

The Court of Cassation on the protection against dismissal for employee representatives reaching the pensionable age



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On 14 December 2020, the Court of Cassation ruled that an employee representative who has been given notice before reaching the age of 65, but whose notice period only ends afterwards, can still claim the indemnity for non-compliance with the dismissal procedure for employee representatives.

Protection against dismissal for employee representatives

Employee representatives for the Works Council and the Committee for Prevention and Protection at Work may only be dismissed for:

- an urgent reason (“cause”) that has been approved in advance by the Labour Court; or
- economic or technical reasons that have been approved in advance by the competent joint body.

In principle, the law denies this protection against dismissal to employees who reach the age of 65 at the time the protection takes effect.

In the event these rules are not followed, the employee can claim payment of an indemnity. Depending on seniority, the indemnity is equal to the salary for a period of up to (maximum) 4 years.

The facts in the case at hand

In the case brought before the Court of Cassation, the employee was given notice by the employer via a registered letter. However, the employee was notified during the protection period without the above dismissal procedure for employee representatives being observed. Therefore, the employee claimed entitlement to a protection indemnity equal to 4 years of salary.

The employer argued that the employee could no longer benefit from this legal protection because he had reached the age of 65 by the time the employment agreement ended. The employer reasoned that a notice served prior to the date on which the employee reaches the age of 65, but with a notice period that ends after that date, is not discriminatory and does not affect the proper functioning of the consultation bodies. Therefore, in the employer's view, the claim of the employee is unfounded.

The judgment of the Court of Cassation

The Court does not follow the employer's argumentation and refers to the finality of the protection against dismissal for employee representatives. The main purpose of the protection against dismissal is to ensure that employee representatives can perform their assignments properly and to guarantee employees the complete freedom to put themselves forward as candidates during social elections. The Court adds that the protection against dismissal was introduced in the general interest and that it concerns public order.

In its assessment, the Court of Cassation emphasizes the importance and function of the protection compensation for employee representatives. Next, the Court states that the dismissal takes effect from the time when notice is given. This implies that the employee still benefits from the protection against dismissal if the notice is given prior to him or her becoming 65 years old, regardless of the fact that the notice period ends only after the employee has turned 65. The Court deems any other view to be in conflict with the intention of the law, i.e. granting employees protection against dismissal as long as they have not reached the age of 65.

Conclusion

It is vital to meticulously adhere to the dismissal procedure when parting from employees who participated in social elections – even when they have reached the age of 65. The financial repercussions can be severe for the employer.