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CLIENT ALERT

The Belgian Constitutional Court Confirms: Individual Agreements on the Notice Period Entered into Before the Uniform Status Act (2014) Should Be Applied to 'Higher' White Collar Workers

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In Belgium, calculating the notice period for ('higher') white collar workers in case of termination of an employment contract has always been a difficult and uncertain business. Even the entry into force of the Uniform Status Act of December 26, 2013 (2014) – legislation that was intended to fix equal notice periods for all blue collar and white collar workers and to create legal certainty – did not end the debate around this issue. For the second time, the Constitutional Court has ruled that the Uniform Status Act partially violates the Belgian Constitution and has given guidance on how to deal with individual agreements, entered into before 2014, about notice periods for higher white collar workers (June 6, 2019 (nr. 93/2019).

Notice Periods Before and After the Uniform Status Act

As notice periods relating to employment contracts that pre-date the Uniform Status Act are partially calculated under the pre-2014 rules, it is important first to look at the situation prior to the Uniform Status Act.

Notice periods applicable before 2014 - Prior to 2014, the calculation of the notice period for a blue collar worker was different from the calculation for white collar workers.

For *blue collar workers*, the notice periods were fixed at sector level, based on the length of the worker's employment (where there was no sectoral rule, the notice periods of a specific national CBA/law applied). These notice periods for blue collar workers were far shorter than those for white collar workers.

For *white collar workers*, a distinction was made between 'lower' and 'higher' workers, depending on the worker's annual gross salary. For lower workers (i.e., white collar workers with an annual gross salary of 32,254 euro or less), the notice period was fixed by law at 3 months for every period of employment of 5 years that the employee had begun. For higher workers, the parties had to agree on the notice period at the time of termination, albeit respecting some fixed minimum notice periods. (If the parties did not agree, the labor court had to determine the notice period). Often, the Claeys formula or the principle of 'one month notice per year of employment' was used. Moreover, for higher workers with an annual gross salary of more than 64,508 euro, it was possible to fix the notice period at the start of the employment contract (individual agreement).

Uniform Status 2014 - Under the Uniform Status Act, which applies to all employment contracts entered into force on or after January 1, 2014, the same notice periods must be respected for both to blue collar and white collar workers.

For employment contracts that pre-date January 1, 2014, the notice period accrued by December 31, 2013 under the old rules is "locked". In other words, the old and new rules have a combined effect: the notice period has two parts.

With respect to the first part of the notice period, article 68 of the Uniform Status Act provides:

(…) para. 2: *The first part of the notice period should be determined based on the legal, regulatory and contractual rules applicable on December 31, 2013* (…).

para. 3: *For white collar workers whose annual salary exceeds 32,254 euro on December 31, 2013, as an exception to the previous paragraph, the first part of the notice period in case of termination by the employer is fixed at one month per started year of employment, with a minimum of three months.*

Discrimination? - Article 68 (in combination with the relevant preparatory work in parliament) raised the following question: Should agreements on the notice period for higher white collar workers, fixed before 2014 still be applied in case of termination now (2014 and later)?

According to a strict reading of article 68, the answer is no. Indeed, article 68, para. 3, provides an exception to the rule, fixing the notice period for these employees by law (one month per started year of employment). In the preparatory documents, however, it is stated that all the existing clauses regarding the notice period should continue to be applied. Is the application of article 68 of the Act (which is a clear text so that, in principle, there is no need to consult the preparatory documents) discriminatory because it allows lower white collar workers to rely on valid clauses about the notice period, but denies higher white collar workers the same possibility (as it effectively prohibits the reliance on individual agreements on notice periods (para. 3))?

Judgment of the Constitutional Court

Confronted with an individual agreement that operated in the favor of a higher white collar employee and was entered into in 2013, the Antwerp Labor Court asked the Constitutional Court to consider the following questions:

Does article 68 of the Uniform Status Act violate articles 10 and 11 of the Belgian Constitution (equality, no discrimination) *because this article provides that, in case of termination by the employer, for lower workers the notice period is determined in accordance with the legal, regulatory and contractual rules applicable on December 31, 2013, while for the higher workers the notice period is fixed without taking into account the contractual rules applicable on December 31, 2013?*

Does article 68, para. 3, of the Uniform Status Act violate articles 10 and 11 of the Belgian Constitution because this article provides that, in case of termination by the employer, the notice period is fixed without taking into account the contractual rules applicable on December 31, 2013 for higher workers without a valid individual agreement on the notice period as well as for higher workers with a valid individual agreement, while their situation is not comparable since for the last category there already existed contractual certainty about the notice period to be applied (by fixing the notice periods by law (art. 68), it was the purpose of the legislator to create legal certainty).

Fully in line with its decision of October 18, 2018 (nr. 140/2018) on comparable questions, the Constitutional Court, on June 6, 2019 (nr. 93/2019), answered affirmative to both questions. Hence, **a valid individual agreement on the notice period should be applied to calculate the first part of the notice period**, irrespective of the current legislation about notice periods. The Constitutional Court indeed asked the labor courts to cease this violation of articles 10 and 11 of the Constitution and take into account the valid existing clauses fixing the notice period, pending further legal initiative.

It is therefore imperative that employers in Belgium verify whether a termination agreement exists in case of an envisaged termination of an employment contract that came into force before 2014.

You can read the full text of this decision on the Constitutional Court's website in Dutch and French.

Our Brussels Labor & Employment practice is available to advise and assist companies with respect to their termination policy as well as with any individual or collective termination matter.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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