Ius Laboris BELGIUM
CLAEYS & ENGELS

CLAEYS & ENGELS
Law Firm

Boulevard du Souverain 280
1160 Brussels

Tel +32 2 761 46 00
Fax +32 2 761 47 00

info@claeysengels.be
www.claeysengels.be

www.iuslaboris.com

Towards a new dismissal regime

Summary

The new regime of dismissal compensation must be simple and should in no way lead to a cost increase for employers. Unnecessary procedures before the courts must be avoided. The purchasing power of the dismissed individuals must be maintained.

Terms of notice and compensation in lieu of notice must be limited to a maximum of 12 months. A minimum of three months seems reasonable. The norm would be of one month per year of seniority worked.

The statutory compensation in lieu of notice must be exempt from social security contributions and income taxes.

Deviations from the statutory regime, to the benefit of the employee must be possible, both on a collective and individual basis.

Each worker will have the right to know the reasons for his/her dismissal. Outside the trial period, the dismissal has to be motivated. In the event the dismissal is considered abusive, the judge will have the competence to assess and to increase the severance compensation by maximum 50%.

The same degree of discretion is given to the judge who considers that a dismissal for serious grounds is in fact not well founded. The judge would be able to take into account the behaviour of the worker in order to reduce the statutory dismissal compensation by a maximum of 50%.

Introduction - a right and duty to train and a right to outplacement assistance

Within the framework of the Law of 3 July 1978, the Supreme Court held that the period of notice had to reflect the period of time the worker would need to find an equivalent job. To determine this, the trial judges had to take into account a number of factors specific to each case, such as age, seniority, function and level of the remuneration.

The correlation between these factors, the period of notice and the time required to find an equivalent job, has never been proven. It often happens that those individuals who receive high severance compensation are also those who quickly find an equivalent job. Furthermore, it is debatable whether it is up to the employer to fund the search for an equivalent job.

The idea that the employer must again pay for the loyalty the worker has shown by staying in its service is not well founded.

In return for the services provided, the worker receives a salary which was negotiated both at an individual and at a collective level. The worker moreover receives other benefits during the execution of his/her contract, including training.

It is up to the public authorities to put in place a social safety net when a worker loses his/her job for whatever reason. In addition to the specific training by the employer so that tasks are properly executed within the company, it is also up to the public authorities to procure schooling, general training and professional development. It is also the individual responsibility of the worker to continually ensure his/her own skill level.

The obligation to offer an outplacement service can be extended to all dismissed workers, whatever their age. The costs of such an offer should be reasonable, in view of its generalized character. Not taking advantage of a proposed outplacement service may not lead to an increase in the termination cost.

An affordable system for white and blue collar workers together

Social security and taxes

The difference between blue and white collar workers has for many years been really discriminating and is flagrant when it relates to notice periods and severance payments in the event of a dismissal.

The abolition of this unconstitutional distinction can practically not be done by applying to the blue collar workers, the notice periods of the "higher" employees.

This would make the whole system totally unaffordable for the employers or make dismissals impossible. This would obviously be negative for the entire Belgian economy, both with regard to the correct allocation of staff and with regard to our reputation abroad and thus our attractiveness to foreign investors.

The system must be totally readjusted. It must be a unified system for what are now two distinct categories of workers. An increase of the legal notice periods for blue collar workers is a must.

In order to avoid making the new system financially unbearable for employers, the severance payments should be exempt from social security contributions. Since the employer social security contributions range around 50% for blue collar workers and around 35% for the white collar workers, an exemption from these contributions would give breathing room to employers. Such an exemption would be logical since the severance payment does not constitute remuneration paid in return for the execution of work.

Similarly, the redundancy payments should also be exempt from income taxes. At the least, the exemption from income taxes and social security contributions should be applicable to severance payments as laid down by law.

The exemption from income taxes and social security contributions would create an incentive to terminate an employment contract with an immediate effect. The workers are often particularly demotivated once the dismissal is notified and they have to work during a notice period. The outplacement could then start immediately.

Calculation basis
Finally, the numerous discussions which currently exist with respect to the calculation basis of severance pay should be avoided as much as possible. The annual salary that should be taken into account should be the base salary multiplied by 12, supplemented by the variable compensation paid in the form of commissions or bonuses (if these are paid at least four times a year) and which are related to the services provided during the 12 months preceding the month in which the dismissal has effectively taken place.

The other elements of the remuneration would not be taken into consideration. The provision of other advantages during the execution of the contract should not lead to an increase of the dismissal cost.

The date from which the notice period begins to run
In the event of termination with notice, the notice period will begin to run from the first day of the week which follows the week in which the notice is given. This notice must be given by registered mail. The same day, the employer must deliver a copy of this letter to the worker. If the worker refuses to acknowledge receipt of this copy, this may be sent by e-mail with an acknowledgement of receipt. This will be also the case if a personal discussion with the worker could not take place.

Notice periods and severance payments

The duration of the notice period can be set at one month per year of seniority. Contrary to what was proposed in the interprofessional agreement, the proposal is to take into account completed years of service and not started years. Per completed year of service (or if at least nine months were worked = 75% of the year of service), the period of notice would be prolonged by one month.

The notice period should never be shorter than three months, except in the case of termination during the trial period. After the minimal trial period of one month, the employment contract could be terminated by notice of seven calendar days. The notice period should start running on the first day following the day in which the registered letter was sent. The employer should deliver a copy of this letter to the worker the same day.

If the worker refuses to acknowledge receipt of this copy, this may be sent by e-mail with an acknowledgement of receipt. This will also be the case if a personal discussion with the worker could not take place.

The maximum legal period of notice should be limited to 12 months. Beyond this period, it could be considered an incentive to inaction. A certain turnover is healthy. The one who stays more than 12 years in the service of the same employer should not obtain a severance payment higher than 12 months of remuneration.

The law would no longer make a difference on the basis of the age or the level of income. The function of the dismissed worker would also be irrelevant. The only relevant factor is the seniority, which is also the most important and steady factor in the different versions of the Claeys Formula. Contractual derogations must remain possible. There should, however, not be an incentive to individually or collectively drive up the cost of dismissals, which has given Belgium a bad reputation on the international scene. While contractual increases of the terms of notice (and its calculation basis) should be allowed, an exception of the increased severance payments, from social security contributions and taxes does not seem warranted.

Obligation to motivate and procedure

The trial period has to regain its real goal: evaluate whether the worker is appropriate for the job, both from the employer's and the worker's point of view. In this context, a trial period of six months seems largely sufficient. During the trial period, the employment contract can be terminated without citing any reasons.

A dismissal after the trial period will have to be justified. Independently of obligations imposed by international norms, decency requires that the person who is dismissed knows the reasons for his/her dismissal.

Obviously, one is dealing with unilateral explanation and a justification regarding the reasons why the decision has been taken.

The worker's agreement with the reasons invoked is not required. Reasons have to be notified by registered letter or by e-mail with an acknowledgement of receipt, within seven days of the request being made by the dismissed worker, who has the possibility to question his/her employer regarding the reasons for his/her dismissal, by registered letter, at the latest seven working days after the effective end of the contract.

The worker has to be entitled to dispute the reality or the absence of justification of the explanation provided. Any dispute regarding the grounds for the dismissal should take place at the latest within the month following the dismissal in a simple procedure in the labour courts. The procedure should allow securing, within the month of its initiation, a decision concerning the validity of the grounds invoked and the absence of discrimination. It should be possible to obtain an appellate level decision within the following month, in such a way that at the latest three months after the effective end of the employment contract, a definitive decision will be rendered on the (un)fairness of the dismissal.

The grounds that can be invoked, to support the dismissal can obviously not be based on criteria prohibited by law. The grounds can be of an economic, technical or organizational nature or can relate to the worker's behaviour and his/her capacity to perform the entrusted tasks.

Each party bears its own legal expenses.

If the dismissal is considered abusive, it has to be sanctioned by an increase of the compensation in lieu of notice. This increase, which is left to the assessment of the courts, could go up to 50% and would be exempt from social security contributions and income taxes.

The sanction mechanism for discriminatory dismissals remains in place. Both forms of compensation can, however, not be combined. The highest of the two forms of compensation will be awarded, provided the conditions for its applicability are satisfied.

Serious grounds for dismissal

Dismissal for serious grounds obviously remains possible. Employers should have a period of seven calendar days in order to dismiss and to notify, at the same time, the reasons for the dismissal. Employers should have the opportunity to look for evidence concerning the grounds invoked. The period of seven days would start to run when this evidence is obtained.

If the dismissal for serious grounds is contested before the court and the serious grounds are not recognized by the court, the court will have a discretionary power regarding the grant of the compensation in lieu of notice: compensation granted could thus be reduced by up to 50% in the event of the employee being at fault.

The mere fact that the court does not recognize the serious grounds that are invoked for the termination, does not render the dismissal unfair. In case the dismissal is considered to be abusive, however, the increase of the severance compensation could run up to 50%.

Transitional measures

It seems illogical to provide transitional measures. A worker with more than 12 years of service, prior to the termination of his or her employment contract, has no acquired right to any form of severance pay and the way it is calculated.

The new act should, in this sense, be directly applicable to all employment contacts, being executed or not at the moment of its entry into force.

Furthermore, it is obvious that the act has to be applied without any distinction being made between white and blue collar workers. It seems also obvious that any system introduced that perpetuates the presently applicable discriminatory legal system, for example for workers in service before 1 January 2012, will be in contradiction with the case law of the Constitutional Court. If one would think of introducing transitional system, it has to consist of the adoption of a totally new system, applicable in the same way to white and blue collar workers.

A transitional system maintaining the actual dismissal system applicable to white collar workers having more than 12 years of seniority, will not only be unconstitutional, but will result in such white collar workers with a long seniority, to become more immobile.

Such a transitional system also creates the impression that an established right is guaranteed.

Summary

The new regime of dismissal compensation must be simple and should in no way lead to a cost increase for employers. Unnecessary procedures before the courts must be avoided. The purchasing power of the dismissed individuals must be maintained.

Terms of notice and compensation in lieu of notice must be limited to a maximum of 12 months. A minimum of three months seems reasonable. The norm would be of one month per year of seniority worked.

The statutory compensation in lieu of notice must be exempt from social security contributions and income taxes.

Deviations from the statutory regime, to the benefit of the employee must be possible, both on a collective and individual basis.

Each worker will have the right to know the reasons for his/her dismissal. Outside the trial period, the dismissal has to be motivated. In the event the dismissal is considered abusive, the judge will have the competence to assess and to increase the severance compensation by maximum 50%.

The same degree of discretion is given to the judge who considers that a dismissal for serious grounds is in fact not well founded. The judge would be able to take into account the behaviour of the worker in order to reduce the statutory dismissal compensation by a maximum of 50%.

27 October 2011
Claeys & Engels

Should you have any other question with regard to this matter, please contact:

Chris Engels
Tel +32 2 761 47 12
Fax +32 2 761 46 77
E-mail chris.engels@claeysengels.be