

[CONTRACT OF EMPLOYMENT – COMPENSATION]

Variable remuneration plans: use of the French language and possibility to modify them

Cass. Soc. September 21, 2017, 16-20246

Where the remuneration of the employee includes a variable part, the employment contract may provide that the employer may unilaterally modify the KPI, whether these indicators are collective (based on company performance) or individual (based on employee's performance), provided following conditions are met. The modification must not result in paying a global remuneration below the minimum remuneration provided by the collective agreement for employee level, or, absent such a collective agreement, the legal minimum ("SMIC"). The indicators must be objective elements (without any influence of the employer). The targets must be realistic and reasonable. The employee must be informed of the new KPI at the beginning of the year.

This case concerned an employee whose contract provided for a variable remuneration equivalent to 10% of his base salary. Early in the year (February) the company's shares had been sold to a new group. Later in the year (in June), the company had been restructured and integrated in the new group. Further to this restructuration the employee was informed in September of the new KPI applicable for the year. After year end, the employee received his bonus corresponding to the individual indicators, but given that the company performance targets were not met, he did not receive the part corresponding to the collective indicators. He claimed for the payment of his full bonus and obtained a favourable award from the Court of appeal on two grounds: first the fact that the bonus plan was initially sent to him in English and second the fact that it was sent too late (September).

By the decision of September 21, 2017, the Supreme Court invalidated this decision.

Regarding the language issue, it should first be recalled that the Labour code requires documents being in the French language when they include obligations for the employee or provisions that are necessary for the performance of the duties. The Supreme Court already judged in an earlier decision that pursuant to this rule, the variable remuneration plans should be written in French, otherwise they are unenforceable against the employee (Cass. Soc. June 29, 2011, 09-67492). In the 2017 decision, the Supreme Court did not accept the argument of the company that the plan was established at group level, hence in English, and that the employee was working mainly in English.

But the Court noted that whereas the bonus plan sent to the employee on September 18 was in the English language, a French version of the plan had been posted on Company intranet eight days later, and judged that it was sufficient to comply with the rule of the labour code on the French language.

Although the outcome of the litigation was favourable to the company, employers should bear in mind that the variable remuneration plans, even if drafted outside France, and even if the employee actually works in English, must be translated into French, failing which they will not be enforceable against the employee.

The second issue was the date the plan was sent to the employee. Pursuant to case law, the targets or KPI, when unilaterally set by the employer, must be communicated to the employee at the beginning of the period (in general the fiscal year). If not, this may be considered equivalent to a constructive dismissal allowing the termination of the contract at employer's torts, either directly by the employee ("*prise d'acte*"), or by the court on employee's request ("*résiliation judiciaire*"). The interesting element of this decision is that the Supreme Court acknowledges that a restructuration may allow the company to determine the targets or KPIs later in the year. The employer had put forward that it was not possible to define reasonable and relevant targets at the beginning of the year given the specific context of the restructuration of the company. The Supreme Court accepted this argument.

It should be also noted that on the occasion of this litigation, the court of appeal had judged that the variable remuneration should be included to compute the vacation payment when part of the KPIs are individual (collective remuneration that depend on the team work and not individual's work are not included to compute vacation payment).

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