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[TERMINATION OF THE EMPLOYMENT CONTRACT]

Downsizing plans: last in is not necessarily first out, professional capabilities matter !

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When preparing a downsizing plan, the employer has to use objective criteria to select the persons to be dismissed. The Labour code provides for the following criteria: the family situation (number of dependants) with a special attention for single parents, length of service, situation of the employees whose situation makes it difficult to find a new job (disabled and aged employees), and the professional capabilities. Some collective bargaining agreement provide for additional criteria.

The labour code expressly provides that the employer may give priority to one of the selection criteria but must take them all into account. In practice, employers frequently prepare a scoreboard with a number of points for each criteria.

In the case judged by the Supreme administrative court, the redundancy plan had been prepared by the liquidator of the company, who had decided that all employees would have the same number of points for the professional capability criterion. The Supreme administrative court judged that by giving one point to each employee the criterion of the professional capability was neutralized, which is contrary to the labour code that requires that all the criteria be taken into account. Hence it judged the plan illegal and nullified the administrative decision that had approved the plan.

Some courts of appeal previously judged in the same way in situations where the employer had neutralized the criterion of professional capabilities. An employer had accepted to neutralize this criterion, upon request of the works council in the course of the consultation process. The Administrative appeal court of Versailles nevertheless invalidated the plan (April 14, 2016). In another case an employer had modulated the criterion of the professional capabilities but decided that should two employees have the same total number of points with the other criteria, the professional capabilities criteria would not be taken into account. The works council had approved this method. Nevertheless, the Court of Amiens decided that this was illegal and awarded damages to the employee claimant (Amiens Court of appeal, September 25, 2013).

All these decisions concern so-called PSE (plans involving more than 10 employees within a company employing more than 50 people), but the solution should apply to any dismissal for economic reason, including when only one person is concerned, since the rule of the labour code on the selection criteria applies whatever the size of the plan.

In the decision of the Supreme administrative court, the liquidator had argued that no performance appraisal of the employees was available and hence it was not possible to modulate this criterion. The Supreme Court already judged that the lack of annual review, which is not a legal obligation, does not make it impossible to appreciate the professional skills (Cass. Soc. April 11, 2008 06-45804).

When appreciating the professional capability of the employees the employer has to use objective criteria, which may be verified by the courts. The elements to be taken into account may be the ability, appreciated by the employer, to help the company returning to a positive situation (Cass. Soc. May 18, 1993). The diploma cannot be the sole element taken into account (Cass. Soc. March 17, 1993, 91-42118). Recent disciplinary sanctions may even be taken into account, provided it is not the only element taken into account (Cass. Soc. May 19, 2010 09-40103).

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