EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

2015/56 Constitutional Court: legislation regulating and standardising unfair dismissal damages unconstitutional (FR)

<p>On 10 July 2015, following over 400 hours of debate in Parliament, France adopted far-reaching legislation commonly known as the loi Macron, named after the Minister of Finance Emmanuel Macron. The law, which was highly controversial, was adopted without a vote in Parliament on the basis of a rarely used prerogative of the government (thereby risking a vote of no confidence) . A group of over 60 members of Parliament applied to the Conseil constitutionel to have a host of provisions of the law declared unconstitutional.</p>
<p>Although the vast majority of the loi Macron passed the constitutionality test, some provisions were declared unconstitutional. They therefore did not enter into force. One was Article 266, which would have brought more predictability for employers in respect of the amount of compensation they need to pay unfairly dismissed employees. The government is now preparing a new effort to achieve predictability.</p>

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Facts

Under French law, in the event of termination, an employee with a permanent contract is entitled to (i) a notice period (préavis), (ii) a transition award (indemnité de licenciement) and, in the event of dismissal in the absence of a real and serious reason (sans cause réelle et sérieuse) (iii) compensation for unfair dismissal.

Compensation for unfair dismissal is designed to compensate the employee for the entire loss he or she suffers as a result of the unfair dismissal. Employment tribunals assess damages mostly on the basis of the employee's length of service, age and the duration of his period of unemployment after dismissal. They also take his health and family situation into consideration. Some judges, even if they do not state this openly, also take into consideration the size of the company. Damages are commonly calculated in months of salary. The statutory minimum is six months of salary for an employee with at least two years of service in a company of at least 11 employees[1]. In exceptional cases, damages can be as high as 30 months[2]. Although the exact amount of damages is unpredictable, it is generally possible to assess them within a certain range.

Article 266 of the loi Macron was to have regulated the amounts of damages awarded by the courts in the event of unfair dismissal. However, on 5 August 2015, the Constitutional Court declared Article 266 unconstitutional.

Article 266 provided for a range of damages depending on the length of service. Within a given range, judges would have determined damages by taking into account the usual factors (age, period of unemployment, health, family situation), with three important changes:

the minimum of 6 months was to have been reduced in some cases;
creation of a maximum;
the company's headcount was to have become a factor.

The following table shows what would have applied had Article 266 not been declared unconstitutional:

[For table, see PDF; eds.]

The judge would have been allowed to overstep the maximum amounts in the event of:

sexual or moral harassment;
discrimination;
violation of a specific protection (maternity, occupational accident);
violation of the right to go on strike;
violation of a fundamental liberty.

The mechanism that Article 266 would have introduced was simple and fairly easy to use, although the calculation of headcount would probably have been challenged in some cases.

Judgment

More than 60 members of parliament challenged the loi Macron before the Constitutional Court[3]. They claimed that making the amount of damages depend on headcount was an unjustified breach of equality between employees, given that unfairly dismissed employees suffer the same losses regardless of headcount. The government defended Article 266 by pointing out that its goal was to bring more predictability to employers and therefore foster employment. Moreover, the government considered that bigger companies are more able to deal with unfair dismissal consequences than smaller ones. In particular, in smaller companies, one single large award of damages can jeopardize the continuity of the business, whereas a bigger company can withstand it[4].

The Constitutional Court examined the constitutionality of Article 266 in the light of two basic constitutional provisions: the right to claim full compensation of the loss suffered from a wrongful act and equality before the law.

Article 4 of the Déclaration des Droits de l'Homme et du Citoyen of 1789 (the year of the French revolution) provides that the author of any action that causes a loss is obliged to compensate that loss.[5] However, as full compensation is not a constitutional principle, the law can set limitations to damages in order to achieve common good. Therefore, the law can limit compensation if it serves the common good of society.

Article 6 of the Déclaration des Droits de l'Homme et du citoyen provides that all citizens are equal before the law. This means that, when legislating with the object of promoting the common good, the legislator must comply with the principle of equality. The law complies with the principle of equality when it provides for different rules applicable in different situations.

As starting point, the Constitutional Court held that damages for unfair dismissal can be limited on the basis of the length of service. However, as argued by the members of parliament, damages for unfair dismissal cannot be differentiated on the basis of headcount, as that would breach the principle of equality between employees. Although the Constitutional Court recognized that the government acted in the common good in its attempt to bring more predictability to employers, it decided that the factors used to limit damages must be related to losses suffered by unfairly dismissed employees. As employees suffer identical losses regardless of headcount, limiting damages on the basis of headcount breaches equality.

Commentary

The Constitutional Court's decision is not consistent with at least three key provisions of the labour and social security codes that limit employees' loss compensation or mitigation in order to foster employment in smaller companies:

First, unfairly dismissed employees in companies with less than 11 employees are not entitled to the minimum damages of six months' salary. If headcount is not a factor to be taken into account, perhaps this limitation is also unconstitutional.

Secondly, the law exempts companies with less than 50 employees or where less than 10 employees are made redundant from the obligation to implement a social plan. The purpose of a social plan is to avoid redundancies or to speed up redeployment outside the company, in order to mitigate employees' losses. The social plan plays a very significant role in compensating/mitigating the employees' losses.

However, it is compulsory only where at least 10 employees are made redundant in companies of at least 50 employees[6]. Applying the Constitutional Court's decision would mean that these provisions breach equality, as employees made redundant in companies employing less than 50 employees suffer the same losses as employees in companies of at least 50. Likewise, whether less than 10 or at least 10 employees are made redundant is irrelevant to the employees' losses.

Thirdly, there is the issue of exemption from social charges. The total amount of the transition award and damages for unfair dismissal is exempted from social charges up to €76,080[7]. However, if this total amount exceeds €380,400, it is fully subjected to social charges. Based on the Constitutional Court's decision, this is also a breach of equality, as the limitation of the net amount of damages is not related to the employee's loss. Under the draft social security finance legislation currently discussed in parliament, this €380,400 ceiling is being decreased to €190,200.

This further limitation will impact the older employees with the greater length of service.

Right after the decision of the Constitutional Court, Mr. Macron announced that his team would work to make the scale compliant with the constitution. New legislation is therefore expected in the next few months. As a first step, the compulsory scale of damages is supposed to be replaced in March 2016 by guidelines to be set by decree, taking into account the employee's length of service, age and other factors. The objective is that judges will follow these guidelines, which will thus become useful to employers and employees when assessing the opportunity to settle or go to court.

Article 266 would have been quite beneficial to companies of less than 20 employees in France, as the maximum awards would have resulted in lower awards than under current practice. However, it would not have had a significant impact on companies employing at least 20 employees, as:

from 2 to 10 years of service, the scale (6-12 months) was consistent with what an employment tribunal would usually award anyway;
the range as from 10 years (6-27 months) was too wide to bring predictability. An additional range, as from 20 years would have been useful.

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Subject: general equality

Parties: over 60 members of Parliament

Court: Conseil constitutionel (Constitutional Court)

Date: 5 August 2015

Case number: 2015-715

Publication: http://www.conseil-constitutionnel.fr/decision-n-2015-715-dc-du-05-aout-2015.144229.html

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Creator: Conseil Constitutionel
Verdict at: 2015-08-05
Case number: 2015-715