European civil service and the creativity and spirt of initiative of the services, without which the Commission and the decentralized agencies will not be able to fulfil their role efficiently.

U4U has formulated the following seven recommendations, which will guide the approach of our union during the proposed social dialogue process.

1. WE NEED A PRECISE ASSESSMENT OF THE NEW INCOMPETENCE MANAGEMENT FRAMEWORK

The existing framework for the assessment of incompetence, characterised by a commitment to dialogue and anticipation, has given way, in particular, to three articles in the Staff Regulations, viz. 43, 44 and 51, intended mainly to determine a scale of sanctions, without a precise definition of incompetence, and adopted solely in response to outside pressures. As yet, there is no way of knowing how the new legal framework has actually been implemented over the past year. We call on the administration to provide the social partners with a succinct evaluation of the implementation of the new legal framework, in order to facilitate a serious dialogue based on objective knowledge of the current situation. How many colleagues have been deemed incompetent? How have they been dealt with? How does the Administration view the current situation, compared with the previous one? Where can possible improvements be made?

2. WE NEED AN OBJECTIVE ASSESSMENT OF INCOMPETENCE

We believe that "incompetence" should be assessed as objectively as possible in a way that takes account of each individual's unique situation and working environment. It should not be trivialised and treated

as a simple assessment left to the discretion of an assessor, given that it triggers, on the basis of the Staff Regulations, a procedure which can have more serious consequences than those associated with the various forms of professional misconduct. A staff member's previous assessment must be taken into account every time. Incompetence must be determined on the basis of the three assessment criteria – performance, competences and conduct – and not just one criterion. This complex issue must not be treated in a simplistic way. It must be based on a human approach which reflects working conditions and the changing nature of such conditions. Similarly, people in specific situations, for example pregnant women, must be given special protection.

3. ANTICIPATE RATHER THAN IMPOSE SANCTIONS

Imposing sanctions for incompetence is a recognition of failure. The criteria for determining incompetence are to a large extent subjective, but reflect a failure of both the individual and the working environment which has not provided the necessary support and resources to enable a colleague to perform effectively and contribute fully to the institution. It may therefore reflect weaknesses in human resources management and mentoring. In this regard, the new legal framework represents a significant step backwards in comparison to a situation which was clearly structured, albeit with the risk of excessive complexity, but with the legitimate concern of seeking to improve a difficult situation rather than the gradual uncoupling of individuals from their working conditions. A good human resources policy needs to be based on anticipation!

4. INCOMPTENCE IS NEITHER A DISABILITY NOR INDISCIPLINE

An individual's poor professional performance, at a given time, must be assessed in an all-encompassing, multifaceted framework, which may involve crucial medical and social factors. Here again, the new legal framework opens the door to considerable risks of abuse in that it does not specify the limits of incompetence, in particular in situations that may lead to disability on medical or social grounds. In addition, incompetence must in no circumstances be confused with disciplinary matters.

5. INCOMPETENCE, ASSESSMENT AND DIALOGUE

U4U wants to retain the necessary "objectivity" of any approach to the concept of incompetence within the framework of a system of annual assessments, including individual guarantees, in particular in terms of a dialogue with the assessor. Here again, the risks associated with excessive subjectivity in the assessment of incompetence should encourage the management to focus more on the need for an ongoing dialogue with staff throughout the year. There is no reason to wait until the time of the annual assessment for line managers to raise the question of a staff member's incompetence, since a regular dialogue would have made it possible to improve a difficult situation earlier, or to attempt to find alternative solutions. It is important that assessors are given suitable training, especially in this area.

6. RIGHTS OF DEFENCE AND A JOINT APPROACH

U4U recognises that article 51 of the Staff Regulations provides for the development of procedures which contain relevant provisions for the necessary rights of defence and a joint approach. These elements are essential, when dealing with complex, often conflictual situations, which require an approach that puts the situation in perspective, with the participation of outside parties, capable of helping to assess the situation objectively and attempting by means of a dialogue to find concrete solutions.

7. INCOMPETENCE AND MOBILITY

The complex situations of incompetence require different solutions depending on the case. Such solutions also need to take account of the human relationship between the colleagues concerned and their work environment. Here again, we call on the Administration not to isolate this issue from other key

~~issues~~ factors related to good human resources management, such as that of mobility.

In some cases, a situation considered as being indicative of incompetence may simply reflect a situation where an individual's working environment is inappropriate. In this context, a good mobility policy can facilitate a new start. However, such mobility is reduced in the agencies, due to the small size of most of the agencies and due to the lack of interagency mobility. Against this background, U4U calls on the Administration to demonstrate flexibility and creativity in finding solutions to problems which can be highly detrimental to both individuals and the agency.

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