

SUMMARY

2010/38: EWC representative protected despite losing membership of domestic works council (BE)

<p>The dismissal protection of an EWC employee representative does not end upon ceasing to be a member of the domestic works council.</p>

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Facts

Ms B. was an elected member of the works council of her Belgian employer and represented this council on the European Works Council (EWC) of the international group of companies to which her employer belonged. When the national works council held elections in May 2004, she did not put herself up for re-election. As a result, she ceased being a works council member, and therefore stopped benefiting from her special dismissal protection as a works council member, as from 6 November 2004.

On 2 December 2004 Ms B. was dismissed by her employer, receiving severance compensation in the amount of 18 months' salary. Although her replacement in the EWC had been discussed, it appears that Ms B. had not formally resigned or been replaced as an employee representative in the EWC before she was dismissed.

Following her dismissal, Ms B. claimed payment of additional compensation, alleging violation of her right to special protection against dismissal as a member of the EWC. The court of first instance ("Labour Tribunal") ordered her employer to pay her such additional compensation in the amount of EUR 86,636. The employer appealed to the Labour Court.

Judgment

Article 10 of Directive 2009/38/EC of 6 May 2009 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees (previously Directive 94/45/EC) stipulates that, in the exercise of their functions, employee representatives in the EWC benefit from protection and guarantees similar to those provided for employee representatives by the national legislation in force in their country of employment.

In Belgium, members of a works council (or of its health and safety committee) can only be dismissed (a) for a serious cause, recognised as such prior to the termination by the labour court or (b) for an economic or technical reason, but recognised as such prior to the termination by the competent joint labour committee. In the case of violation of the procedure prescribed by law, the employee representative can either apply for reinstatement within 30 days following the dismissal or claim compensation (up to a maximum of four years' salary). An employer who has unlawfully dismissed an employee representative is liable to pay special compensation, which can amount to a maximum of eight years' salary, depending on length of service and on whether or not the employee representative requests reinstatement (which Ms B. did not do).¹ Following the Belgian implementation of Directive 94/45/EC, Belgian employee representatives in the EWC benefit from the same protection.

The question arose as to whether Ms B. automatically lost her protection as an EWC member from the moment she ceased to have any national mandate and ceased to benefit from special employment protection as a member of the domestic works council.

In its defence, the employer argued that the loss of her mandate in the national works council implied the loss of her EWC mandate and the corresponding dismissal protection. The employer referred, *inter alia*, to Article 29 of the Collective Bargaining Agreement (CBA) n° 62, which stipulates that EWC employee representatives must be designated from amongst employee representatives in the national works council. Ms B. argued that she did not resign from the EWC and thus still benefited from the special protection at the time of her dismissal.

The Labour Court ruled that CBA n° 62 only regulates the procedure and the way to designate EWC employee representatives, but in no way stipulates that EWC members lose their dismissal protection as from the moment their mandate in the national works council or any other national consultative body ends.

The special protection guarantees the proper execution of the mandate as employee representative in the EWC. It would not be effective if a member of the EWC is only protected for the duration of his national mandate irrespective of the duration of the mandate within the

EWC.

The specific protection against dismissal normally ends the day the next elected Belgian works council is installed. Since social elections normally take place every four years, the Labour Court held that once the employee representative has been designated in accordance with CBA n° 62, his or her mandate and the corresponding employment protection last in principle for four years. In any event, the termination of the mandate in the national works council does not automatically imply the end of the mandate in the EWC.

The Labour Court therefore ordered the employer to pay Ms B. the same specific protection compensation as the court of first instance had ordered it to pay.

Commentary

Case law concerning the protection and guarantees (including the protection against dismissal) of EWC employee representatives is scarce.

This judgement is particularly interesting because it clearly states that the statute of employee representatives in the EWC is a completely autonomous statute. It does therefore not depend on the existence of any national mandate, even though national legislation may stipulate that the employee representatives in the EWC must be designated from amongst employee representatives in a national consultative body.

Because of their mandate in the EWC, the same protection and guarantees provided for employee representatives in a national constitutive body apply to EWC employee representatives. Therefore, these rights are not lost when the protection as a member of a national consultative body ends.

Comments from other jurisdictions

Germany (Elisabeth Höller, Paul Schreiner): In Germany the construction and constitution of a European works council (EWC) is regulated in the Act of the European Works Council (EBRG).

The individual term of membership in the EWC is four years from the date of appointment, but re-appointment is possible. In general there is no requirement in German law that a member of the EWC must also be a member of a local works council, but the dismissal protection of members of the EWC must follow provisions for members of local works councils. According to the relevant German Works Constitution Act (BetrVG) an ordinary notice of termination of works council membership is not permitted. During the membership and for one year after the mandate has expired, only an extraordinary termination for cause is

possible. However, even an extraordinary termination either requires the consent of the works council or, as a substitute, of the Labour Court. According to section 36 of the EBRG a premature termination of membership of the EWR is only possible in the case of revocation by the works council which delegated the member according to section 36 EBRG or for other reasons such as premature resignation of the mandate; necessary reappointment of members of the EWR as a result of changes in the operational structure; reorganisation of the EWR because of mergers with other companies; termination of the mandate of the EWR due to an arrangement pursuant to section 17 of the EBRG; permanent reduction of the number of employees below the threshold level pursuant to section 3 of the EBRG; termination of the employment relationship; and the death of the EWR member.

Since membership of the EWC does not require membership of another works council, termination of the mandate in the national works council does not automatically imply the end of the mandate in the EWR. If membership of the EWR has not been cancelled or terminated for the above reasons, the membership will persist. At the time of writing there is no case law regarding such a situation in Germany, but the legal provisions seem to suggest that in Germany a result comparable to the Dutch decision would have been reached.

Since the EBRG refers to the national provisions concerning the special dismissal protection of members of a works council, all members of the EWR are specially protected against dismissal during their membership of the EWR.

Footnote

¹ Act of 19 March 1991 considering the regulation of the dismissal of employee representatives.

Subject: Unfair dismissal

Court: Labour Court of Antwerp

Date: 28 September 2009

Parties: NV - v - CB

Publication: <http://jure.juridat.just.fgov.be>

Creator: Labour Court of Antwerp

Verdict at: 2009-09-28

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