VIVIEN & ASSOCIÉS

act

Employment news

October 2018

Dismissal: the Macron compensation scale in court

The compensation scale introduced by Decree no. 2017-1387 of 22 September 2017 in cases of **dismissal without real and serious cause**, pursuant to Article L. 1235-3 of the French Labour Code, sets a **cap on the compensation** that can be granted to employees victims of such a dismissal. However, the principle of the scale is **strongly contested** on the grounds that it does not allow for the full compensation of the damage suffered and is therefore contrary to both Article 10 of ILO Convention no. 158 and Article 24 of the European Social Charter. A number of employees are therefore currently claiming before labour tribunals that **the scale is not compliant** with these two texts, using a now well-established argument aiming to lift the cap, which is widely promoted by certain employees' trade unions.

Article 10 of ILO Convention no. 158 sets out the rule according to which the compensation paid in the event of unjustified dismissal must be "*adequate*" or consist of "*such other relief as may be deemed appropriate*". **Article 24 of the European Social Charter** contains very similar provisions, aimed at "*ensuring the effective exercise of the right of workers to protection in cases of termination of employment*".

In a **judgement of 10 September 2018**, **the Labour Tribunal of Saint-Quentin** considered that the question of the scale's compliance with the aforementioned texts constituted a "*preliminary question of compliance*" that justified a stay of proceedings, and invited the employee to refer this question to "*the European Court of Justice*".

This was a surprising judgement for more than one reason. Firstly, because there is no such thing as the "*European Court of Justice*", and we do not know whether the judges were referring to the Court of Justice of the European Union or the European Court of Human Rights and secondly, because it is doubtful that the mechanism of the preliminary question can be set in motion before either of these courts. No European jurisdiction is competent to assess the compliance of a text of domestic law with the provisions of ILO Convention no. 158, which is a text of international law. Moreover, the preliminary question is itself admitted only in the context of Article 267 of the Treaty on the Functioning of the European Union, and only for the interpretation of the Treaties concluded in the context of the European Union or for the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union. Neither ILO Convention no. 158 nor the European Social Charter is an act of this kind, and neither was concluded in the context of the European Union.

More reassuringly, a **judgement of 26 September 2018** handed down by the **Labour Tribunal of Le Mans rejected the objection of non-compliance** raised by the employee, considering that Article L. 1235-3 of the French Labour Code was not contrary to the provisions of Article 10 of ILO Convention no. 158.

According to the judges, "*if the estimation of damages is fixed between a minimum and a maximum, it is still up to the judge, within the limits of this scale, to take into account all the elements contributing to the harm suffered by the dismissed employee when issuing a judgement on the amount of compensation payable by the employer (i.e. age and difficulty finding another job after years spent at the same company)*". The Tribunal pointed out that "*the scale is not applicable to situations where the dismissal takes place in a context of particularly grave failure on the part of the employer to meet its obligations*". Such situations include cases of psychological or sexual harassment, infringement on the exercise of a mandate by a protected employee, and violation of a fundamental freedom. In all these cases, the dismissal is invalid. Lastly, the Labour Tribunal pointed out that it is still possible for the employee to claim for **damage other than that resulting from the loss of employment**, which is "*likely to give rise to a distinct reparation on the basis of civil liability, provided that the employee can prove the existence of distinct damage*". Possible examples include the granting of damages based on the sudden and vexatious nature of the dismissal.

With regard to Article 24 of the European Social Charter, the judges do not consider this article to be directly applicable before national jurisdictions, since the objective of protection that it sets forth is addressed to the signatories of the Charter, i.e. States. Employers, therefore, are not directly bound by the provisions of said text.

In any case, the two divergent judgements described above illustrate how this key business issue has led to a bitter debate that is only just beginning. Other judgements are expected...

Joëlle Hannelais | Partner
Marie-Emilie Rousseau-Brunel | Partner
Sarah Machrhoul Lhotellier | Lawyer
Christophe Calvao | Lawyer
Astrid Brébant | Lawyer