TETRALERT – LABOUR LAW

DISMISSAL IN THE PUBLIC SECTOR: THE CONSTITUTIONAL COURT TACKLES THE COURT OF CASSATION

I. DESCRIPTION OF THE PROBLEM

One question which has long divided labour jurisdictions is that of knowing whether a public authority, when it is thinking of cancelling the labour contract of one of its contract agents must, as is the case with termination of on a statutory member of the staff, respect the general principles of good administration, and more especially the principles of prior hearing and of giving a formal rationale for the dismissal decision.

II. POSITION OF THE COURT OF CASSATION

In our Tetralert for the month of October 2016, we notified you that the Court of Cassation finally resolved this controversy by its judgment of 12 October 2015 (Ruling no. S.13.0026.N) by stating that an employer in the public sector does not have to arrange a preliminary hearing of a contract agent before dismissing him or her, nor does the employer have to justify the dismissal decision. The Court simply found that the rules relating to the termination of an indeterminate length labour contract (CDI) (articles 32, 3°, 37 §1 par.1 and 39 §1 par. 1 of the law of 3 July 1978) do not require the employer to arrange a hearing for the worker before proceeding with dismissal. A judge who would decide this differently would be misreading the law.

III. THE CONSTITUTIONAL COURT QUESTIONED

By its judgment of 6 July 2017 (n° 86/2017), the Constitutional Court revived this discussion. The Court took up the interlocutory question of the French-speaking Labour Court of Brussels, which had heard a female worker who was engaged under a labour contract by the Brussels commune and alleged discrimination against her compared to her statutory colleagues because she was dismissed without any preliminary hearing.

In its ruling, the Constitutional Court states, firstly, that workers in the public sector, whether statutory employees or those engaged under a labour contract, are in comparable situations when the issue is to determine the conditions under which they can lose their jobs. It then found that unlike the contract staff, statutory employees have the right to a hearing by the public authority before a grave measure is taken linked to their attitude or to their behaviour. It deduces from this a difference in the way they are treated that cannot be reasonably justified by the difference in legal status by virtue of which they are engaged by the public authority. The

Constitutional Court thus concluded there was discrimination in the case.

CONCLUSION

The Constitutional Court does not contradict the Court of Cassation, but their argumentation, each in its own sphere of competence, arrives at opposite conclusions. The Court of Cassation notes that the rules relating to the termination of CDI stipulated by the law of 3 July 1978 do not oblige an employer to arrange a hearing for the worker before proceeding with his or her dismissal. By virtue of a general principle of good administration, there cannot be an exception to these rules by considering that the employer who does not give a hearing to a worker is at fault. But the Constitutional Court believes that the provisions of the law of 3 July 1978 on labour contracts which authorises a public authority to dismiss a worker under a labour contract without being obliged to arrange a preliminary hearing creates an inadmissible difference in the way this worker is treated and the treatment of statutory workers. The provisions of the law are thus unconstitutional because they are discriminatory.

In view of the ruling issued by the Constitutional Court, one can only advise public employers, when they are considering dismissing one of their agents under a labour contract, to proceed in advance with his or her hearing in order to listen to their means of self-defence.

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