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Employment, Pensions & Benefits

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Dear Madam,

Dear Sir,

In this e-zine, we examine a number of areas where there still seems to be a lack of clarity concerning application of the language legislation in employment matters. We take the opportunity to look at the principles underlying the legislation.

In our second article, we present the employment measures under the government's economic revival plan. We also talk about recent case law confirming that a dismissal for serious causes during too short a notice period forfeits the right to an additional severance compensation.

We wish you a good and informative read.

Alexander Vandenbergen	Jan Hofkens
Partner	Partner

IN THIS EDITION:

Observations to note in the language legislation relative to employment matters

Good to know

Observations to note in the language legislation relative to employment matters

In HR policy, account has to be taken of the special legislation applying in relation to languages. Recent case law shows that this legislation still causes problems. We therefore thought it worth again running over the most important governing principles.

THE LANGUAGE LEGISLATION

In determining what legislation applies, it is the **place of business** to which the employee is attached that is decisive.

It is consistent case law that the notion of the place of business is defined as any establishment or any centre of a permanent nature to which the staff member is attached. For commercial representatives, the place of business is that place from where they receive their instructions.

It is generally accepted that the language legislation is only applicable to the employer and not to the employees: thus, it is accepted that if the employee serves notice of termination in English, it is not void.

The following table sets out the applicable language legislation, depending on the location of the place of business the employee is attached to.

	Brussels Capital	**Wallonia**	**Flandres**
	Consolidated acts (18/7/1966)	Walloon Decree (Decree 30/6/1982)	Flemish Decree (Decree 19/7/1973)
Scope of application	Acts and documents prescribed by law and documents intended to the staff	Employment relations, acts and documents prescribed by law and documents intended to the staff	Employment relations, acts and documents prescribed by law and documents intended to the staff
Language	Depends on the	French	Dutch

	language of the addressee		
Penalties	Obligation to replace	Void *ab initio*	Void *ab initio* and obligation to replace
Solution	Replacement with retrospective effect	Replacement without retrospective effect	Replacement without retrospective effect
Protection of employees and third parties	Not provided for	Not provided for	The fact of being void may not cause prejudice to the employee and does not affect the continued force and effect of third-party rights
Employer's liability	Not provided for	Not provided for	The employer is liable for any damages caused

EMPLOYMENT RELATIONS, ACTS AND DOCUMENTS

The language legislation applies to acts and documents prescribed by law and to documents intended for the staff.

The regional Flemish and Walloon Language Decrees are also applicable to employment relations. Employment relations cover individual and collective written or verbal contacts between employers and employees that relate directly or indirectly to the employment relationship.

The Flemish and Walloon Language Decrees are therefore of greater ambit than the consolidated acts of parliament.

Employment relations cover *inter alia*:

- **all relations between the employer and his employees that are located at the level of the business** in the form of: orders, communications, publications, departmental meetings, staff meetings, the HR department, the company medical department, company welfare services, reception;

- **relations that take place at the level of the business** in the works council, the health and safety at work committee or between the employer and the union chapter and in or with any other body that has been set up by law or in joint consultation with a view to institutionalising those relations.

We would mention the following documents by way of example:

- **all documents governing employment matters within the undertaking:** departmental orders, communications and instructions to the staff, safety instructions, the works regulations and all policies (e.g. internet and e-mail, good conduct policy, car policy);

- **all documents drawn up for each individual employee:** individual employment contracts, letters of termination of employment, pay slips, staff register, individual accounts, quarterly social security returns, health files, health-assessment forms, holiday request forms, industrial accidents insurance policy, file cards for industrial accidents, industrial accident report forms, medical certificates in cases of industrial accidents, forms C4, tax slips, pension certificates;

- **all documents relating to employee consultation:** collective bargaining agreements, the by-laws for the works council and the H&S committee, notices and minutes of meetings of the works council and the H&S committee, notices posted up in connection with in-house "social" elections;

- **all documents relating to pay benefits:** regulations for the group insurance policy, supplementary insurances, occupational pension schemes, bonus schemes, share plans, stock-option plans, etc.

WHAT ABOUT BILINGUAL DOCUMENTS?

It is often the case that an employment contract or letter of termination is written in two languages (e.g. the Dutch version alongside the French, or alternate paragraphs in Dutch and French) where the employee has no command of the language imposed by law.

Recent case law indicates that this is accepted as regards employees that have no command of the language, as long as it is clear which is the statutory language and which is used for translation purposes. Thus, the Brussels Employment Tribunal accepts the situation where, instead of providing a full translation, the translation of each paragraph in a letter of dismissal immediately follows the paragraph in question. This is acceptable provided it can be understood from the letter that use is primarily made of, say, Dutch (the correct, statutory language) and French is merely the translation. There therefore has to be a clear separation between the two languages, for instance by printing one

language in bold or italic type and the additional translation in ordinary text.

If you use bilingual documents, we certainly advise clearly showing which is the language applying between the parties and which language is purely informally added as a translation. Naturally, it nevertheless makes sense to draw up two separate documents.

WHAT IF THE PLACE OF BUSINESS IS MOVED?

If a business moves its place of business to another language area, does it have to change the documents that were initially validly drafted but that are no longer in line with the language legislation owing to the move?

The legislation itself does not resolve this issue.

Where the place of business is moved to another language area, the view was for a long time that all the documents written prior to the move had to be replaced with others written in accordance with the requirements of the new applicable legislation.

This principle was set aside by recent case law from the Employment Court in Brussels. The Court ruled in a case dealing with the validity of a competition clause that *"in evaluating conditions for the validity and formal requirements of the clauses of an employment contract such as the probationary period, fixed-term contracts or contracts for defined work, or a provision relative to the notice period as set down in section 83(5) Employment Contracts Act … they require to be assessed on the basis of the laws then applying in view of the fact that these rights vest directly at that moment in time."*

Accordingly, it is not fundamentally necessary to replace an employment contract written in French with one written in Dutch when the place of business moves, say, from Liège to Ghent.

However, documents written after the move do have to be drawn up in, or changed to, the statutory language for the area where the business is established.

POSSIBLE SOLUTIONS

If you find that an employment contract is not in accordance with the language laws, you must replace it without delay, i.e. get the employee to sign a new employment contract. The new contract can include the same clauses as the original agreement and can be supplemented with a **preamble** making it clear that the employment contract originally signed by the parties is not in accordance with the language legislation and it has been decided to replace it. It is also best to provide that the parties expressly recognise that the date of commencement of employment is as provided for in the initial contract. The contract could also include an **express clause** according the employee seniority as from the initial commencement of his employment.

Unfortunately, this solution is not complete and cannot guarantee the validity of **certain clauses**, such as those that have to be set down in writing no later than the time of commencement of employment (e.g. probationary period, clause setting down the term for a fixed-term contract, clauses relating to the notice period for higher-paid white-collar employees, clauses providing for a part-time work schedule, etc.).

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Good to know

1. Economic revival plan: employment measures

The government and parliament are currently putting the finishing touches to a hefty law in a bid to revive confidence in the economy.

The aim is to set out three packages of measures:

- measures to bolster business;
- measures to create jobs and reinforce purchasing power; and
- measures aimed at investment in growth and sustainability.

In addition to these measures, the arrangements agreed between employers' and employees' organisations under the 2009-2010 inter-professional accord (IPA) are being implemented.

At present, the draft economic revival act is before the Lower House.

Amongst the measures in relation to job-creation, we would point to the following:

The system of *one-off innovation premiums* is extended till 1 January 2011. With an innovation premium, you can, under certain circumstances, provide extra benefits to creative employees in a manner that is favourable from a tax and social security viewpoint.

The maximum contribution by the employer in granting *meal vouchers* is increased by €1 (i.e. up to a maximum of €5.91). The employer can claim this €1 as a deductible expense. The rest of the employer contribution continues to qualify as a tax-free employee benefit, which is not deductible.

Laid-off workers will be given better guidance in the case of *reorganisations*. A *jobs unit* will be a requirement for employers that decide to announce collective lay-offs. What precisely is meant by the term 'announcement of collective lay-offs' remains to be clarified under secondary legislation (a royal decree). It will probably mean announcing the intention to carry out collective lay-offs, as currently defined in the Royal Decree of 9 March 2006 on activating policy in reorganisations. It is no longer required that the employer also applies for a reduction in the early pensionable age. SMEs will only be obliged to do so if they apply for a reduction in the early pensionable age; in other cases, a jobs unit continues to be optional for SMEs. The jobs unit system is extended to employees under 45 years of age. The unit is also available for certain short-time workers and certain temps. All workers laid off will have to register with the jobs unit and the VDAB/FOREM/ACTIRIS.

The reimbursement of outplacement costs is increased in certain cases (e.g. in the case of workers aged over 45). The engagement fee is repaid during the period for which the jobs unit is applicable. The fee is retained if a worker resumes his work during the period for which the jobs unit is in operation. Both an employer that engages an employee that has been the victim of a reorganisation and the employee in question qualify for a reduction in social security contributions.

The existing rules on *half-time early pension* are extended for 2009 and 2010. It continues to be possible to sign CBAs providing for half-time early pension from age 55. The general half-time early pension arrangement as from age 58 also continues in existence.

The proposed simplification of *career plans* (structural reductions, target group reductions, start-up jobs, etc.) has meanwhile hit a sticky Community wicket and is being removed from the draft.

2. Dismissal for serious cause during (too short) a notice period: right to additional severance compensation is forfeited

Where an employee is dismissed with too short a notice period, the employee may claim additional severance compensation.

This right to supplementary severance arises at the time notice of termination is given, even though the employment contract continues in effect until the notice period requiring to be observed has elapsed.

During too short a notice period, the agreement can still be terminated by the employer for serious reasons. The question arises as to what repercussions such dismissal has on the right to additional severance compensation: is the payment still due? For a long time, this was a matter of controversy before the courts.

In a decision handed down on 5 January 2009, the Court of Cassation has confirmed that dismissal for serious reasons during a notice period served by the employer that is too short has the immediate effect that the right to additional severance in compensation for the incomplete notice period is forfeited by the employee.

According to the Court, the right to additional severance, the aim of which is to compensate the employee for the inadequate notice period served on him, ceases to be of any object where the employment contract no longer ends as a result of that service of notice (served on an inadequate period of notice) but rather does so by reason of the notice of dismissal for serious reasons served by the employer.

It is the second time that the Court has ruled along the same lines as regards dismissal for serious reasons during too short a notice period (see also Court of Cassation, 26 February 2007, *J.T.T.* 2007, 239), albeit the reasoning differed slightly in that case.

As regards dismissal for serious reasons during a notice period that is too short, a consistent line of cases appears to have been established. Nonetheless, uncertainty prevails as regards other causes of dismissal during too short a notice period, on which the Court has not given any explicit ruling (e.g. termination by joint agreement, an act of God).

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