SUMMARY

2014/23 Different termination rules for blue and white collar workers finally ended (BE)

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Facts

Georges Deryckere joined SA Bellerose, a chain of clothing stores, on 11 December 2001 as a blue collar worker with a fixed-term contract. On 2 January 2002, his contract was converted into a contract for an indefinite term. SA Bellerose terminated his employment on 3 April 2008 with a notice period of 28 days. He claimed compensation for arbitrary dismissal before the

labour tribunal of Brussels and also severance pay worth six months' salary, which is the same as the severance indemnity payable to white collar workers with the same level of seniority. He argued that the different treatment of blue and white collar workers with regard to dismissal violates the anti-discrimination provisions in Articles 10 and 11 of the Belgian Constitution. Finally, he claimed overdue payments for so-called 'carenz days'. A carenz day is the first day of sick leave of a blue collar worker, where the total period of sickness does not exceed 14 days. Carenz days are not remunerated.

Mr Deryckere asked the labour tribunal to address two preliminary questions to the Belgian Constitutional Court:

Do Articles 591 and 822 of the Employment Contracts Act (which deal with the notice periods for blue and white collar workers respectively) violate the anti-discrimination Articles 10 and 11 of the Belgian Constitution, in that they provide for different notice periods for blue and white collar workers with the same level of seniority?
Do the Articles 52 §13 and 704 of the Employment Contracts Act (which deal with carenz days) violate the anti-discrimination Articles 10 and 11, in that they provide for the first day of sick leave for blue collar workers to be unpaid, even though a white collar worker in an equivalent contractual position would be paid?

The labour tribunal examined the Constitutional Court's prior jurisprudence. It concluded that the jurisprudence regarding the first question might be revisited and that the second question had not yet been examined by the Court. The labour tribunal thus addressed the two above-mentioned questions to the Constitutional Court, leading to the latter's judgment of 7 July 2011.

Judgment

The Constitutional Court started its analysis with a reference to its judgment 56/93 of 8 July 1993. In this judgment, the Court had concluded that the legislator had adopted differences in treatment of blue and white collar workers based on a criterion (namely, that blue collar workers do manual work, while white collar workers do intellectual work) that was not objective or reasonable.

The Court was now of the view that the criterion was even more unreasonable and less objective today, in particular, with regard to the differences in treatment surrounding notice periods and the carenz day. The Court concluded that these differences in treatment violate the anti-discrimination Articles 10 and 11 of the Belgian Constitution.

The Court stated, however, that in its previous judgment of 1993 it had recognized that the legislator had already taken action to harmonise the protection of blue and white collar workers in the case of dismissal and that harmonisation could only be expected to take place gradually. The fact that it found that it was unjustified to adopt the distinction at the time (i.e. in 1993), did not mean that the existing distinction should suddenly have been abolished and therefore it was not disproportionate for it to have been maintained.

The Court continued that since the judgment of 1993, the legislator had taken further steps to harmonise the two categories of employees. With reference to the decision of the European Court of Human Rights (ECtHR Grand Chamber 12 April 2006, *Stec e.a. - v - United Kingdom*, application nrs. 65731/01 and 65900/01[5]), the Court added that when a reform which aims at equality, has far-reaching and serious consequences, it is not possible to blame the legislator for doing it in a well-thought out and gradual manner. The Court also recollected that the different regulations sometimes favoured blue collar workers and other times favoured white collar workers.

The Court was, however, of the view that the legislator should not have had an unlimited period of time in which to harmonise the law relating to blue and white collar workers. Harmonisation along gradual lines did not justify that the differences in treatment brought before the court should have continued to exist 18 years after the Court had established that the criterion for distinguishing between blue and white collar workers was discriminatory.

On the other hand, the Court considered that a fair balance needed to be found between the abolition of discriminatory legal provisions on the one hand, and the principles of legal certainty and legitimate expectations on the other.

With reference to European Court of Human Rights case-law (ECtHR 13 June 1979, *Marckx - v - Belgium* and ECtHR 16 March 2000, *Walden - v - Liechtenstein*), the Court felt justified in setting a deadline to the legislator to amend the law, with the unconstitutional provisions remaining in effect in the interim.

The Court considered that an abrupt declaration of unconstitutionality of the law in the case at hand would lead to substantial legal uncertainty and would cause financial difficulties to a large number of employers. The Court added that such abrupt declaration of unconstitutionality could also interfere with the legislator's current harmonisation efforts, emanating from the earlier judgment of 8 July 1993.

Commentary

With its judgment of 7 July 2011, the Constitutional Court put a time-bomb under Belgian

termination law. Parliament - and by extension the government - had until 8 July 2013 to abolish the distinction between blue and white collar workers regarding notice periods and the carenz day - a task they had not completed successfully for the last 18 years. As is common in Belgium prior to important changes to employment legislation, the government instructed the social partners to negotiate and agree on harmonised notice periods for blue and white collar workers – and for a long time, it looked as if the new deadline would not be met either.

Finally, on Friday, 5 July 2013, after intervention by the Minister of Labour, the social partners reached a political agreement on "unified status". This agreement was transformed into the Act of 26 December 2013 on the implementation of the unified status of blue and white collar workers regarding notice periods and the carenz day, along with various accompanying measures. The Act of 26 December 2013 is indeed a milestone and certainly one of the most profound changes in our labour law since the adoption of the Law of 3 July 1978 on employment contracts. It represents a thorough redesign and modernisation of Belgian termination law, which is now largely (but not completely) harmonised. The so-called carenz day was eliminated.

As from 1 January 2014 a uniform redundancy scheme for blue and white collar workers was implemented. The new redundancy scheme with uniform notice periods applies to new employment agreements as well as existing agreements. For the new notice periods there is just one relevant criterion: the number of years of seniority (per calendar year commenced). The new notice periods for employers evolve in accordance with the different phases of the employment relationship:

During the first five years, the term evolves progressively (from 2 to 15 weeks): first every three months during the first two years and then annually. At the beginning of the employment relationship the terms are very short, in order to eliminate the slowdown of recruitment.
From the fifth until the nineteenth year, the accrual is regular but significant with three weeks per year of seniority per calendar year commenced (18 to 60 weeks), with the objective of offering job security to employees.
The twentieth year is a pivotal year in which the progression slows down. The notice period amounts to a total of 62 weeks.
From the twenty-first year, the accrual is slowed to one week per year. The legislator does this in order not to penalize the employer for retaining employees with many years of seniority.

For employment agreements existing before 1 January 2014 there is a transition scheme which secures the rights accrued under the old scheme. The notice period must be calculated in two separate steps, the results of which must be added up, as follows:

The first step concerns the accrued years of seniority until 31 December 2013. The length of the notice period associated with this seniority is determined pursuant to the rules that apply to the relevant employee on 31 December 2013 - and thus depends on his or her status as a blue or white collar worker.
» White collar workers accrue their notice period until 31 December 2013 pursuant to the following scheme:
--- Lower-ranked white collar workers (annual salary ≤ €32,254): three months per started level of five years of seniority;
--- Higher-ranked white collar workers (annual salary > €32,254): one month per started year of seniority, with a minimum of three months. This specifically means that the well-known Claeys formula, which had in practice been governing notice periods since the late 1970s, has been pensioned off.
» For blue collar workers too, termination rights until 31 December 2013 must be calculated according to the rules applicable to blue collar workers on 31 December 2013. As the redundancy rules for blue collar workers until 31 December 2013 are a lot less favourable than those of white collar workers, the National Employment Office will pay them additional redundancy compensation.
The second step concerns the employment seniority acquired from 1 January 2014. The length of the part of the notice period associated with employment seniority must be calculated according to the new rules. It is assumed that the new seniority starts on 1 January 2014, therefore time starts to run at 0 for every employee.

Finally, the Act of 26 December 2013 on unified status also provided an obligation on employers to give reasons for dismissals. Belgium has long been one of only a few countries in Europe where employers have generally not been required to justify dismissals. The obligation to do so was supposed to have been made concrete in a Collective Bargaining Agreement of the National Labour Council by 1 January 2014. A little later than planned, the National Labour Council adopted Collective Bargaining Agreement No. 109 concerning the justification of the dismissal, entering into force on 1 April 2014.

The effect is this: every employee in the private sector is now entitled to ask the employer for the reasons for his or her dismissal. If the employer refuses to provide these, it must pay a fine equal to two weeks' salary. Moreover, if an employee finds that the dismissal was manifestly unreasonable, he or she can summon the employer before the Labour Court. If the court judges that the dismissal was not based on reasons related to the suitability or the conduct of the worker or on the operational needs of the company and the decision to dismiss would never have been made by an ordinary and reasonable employer, it will award additional

compensation equal to between 3 and 17 weeks' salary.

The Act of 26 December 2013 on unified status has not made blue collar and white collar workers disappear. The distinction between the two still exists in relation to a very large number of important employment topics, such as holiday allowances, economic unemployment, supplementary pensions, the rules with regard to joint industrial committees, social elections, etc.

However, now the legislator and the social partners must put their minds to (and perhaps to break their heads over) the significant differences that still exist. It will be interesting to see whether they will need another deadline from the Constitutional Court to make them complete the project.

Comments from other jurisdictions

Czech Republic (Nataša Randlová): In Czech employment law, there has never been a distinction between blue and white collar workers. The new Labour Code adopted in 2007 uses a different approach (which is not considered to be discriminatory in any way) and distinguishes between (i) managerial employees, i.e. those in a superior position to other employees, and (ii) regular employees, i.e. those with no superiority vis-à-vis any others. However, these two categories have not been treated differently in relation to either notice periods or 'carenz days'.

The minimum notice period is stipulated in the Labour Code to be two months commencing on the first day of the month following the month in which the notice was delivered to the other party. The notice period may be extended by agreement, but always must be the same for the employer and the employee. There is no provision stating that the notice period depends on seniority or would be different for managerial and regular employees.

By contrast, the issue of so-called 'carenz days' has been continuously and repeatedly discussed and reviewed. The Labour Code provides that the first three days of temporary unfitness to work are not remunerated. In practice, the employee therefore receives compensation for salary from the employer as of the fourth day of sickness (or as of 25th working hour). After two weeks of being paid by the employer, an unfit employee is then entitled to sickness benefit from the state.

Initially, unpaid sickness was disputed before the Constitutional Court of the Czech Republic in 2010. In 2012, the Court held that it was in accordance with the constitutional rights of employees and, in practice, helped to prevent the employees from claiming they are sick for one or two days whilst still being paid by the employer. Therefore, the ability to make initial

days of sickness unpaid helps the employer economically. In Czech labour law, therefore, effective regulation of initial days of sick leave can still be found.

Germany (Klaus Thönißen): From a German perspective it is interesting to see that the Belgian parliament did eventually stop the discrimination of blue collar workers at the end of 2013. In terms of notice periods, Germany also used to have discriminatory rules, but in 1982 the Federal Constitutional Court (*Bundesverfassungsgericht*) ruled that any difference between blue and white collar workers was unconstitutional. In a nutshell: all types of employees must be treated equally.

However, the parties to collective bargaining agreements still have the power to agree on notice period provisions which differ between blue and white collar workers, as long as there is a legitimate reason for the difference.

Note that in Germany there is no such thing as a legally-regulated severance payment or indemnity. In principle, an employer does not have to pay any kind of severance package upon termination. It just needs to pay the employee for the termination period. Under German labou law the notice period is usually between two weeks (during probation) and seven months (employee longevity of 20 years and more), unless a different termination period is agreed in the employment contract or collective bargaining agreement. The statutory termination periods are regulated in section 622 of the Civil Code (the BGB).

Luxembourg (Michel Molitor): Until 1 January 2009, Luxembourg law also distinguished blue and white collar workers. Indeed, both categories of workers were, *inter alia*, represented by different employee chambers and had different health insurance and pension funds.

After negotiations between the government, trade unions and employers' associations, both the statutes relating to each type of worker were repealed and the single employee's statute was enacted by means of the law of 13 May 2008 on the introduction of a Single Statute.

This has introduced many changes to labour law, including severance pay, additional hours and salary during sickness. There have also been many changes to the Luxembourg social security scheme, as the National Health Insurance (*Caisse nationale de santé*) and the National Pension Insurance (*Caisse nationale d'assurance pension*) were created in 2009 and absorbed all former sector-specific types of insurance. The reform aimed to abolish discrimination between blue collar workers and other employees.

Subject: Other forms of discrimination

Parties: Mr Georges Deryckere - v - Council of ministers

Court: Grondwettelijk Hof (Constitutional Court)

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