SUMMARY

2015/27 Constitional court validates unified status for white collar and blue collar workers (BE)

<p>Under Belgian law, an employer wishing to dismiss an employee has the choice of either observing a notice period (the length of which depends on years of service) or paying the employee an ‘indemnity in lieu’, that is to say a sum of money equal to the salary (including fringe benefits) that the employee would have earned during the notice period. In December 2013, a law was passed that altered the rules on notice periods. Some of the provisions of the 2013 law especially affect employees who are entitled to a notice period (or an indemnity in lieu) of 30 weeks or more. These ‘30+ week employees’ must now be offered employability assistance by an external outplacement agency. Employees who are dismissed with notice receive these outplacement services during their notice period. The cost of the outplacement agency is borne by the employer. Employees who are not given notice but are paid an indemnity in lieu, on the other hand, bear the cost of the outplacement services themselves, in that their indemnity is reduced by a sum equal to four weeks of salary. A union representing executive employees (‘cadres / kaderpersoneel’) and several individual workers challenged the constitutionality of the relevant provisions of the 2013 law without success.</p>

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Facts

Until 31 December 2013, Belgian employment law contained different rules for white collar and blue collar workers. In a judgment dated 7 July 2011, the Constitutional Court found this distinction to be discriminatory and therefore unconstitutional. The legislator was ordered to adopt legislation harmonising the legal status of both categories of workers by 8 July 2013. The judgment was reported in EELC 2014/23.

On 26 December 2013, Parliament enacted a law known as the Unified Status Act (*Statut unique*), which came into force on 1 January 2014, almost seven months after the deadline set by the Constitutional Court. The Act did not merely unify the status of white and blue collar workers, it also quite radically amended Belgian dismissal law and some other aspects of employment law (such as payment during sickness). This is because the government seized the opportunity to reform employment law while complying with the Constitutional Court's order.

On 27 June 2014, a union representing executive employees and a number of individual workers applied to the Constitutional Court. They asked the court to declare three provisions of the Act, Articles 81, 88 and 92, unconstitutional and void. These provisions form the basis for the legislator's increased focus on re-employability after dismissal, which is one of the new elements in the Unified Status Act. This new approach especially impacts 30+ week workers.

The mechanism introduced by the new law differs, depending on whether the employer

dismisses the employee with a notice period or with an indemnity in lieu of notice[1].

A 30+ week worker dismissed with a notice period is entitled to 60 hours of outplacement paid by the employer, to be taken during the notice period. In Belgium, employees are entitled during their notice period to extra paid leave in order to look for a new job. It is during these days of paid leave that they will have to follow the outplacement guidance.
A 30+ week worker dismissed with an indemnity in lieu of notice is also entitled to a 60 hour outplacement package, paid for by the employer. The value of the package must equal 1/12th of the annual salary, but may not be less than € 1,800 and is capped at € 5,500. To compensate employers for this extra cost, Article 81 stipulates that a sum equalling four weeks' salary is deducted from the indemnity. In practice this means that the exit package of such an employee is composed of an indemnity equalling 26+ weeks' salary and 60 hours of outplacement services2.

Article 88 introduces a transition period ending on 31 December 2015. During this period, a 30+ week worker who was dismissed with an indemnity in lieu may waive the right to outplacement, in which case there is no deduction from the indemnity payment.

Article 92 provides that, starting no later than 1 January 2019, the social partners must negotiate collective bargaining agreements at sector level in order to replace one third of the current exit package of 30+ week workers by employability-enhancing measures. For these workers a minimum notice period (or indemnity in lieu) of at least 26 weeks is, however, guaranteed.

In brief, what these provisions do is to shift the focus of dismissal protection from monetary compensation to assistance on re-entering the labour market through outplacement. The snag is that workers pay for this assistance themselves. The claimants argued that this involuntary contribution to the cost of their outplacement infringed (i) their right to property, (ii) their right to equal treatment and (iii) their right to protection of acquired rights ('standstill rights').

Judgment

Right of property

The *Statut unique* will cause redundant employees to lose a portion of their indemnity in lieu of notice in exchange for employability assistance. The plaintiffs claimed that this involuntary exchange infringes their right of property as guaranteed by Article 16 of the Belgian Constitution and Article 1 of the First Additional Protocol to the European Convention on

Human Rights.

The Court held that the challenged provision does not change the total value of the exit package, but only defines the balance between, on the one hand, measures destined to increase the employability and on the other, the notice period or indemnity. Therefore, there is no expropriation within the meaning of Article 16 of the Constitution.

Article 1 of the First Additional Protocol to the European Convention on Human Rights covers more than expropriation. It includes a prohibition on interference with the peaceful enjoyment of possessions and restrictions on governmental regulations on the use of property. The Court recalled that interference in the right of property must achieve a balance between the general interest and the protection of individuals' peaceful enjoyment of their possessions. In the present case, the Court considered that the interference by the legislator was limited to establishing minimal measures to increase employability in cases of dismissal and that this measure is pertinent in order to help dismissed employees find a new job. Further, these measures not only promote the general interest, but also the particular interest of the dismissed employee. Finally, proportionality has been respected, as the employability measures only concern one third of the exit package and a minimum notice period or indemnity of 26 weeks is guaranteed.

Right of equal treatment

The breach of the equal treatment right was invoked at two levels:

between the 30+ week workers on the one hand and employees entitled to shorter notice, whose exit package is not impacted, on the other;
within the group of 30+ week workers, between employees dismissed via a notice period, during which they have to serve and those who receive an indemnity in lieu of notice. Only the latter have to finance the outplacement by a deduction of four weeks of salary from their indemnity. The former follow the outplacement during the notice period and are paid during this time.

As regards the first distinction, the Court recalled its judgment of 7 July 2011 and the fact that one of the purposes of the Act of 26 December 2013 was not only to indemnify the loss of the previous occupation, but to help the employee find a new job. As for employees with a higher seniority (and therefore greater notice), it is generally more difficult for them to find a new job than for employees with less seniority, so the measure has a reasonable justification. Moreover, the difference in treatment is based on an objective criterion, i.e. notice of more or less than 30 weeks.

Regarding the difference between employees who are dismissed with a notice period and those with an indemnity in lieu of notice, the difference in treatment is relevant and reasonably justified. The former do not receive an indemnity. Reducing their salary would therefore be a disproportionate burden in comparison with the deduction of four weeks' salary for those who do not have to continue to work and will receive an indemnity instead.

Regarding the transition period until 31 December 2015, during which dismissed employees are entitled to waive their right to outplacement in order to avoid the deduction of four weeks' salary, any inequality of treatment will only be caused by their own decision. So, there is no discrimination in this case.

Standstill

The plaintiff also invoked a breach of Article 23 of the Belgian Constitution and Article 4 of the European Social Charter, arguing that the legislator cannot reduce an acquired level of protection in fundamental socioeconomic rights. In this view, the compulsory accompanying measures in the case of dismissal and the standardisation of the notice periods between blue collar and white collar workers would significantly impact the protection level of white collars. The Court considered that the standstill obligation had been respected, as the protection level of employees is not reduced but remains the same, even though one third of the exit package is replaced by employability measures.

Commentary

In its judgment of 7 July 2011, the Constitutional Court stated that the distinction between white and blue collar workers regarding notice periods and also their rights in relation to the first day of sickness (where blue collar workers were not paid benefits on their first day), was no longer justified. Negotiations between the social partners and the Government started, which resulted in the adoption of the Act of 26 December 2013.

The status of white and blue collars is not yet entirely harmonised but now blue and white collar workers are generally entitled to the same notice period. A transition period is foreseen for rights acquired before the new legislation came into force. Also, blue collar workers are now entitled to receive salary for their first day of sickness - as was already the case for white collar workers.

For completeness, it should be noted that another proceeding for annulment against the Act of 26 December 2013 is also pending before the Constitutional Court for what concerns the special (shorter) notice periods for the construction sector.

Apart from validating the first steps towards standardisation of the status of blue and white collars, the Constitutional Court also validated the legislators' new approach on dismissals. Previously, the exit package only dealt with the length of the notice period or the indemnity in lieu of notice. The reasoning behind this system was to give time to the employee in order to find a new job.

To increase the chances of finding a new job, in 2002, an obligation to offer outplacement services for employees aged 45 and over with one year of seniority was introduced. The Act of 26 December 2013 focusses even more on the re-employment of dismissed employees, by providing a right for all the employees dismissed with a notice period or indemnity of more than 30 weeks to access outplacement services and this will form part of the exit package. The legislator went even further by asking the social partners to consider employability-enhancing measures, including but not limited to outplacement, by 1 January 2019, to replace a third of the exit package.

In many ways, therefore, this judgment is a validation of a more modern approach towards dismissal, with no distinction between blue and white collars and the focus on re-employment.

Comments from other jurisdictions

Austria (Jana Eichmeyer / Anna Schmitzer): The Austrian Constitution guarantees the right to equal treatment in Article 7. However, the treatment of white and blue collar workers is not entirely harmonised as yet. There is still a legal distinction between both categories in respect of certain rights, including, for example, about the fact that the statutory notice period is only 14 days for blue collar workers but at least six weeks for white collar workers (increasing on a sliding scale up to five months based on years of service) and the different length of sickness pay. In a 1992 judgment, the Austrian Supreme Court held that the difference between white and blue collar workers is acknowledged by the legislator but could be mitigated by negotiation in collective bargaining agreements.

Austrian employers are also under no obligation to assist dismissed employees with reintegration in the labour market. Their duties in this regard are considered fulfilled by payment of the mandatory social security contributions, which includes unemployment insurance. However, in the last few years outplacements have become quite common features of mutual termination agreements. In Germany this is generally handled by the Federal Employment Agency ('Arbeitsmarktservice', 'AMS'), which is financed by unemployment insurance contributions.

Further, in Austria there is no option to choose between dismissal with notice and an

indemnity in lieu of notice. The employer must always respect the notice period and the statutory termination date. If the employer complies with these provisions, the employee has no additional financial entitlement upon termination (except for mandatory severance payment based on the old severance payment system, which applies to both blue and white collar workers). However, the employer has the right to put the employee on paid garden leave during the notice period. This gives the employee the benefit of continued social security.

Even without mandatory outplacement measures, older employees generally enjoy higher protection against dismissal, as the likelihood of finding a new job is a significant part of the assessment the Labour Court would make if there was a challenge about whether a dismissal was unfair on social grounds.

Germany (Dagmar Hellenkemper): Germany eliminated pretty much any differentiation between blue and white collar workers in the 1980s. Today, differentiation can only be found in certain collective agreements, but only to a very limited extent (i.e. collective 'preclusive periods'). In nearly any other area, the courts have decided that any differentiation is not justified and hence discriminatory.

Payment in lieu of notice does not exist in Germany. However, I find the approach of looking at severance payment as a means to help find a new job interesting. In Germany, any kind of severance payment that results from settlements is usually deemed as payment for the loss of employment. The Belgian approach would mean it is deemed to help fund measures to assist employees in finding new jobs.

Notes

1 A combination of notice period and indemnity is possible.

2 The purpose of the legislator was to foresee an outplacement valued to 1/12th of the annual salary which approximately corresponds to four weeks. Further, in order to ensure uniformity and quality in the outplacement services, the legislator stipulated that the price range must be between € 1,800 and € 5,500 and that there must be 60 hours of training. The 60 hours are therefore a kind of guarantee of the quality of the outplacement, but are not related to the value of the services. This calculation nevertheless means that it is better for high wage employees to waive their entitlement to outplacement and ask for four weeks' wages. They still have the possibility to use the outplacement services on an individual basis at a lower cost.

Subject: Discrimination on other grounds

Parties: CNC / NCK – v – le Conseil des ministres / de ministerraad

Court: Cour Constitutionnelle / Grondwettelijk Hof (Belgian Constitutional Court)

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