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Terminating Protected Employees – Closure of Company Division

Antwerp Labour Court of Appeal, 2 October 2018 – 2017/AA/307 - not published

The Antwerp Labour Court of Appeal recently upheld that a protected employee (who was a member of the committee for safety, health and well-being at the workplace) can be terminated for economic or technical reasons without the competent Joint Committee's approval and without paying him or her any protection indemnity if the company's division (to which the employee belonged) is closed down.

Although this ruling is nothing new because it reflects the application of the rules of Article 3, §1 of the Belgian Act of 19 March 1991 (establishing special dismissal procedures for employee representatives of work councils and of the committee for safety, health, and well-being at the workplace, and for candidate employee representatives), the interesting element in it is that the Court accepted the definition of "a division" merely based on evidence produced unilaterally by the company, despite the fact that the employee and the judges at first instance had labelled the definition "artificial".

The Court's conclusion that there was a closing of a company division was based solely on the company organigram, a written statement from one of the plant managers, and exhibits showing that the goods from the two company "divisions" were stored separately and that the orders were processed independently from each other (including a separate cost structure and accounting).

Therefore, the Court held that the department to which the employee belonged did indeed form a division that was closed down, so it could be considered a closure of a company division within the meaning of Article 3, §1 of the Act of 19 March 1991. The Court thus rejected the former (protected) employee's claim for payment of protection indemnities on appeal.

In our view, this shows that how a company defines its divisions and how it appears to structure them is sufficient and that Courts do not have a duty to verify the company's strategy behind defining the different divisions as long as what was produced as evidence has a certain degree of consistency and credibility in supporting the company's assessment (read: definition) of its different divisions.

Collective Bargaining Agreements Have Retroactive Force

Brussels Dutch-speaking Labour Court, 10 December 2018, 17/1832/A - not published

The Brussels Dutch-speaking Labour Court recently confirmed its rulings that collective bargaining agreements have retroactive force.

In the case here, the employer had applied monthly reductions to its employees' gross salaries throughout the entire period of their employment, which was based on a unilateral decision the company had made in 1998. These reductions were offset by other company benefits.

The employees argued that these salary reductions were contrary to Article 23 of the Salary Protection Act and / or could amount to a criminal offence (i.e., failure to pay an employee salary) because the employees had not agreed to these salary reductions. They therefore demanded salary arrears, end-of-year premiums, and vacation pay from their former employer.

The employer submitted in its defence that these salary reductions were allowed based on a collective bargaining agreement concluded at company level in November 2017 (i.e., after the termination of the employment contracts), but it had retroactive effect until 1998.

The question before court was therefore whether this collective bargaining agreement, which could be regarded as an agreement between parties regarding the salary reductions, indeed applied to the relevant employees.

The Court, in two judgments of December 2018, confirmed that an agreement on salary reductions through a collective bargaining agreement, which is considered an agreement between employer and employees, can have retroactive effect. This is apparent from Article 16, first paragraph, 6° of the Collective Bargaining Agreement Act, which stipulates that a collective bargaining agreement must determine its own date of entry into force if it does not enter into effect on the date when it is concluded.

Furthermore, the Court confirmed that a retroactive collective bargaining agreement binds all employees who were employed at the time it is effective (and also, at the time of its retroactive force), including those who were no longer employed by the employer when the collective bargaining agreement was concluded.

Finally, the court pointed out that the fact that legal proceedings were initiated against the employer prior to the conclusion of the collective labour agreement does not lead to a different assessment.

That being said, if the court had ruled before the collective labour agreement had been concluded, the dispute would have had a different outcome.

The relevant collective labour agreement, which retroactively recognized the (unilateral) decision of the employer to reduce the salaries as a source of law, was therefore indeed applicable to these two employees.

The court thus rejected the claims for reimbursement of the salary reductions.

Improper use of grant of options on SICAV shares and warrants?

Stock option plans (also called warrant plans) are very popular and are frequently used by Belgian companies as incentives for employees, especially senior executives and directors.

The Act of 26 March 1999 on the Belgian action plan for employment 1998 (the "SOP Act") provides for a specific tax system that applies to stock options (including warrants).

In accordance with the SOP Act, granting options to employees is regarded as a benefit in kind for the beneficiaries, and the options are taxed at the time they are granted. Tax is charged on a lump-sum basis that corresponds to a percentage of the value of the underlying share. Income tax remains due on those options even if the options are not or cannot be exercised, and it is not possible to recover the tax on it if the options are not exercised. The SOP Act regards the options to be granted on the 60th day following the date of the company's offer provided that the beneficiary has notified his or her acceptance of the offer before the 60-day period expires.

The value of the options is determined by the value of the underlying shares. If these are listed on the stock exchange, the stock price will be decisive. However, if the shares are not listed, they are valued at their fair market value at the time of the offer, which is determined with the approval of the company's auditor or, if there isn't one, an auditor or a chartered accountant.

Once the value of the share has been determined, the value of the option can be determined too. If the options are not listed, the value of the taxable benefit received by the beneficiary is fixed at 18% of the value of the underlying share. If the option is granted for more than five years from the offer date, the taxable benefit is increased by 1% of the said value per year beyond the 5th year. Under certain conditions, that percentage is reduced to 9%, to be increased by 0.5% per year or part of the year when the options remain exercisable beyond 5 years starting from the offer date.

Financial institutions and intermediaries have been offering option products on listed SICAVs/warrants for years. These products became very popular over the years because they allow employers to convert the yearly bonus into options on SICAV shares and warrants, which benefit from a favourable tax treatment, as mentioned above.

The Ruling Commission has restricted the use of this kind of product for services rendered as from 1 January 2018. It has issued several rulings in the past in which it specified that the implementation of such plans would result in improper use if the granting of options on listed SICAVs/warrants was "disproportionate" in comparison to the remuneration usually paid. However, these decisions did not define what is a "disproportionate" grant of such options (or warrants).

The Ruling Commission has now clarified what should be understood under the concept of "disproportionate". Granting options on SICAV shares or warrants to **employees** is not disproportionate if it does not exceed 20% of the sum of:

- the monthly gross remuneration, multiplied by 12.92 (thus including vacation pay, but not taking into account the benefits in kind);
- the 13th month salary; and
- the gross variable remuneration.

Self-employed individuals may only be granted options on SICAVs or warrants if the amount does not exceed 20% of the sum of:

- the fixed gross yearly salary (subject to withholding tax and social contributions for self-employed individuals, and not taking into account the benefits in kind); and
- the yearly gross variable salary.

In both scenarios, the real/economic value of the granted options on SICAV shares or warrants must be used for calculating the 20% limit.

This new limit enforced by the Ruling Commission does not in principle apply to option plans concerning shares of the employer or shares of group companies to which the employer belongs.

It should also be emphasised that the calculation of this 20% limit has raised many practical issues that still need to be clarified by the Ruling Commission.