Ius Laboris BELGIUM
CLAEYS & ENGELS

CLA no. 109: The obligation to motivate a dismissal and the manifestly unreasonable dismissal

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Content

The final compromise proposal of the Minister of Work of 5 July 2013 stipulated that "an arrangement concerning the motivation of the dismissal and the need for a good HR policy" would be provided by a CLA, to be negotiated in the context of the National Labour Council, entering into force on 1 January 2014. On 12 February 2014, the CLA was finally concluded entering into force on 1 April 2014.

This new arrangement replaces the provision in article 63 of the Employment Contracts Act regarding the unfair dismissal of blue-collar employees. In practical terms the CLA foresees that an employee who has been dismissed, whether he is a blue- or white-collar employee, has the right to know the specific reasons for his dismissal. When the dismissal of an employee is considered to be "manifestly unreasonable", the employer is obliged to pay an indemnity of 3 to 17 weeks' salary.

In this newsletter, we will try and answer all the key questions you are likely to have regarding this subject:

- **Does the employer have the obligation to motivate every dismissal?**
- **Does the employee have an unlimited right to know the specific reasons for his dismissal?**
- **What are the penalties for the employer if he refuses to motivate the dismissal?**
- **Does the employer have to prove that the employee was not dismissed in a manifestly unreasonable way?**
- **...**

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1 Current regulation

1.1 Blue-collar employees: unfair dismissal

A dismissal of a blue-collar employee is considered to be unfair when the dismissal is based on reasons that are not related to the suitability or the behaviour of the employee, or when it is not based on the necessities of the organisation of the company, institution or service.

When the blue-collar employee invokes the unfairness of his dismissal, the employer has to prove the reasons for the dismissal and the fairness of it. If the employer fails to do se, he owes the blue-collar employee an indemnity of six months' salary, on top of a notice period or a termination indemnity.

This regulation is considered to compensate the shorter notice periods for blue-collar employees. Since the single employment status foresees equal notice periods for all employees (at least for employment contracts as from 1 January 2014), the regulation of unfair dismissal needed to be adjusted.

1.2 White-collar employees: abuse of the dismissal right

The way unfair dismissal is currently regulated when it comes to blue-collar employees does not apply when it comes to white-collar employees This means that an employment contract of a white-collar employee can be terminated without the employer being obligated to motivate the dismissal (obviously this does not include the situations in which employees are protected against dismissal, for example pregnant employees, employees benefitting from time credit,...).

A white-collar employee can only claim an indemnity, on top of a notice period or a termination indemnity, if he proves that the employer has abused his dismissal rights. It rests with the employee to prove the fault of the employer and the losses he has suffered. A dismissal will be considered abusive if the employer uses his dismissal rights in a way that never would have been approved by a careful employer.

In reality, claims regarding abuse of dismissal rights will only be granted when the dismissal took place in a very specific context (for example, the employer giving inappropriate publicity to the dismissal, false accusations made by the employer about the employee, a dismissal of an employee who wanted to exercise his rights,...).

2 Scope of the CLA

CLA no. 109 is applicable to the dismissal by the employer of any employee, whether it is a blue-or a white-collar employee, with at least six months' service. Previous consecutive fixed-term employment contracts and temporary employment contracts for an equal position with the same employer, are taken into account for the calculation of these six months.

Other situations in which the new CLA is not applicable:

- termination of temporary employment contracts or employment contracts for students;
- dismissal in view of (early) retirement;
- dismissal in the framework of collective dismissal, closure or termination of the activity, multiple dismissals as defined on industry branch level;
- when a specific dismissal procedure has to be followed, prescribed by law or a CLA (for example the employees who are protected within the framework of the social elections, dismissal of the prevention counselor).

When an employer dismisses an employee for serious cause, the rules with respect to the obligation to motivate a dismissal do not apply. In this case the motivation is based on article 35 of the Employment Contracts Act. The rules with respect to the manifestly

unreasonable dismissal are however fully applicable.

CLA no. 109 contains a special regime for the branches of industry falling under the exceptional measures of the single employment status regarding the notice period. This special regime will be discussed at the end of this newsletter (section 5).

3 Obligation to motivate

3.1 The employee has the right to know the reasons for his dismissal

CLA no. 109 provides a right for employees who have been dismissed, to know the specific reasons on which their dismissal was founded.
The employer is free to communicate the reasons for the dismissal at his own initiative (for example in the letter of dismissal), but he is not obliged to do so. The obligation to motivate a dismissal, as foreseen by CLA no. 109, only exists when the employee has made a request to the employer. However the employer still has to declare the reason for the termination of the employment contract on the so-called "unemployment form", also known as C4-form (section: "actual reason of unemployment"). If the employer chooses not to communicate the reasons for the dismissal at his own initiative, he must be aware that, in case of a dispute, he will have to prove the reasons as mentioned on the unemployment form.

The employee has to make his request by registered mail, within a period of two months following the end of the employment contract. When the employee received notice with a notice period, this request needs to be made within six months following the notification of the notice period (starting the third working day after the date the notification has been sent by registered mail), without exceeding two months after the effective termination of the employment contract.

When the employer receives such a request, he must send an answer to the employee within two months by registered mail. This period starts on the third day after the request of the employee has been sent by registered mail. The answer of the employer must cite the specific reasons on which the dismissal was founded. As all other documents sent by the employer, the answer of the employer must be written in the language as imposed by law.

If the employer already has communicated the reasons for the dismissal at his own initiative, he is not obliged to respond to the request of the employee. It is however necessary that the communication of the employer did indeed contain all elements based on which the employee was allowed to know the specific reasons for his dismissal.

3.2 Penalty

An employer who does not respond to the request of the employee which has been sent in time by registered mail (and who has not already communicated the reasons for the dismissal at his own initiative), owes the employee an indemnity equal to two weeks' remuneration.

It can be argued that this indemnity is exempted from social security contributions. The National Labour Council takes this view.

4 Manifestly unreasonable dismissal

4.1 Concept

A dismissal is considered to be manifestly unreasonable when an employee with a permanent contract is dismissed and the dismissal is:

- based on reasons which are not connected to the suitability or behaviour of the employee;

- or, the dismissal is not based on the necessities of the organisation of the company, institution or service;
- and it would never have been approved by a normal and reasonable employer.

This rule applies to the dismissal of any employee, whether it is a blue- or a white-collar employee.

The assessment of a manifestly unreasonable dismissal does not concern the circumstances of the dismissal. This assessment is limited to examining whether or not the dismissal was indeed based on the suitability or the behaviour of the employee, or the necessities of the organisation of the company.

Moreover, the assessment is merely a test of reasonableness. The employer maintains his right to decide whether or not a decision is reasonable, and still has the possibility to choose between the several management options a normal and reasonable employer would also consider. The labour tribunal does not have the right to test the opportunity of the decisions of the employer.

4.2 Indemnity

An employee who has been dismissed in a manifestly unreasonable way, may claim an indemnity of 3 to 17 weeks' salary. The amount of the indemnity depends on the degree of the manifest unreasonableness of the dismissal. The maximum amount of the indemnity is however lower than the current indemnity of six months' remuneration, in case a blue-collar employee has been dismissed unfairly. CLA no. 109 foresees the possibility for the employee to claim an indemnity based on the actual losses of the employee instead of the flat-rate amount. In this situation the employee will have to prove the fault made by the employer, his own losses and the causality between them.

The indemnity can be cumulated not only with the fine owed by the employer in the event he fails to meet the obligation to motivate the dismissal, but also with a severance pay, a non-compete indemnity, an indemnity for loss of clientele or an supplement paid on top of certain social allowances. The indemnity, however, cannot be cumulated with any other indemnity owed by the employer following the termination of the employment contract (for example, an indemnity for protection against dismissal, an indemnity for discrimination, an indemnity that covers damages,...).

Like the fine owed by the employer in the event he fails to respect the obligation to motivate the dismissal, it can be argued that this indemnity is also exempted from social security contributions (and the National Labour Council takes this view).

4.3 Burden of proof

In the event of a dispute, it is obviously very important to know who holds the burden of proof.

Under the current rules with regard to the unfair dismissal of blue collar workers, it is sufficient for a worker to suggest that his dismissal was unfair. It is u to the employer to prove that the dismissal is based on reasons connected to the suitability or behaviour of the employee or the necessities of the organisations of the company.

Regarding the manifestly unreasonable dismissal, the burden of proof has been divided. Three possible situations can be distinguished:

1. **The employer has, at his own initiative or at the request in time of the employee, communicated the reasons on which the dismissal is founded**: the party who makes a statement has to prove this statement.

2. **The employee has made a request but the employer failed to communicate (in time) the reasons on which the dismissal is founded**: the employer has to prove the reasons for the dismissal which have to

demonstrate that the dismissal was not manifestly unreasonable.

3. **The employee has not made any request to know the reasons for his dismissal**: the employee has to prove the elements which indicate that the dismissal was manifestly unreasonable.

We will have to wait and see how these rules will be interpreted by the courts and if the three situations as mentioned by CLA no. 109, in reality will make a difference regarding the burden of proof. In any event, a careful employer should collect as much evidence as possible regarding the reasons for any dismissal in order to be able to contest a claim for manifestly unreasonable dismissal with success (or even better, to avoid such a claim).

5 Special regime

5.1 Applicable to whom?

CLA no. 109 provides a special regime for the branches of industry which fall under the exceptional measures of the single employment status regarding the notice period (whether structural, like certain activities in the building sector, or temporary, like companies for clothing, for wood and furnishing, for diamonds,..).

5.2 Which rules apply?

- First of all: the rules regarding the obligation to motivate are not applicable to the dismissal of employees submitted to the special regime. However for the employees for whom the exceptional measures are temporary, the special regime only applies until 31 December 2015. As from 1 January 2016 these employees will also have the right to request a motivation for their dismissal. Only for employees for whom the exceptional measures are structural (certain activities in the building sector) the employers have no obligation to motivate the dismissal.

- Furthermore, the rules regarding the manifestly unreasonable dismissal will not apply until 31 December 2015 for the employees for whom the exceptional measures are temporary and in a permanent way for the employees with certain activities in the building sector. A regime equal to the current regime regarding unfair dismissal will be applicable instead. This means that the employees with a permanent contract, to whom the special regime is applicable, cannot be dismissed for reasons which are not connected to their suitability or behaviour or reasons which are not based on the necessities of the functioning of the company, institution or service. The employer will have to prove the reasons on which the dismissal is based, and in case of an unfair dismissal, he will owe the employee an indemnity of six months' salary.

6 Conclusion

CLA no. 109 may be considered as a new milestone in the history of Belgian employment law. From 1 April 2014 employees have the right to know the reasons on which their dismissal is founded, and this whether they are a blue-collar or white-collar employee. Furthermore, white-collar employees will have the right, just like blue-collar employees already have, to claim an indemnity if their dismissal was manifestly unreasonable. However, this indemnity is lower than the indemnity of six months' salary as applicable for blue-collar employees until 31 March 2014.

CLA no. 109 imposes extra administrative duties for the employer: on the one hand they can expect requests to motivate dismissals and here they are obliged to answer by registered mail, on the other hand they will have to collect as much evidence as possible regarding the reasons for a dismissal in order to be prepared for a possible claim for manifestly unreasonable dismissal.

We are looking forward to having the point of view of the labour tribunals and courts regarding this new regulation. At the moment there is no case law so we have to speculate about the severity of the burden of proof, and about the way the 3-17 weeks' margin of the indemnity for manifestly unreasonable dismissal will be applied.

Obviously we will carefully monitor all relevant future developments

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