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The principle of legality applies to disciplinary sanctions (LU)

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Summary

The Court of Appeal held that disciplinary sanctions are subject to the general principles of criminal law and therefore must respect the principle of legality. Consequently, the wording of any collective agreement that is used as the legal basis of a sanction must be sufficiently clear and precise to enable the employee to understand the consequences of his or her misconduct.

Facts

The employee, a civil servant of a Luxembourg municipality, brought a claim against his employer requesting the annulment of a disciplinary sanction. The sanction was imposed for repeated refusal to carry out the employer's orders. It imposed a demotion of three grades and a reduction of EUR 2,000 EUR gross per month.

The employer based the sanction on the collective agreement which applied to civil servants in the respective sector and region. This set out a number of possible disciplinary sanctions including demotion. The collective agreement simply stated: '*demotion to a lower grade of salary*' ('Einstufung in eine niedrigere Lohngruppe').

The employee argued that due to the constitutional principle of legality of sanctions, a disciplinary sanction cannot be founded on a collective agreement, but only on the law itself.

Judgment

The court of first instance ruled in favour of the employee and annulled the disciplinary sanction on the basis of breach of the principle of legality.

In its first judgment, dated 30 June 2016, the Luxembourg Court of Appeal ('*Cour d'appel*') decided that, in line with the case law of the Constitutional Court of Luxembourg, a disciplinary sanction taking the form of a punishment must comply with the principle of legality that governs criminal sanctions (i.e. those sanctions can only be provided for, and imposed, by law). However, the Court of Appeal's judgment differed in the following respect from that of the first instance court: it found that a disciplinary sanction could also be grounded on the provisions of a collective agreement or of an employment contract, provided that:

- if the employment contract or collective agreement derogates from the law it only does so in ways that are more favourable to the employee (Articles L-121-3 and 162-12, paragraph 7 of the Luxembourg Labour Code); and
- the disciplinary sanction is set in a way that allows the employee to predict sufficiently certainly what it is likely to be.

The only disciplinary sanctions provided by the Luxembourg Labour Code are the dismissal of the employee with immediate effect and dismissal with notice. The Court of Appeal held that in comparison, the sanction in the collective agreement (i.e. demotion and a decrease in salary) was more favourable for the employee.

In this first decision, the Court of Appeal held that for the collective agreement to apply, it needed to provide a precise definition of the sanctions that could be imposed so that the employee could predict what sanction to expect. However, the Court of Appeal ruled on 30 March 2017 that the wording of the disciplinary sanction of demotion in collective agreement in this case was too vague and imprecise. To be valid, the provision should have: (i) stated the criteria that must be considered when an employer chooses to downgrade a employee; (ii) set a limit on the demotion, i.e. the lowest grade an employee could be downgraded to; (iii) limited the sanction in time; and (iv) stated the conditions under which the employee could be promoted again.

The Court of Appeal therefore confirmed the judgment of the court of first instance and annulled the sanction of demotion imposed by the employer.

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Commentary

This judgment of the Court of Appeal is important both from both an internal Luxembourg point of view and from a comparative point of view, as different Member States tend to have different approaches to this issue. Further, this decision provides insight into the hierarchy of sources and the incorporation of collective agreements into employment contracts.

The decision involves a civil servant, but the findings also apply to employees in the private sector.
In the past, on one hand, the Luxembourg courts have taken the view that employers are allowed to impose any disciplinary sanctions they consider appropriate, based on the seriousness of the employee's misconduct, even if this was not provided for in law, the collective agreement, the employment contract or the internal rules. The only restriction on the employer was that it must respect the principle of *ne bis in idem*, i.e. an employee cannot be sanctioned twice for the same misconduct (e.g. an employee who has received a written warning for a specific incident of misconduct could not later be dismissed for the same misconduct). On the other hand, only a few years ago, the Court of Appeal ruled against some disciplinary sanctions contained in a collective agreement, because they would have created a less favourable regime for the employee. (Note that the Luxembourg Supreme Court has since reversed this judgment.)

The recent judgments of the Court of Appeal reported here have helped to clarify the position. They make it clear that the employer may introduce disciplinary sanctions into the employment contract or the collective agreement, but they must describe the consequences of any transgressions by employees as precisely as possible. Sanctions cannot be imposed on employees if they are not clearly stated in the law, the contract or a collective agreement.

Another question is whether disciplinary sanctions contained in internal rules will also be considered as 'rules under the law' that meet the requirements of the principle of legality. The Labour Code mentions internal rules in some provisions but does not define them. The Court of Appeal stated that employment contracts and collective agreements can include disciplinary sanctions, but internal rules may not. In contrast to an employment contract or collective agreement, the internal rules have not been negotiated but are part of the employer's right to give instructions. However, in our view, 'rule under the law' must be understood in a broad sense and include internal rules.

The ECJ was recently asked to decide if internal rules prohibiting religious signs constituted direct discrimination (14 March 2017, Cases C-157/15 *Samira Achbita* and C-188/15 *Asma Bougnaoui*). Although the Luxembourg decisions referred to in the case at hand do not discuss the thorny issue of discrimination, these ECJ cases demonstrate the importance of well-drafted internal rules.

These Court of Appeal judgments also raise questions on the annulment of a sanction. For example, if a judge annuls the sanction because it was not provided for in the employment contract or the collective agreement, is the still employer allowed to dismiss the employee based on the same facts?

In Luxembourg, collective agreements are of great practical importance: nearly 60% of all employees are covered by one. The legal rules governing collective agreements are detailed in Articles 162-1 to 162-15 of the Luxembourg Labour Code. These state that a collective agreement is concluded for between six months and three years, and may not be of indefinite duration. However, in practice, many collective agreements apply beyond three years because they remain in force as long as they have not been terminated or renegotiated.

Article 162-12, paragraph 6 of the Luxembourg Labour Code states that an employment contract may not contain clauses that are less advantageous to the employee than the collective agreement. This means that the provisions of a collective agreement overrule the provisions of the employment contract.

Under Article 121-4, paragraph 2, no. 12 of the Luxembourg Labour Code, if a collective agreement applies to an employee, it must be mentioned in the employment contract and therefore is part of the obligatory content of an employment contract. However, the collective agreement is not implicitly incorporated into the employment contract. If the collective agreement is amended or expires, the employee cannot benefit from the provisions of the collective agreement and its effects do not continue.

Overall, these judgments, as well as the judgments of the ECJ, are an opportunity for employers to review the wording of disciplinary sanctions in collective agreements, employment contracts and the internal rules of the company.

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