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Until when can an employee reaching the legal retirement age and protected under the Act of 19 March 1991 continue to benefit from the protection provided by this act?

Employees who ran as candidates during the social elections are protected against dismissal, as provided by the act of 19 March 1991 (establishing special dismissal procedures for employee representatives to the works councils and to the committees for safety, health and embellishment of the workplace, and for candidate employee representatives. This act provides that the system of protection against dismissal is no longer granted to employee representatives reaching the age of 65, unless it's a constant practice within the company to keep in service the category of workers they belong to.

Furthermore, the mere fact of reaching the legal retirement age does not lead to the termination of the employment contract.

Employers or employees wanting to terminate an employment contract of an employee reaching the legal retirement age shall either notify a notice period or pay an indemnity in lieu of notice. However, the legislator provides the possibility of a reduced notice period. As a matter of fact, article 37/6 of the act of 3 July 1978 on employment contracts allows the dismissal of a worker, using a reduced notice period if *"the notice is given in order to terminate the employment contract concluded for an indefinite period of time as of the first day of the month following the month in which the employee reaches the legal retirement age"*.

In case of dismissal with immediate effect upon payment of an indemnity in lieu of notice, the notification of the dismissal can only take place through the application of a notice period as of the first day of the month following the month in which the employee reached the legal retirement age.

In case of dismissal through the execution of a notice period, a shortened notice period can only be used provided that the notice period expires at the earliest on the last day of the month in which the employee reaches the legal retirement age.

The Ghent Labour Court had to rule on a dismissal through the execution of a notice period for an employee protected by the act of 19 March 1991 who reached the legal retirement age on 15 June 2013 (*Ghent Labour Court, 9 September 2016, RG 2015/AG/46, available here*). A letter regarding the dismissal through the execution of a notice period was sent to him by registered mail on 17 December 2012, the reduced notice period of 6 months started on 1 January 2013 and ended on 30 June 2013, e.g. at the end of the month in which he reached the age of 65.

Although the notice period was duly notified in order to terminate the employment contract as of the 1st day of the month after the month in which the employee reached the legal retirement age, the employee concerned had not reached the legal retirement age yet at the time he was notified of the dismissal through the execution of a notice

period (on 17 December 2012).

As such, the Ghent Labour Court had to rule on the legal character of this dismissal with respect to the Act of 19 March 1991 with, in the end, the application (when appropriate) of protection indemnities provided by the act of 19 March 1991.

For the Ghent Labour Court, although in the case at hand the conditions were met in order to apply the reduced notice period provided in article 37/6 of the act of 3 July 1978 on employment contracts, the ones required in order to no longer benefit from the protection regime (based on age) provided by the act of 19 March 1991 had not (yet) been met.

For the Ghent Labour Court, a dismissal that is notified before the worker reaches the legal retirement age of 65, even if the notice period only starts after the employee has reached the age of 65 is unlawful in the sense of the act of 19 March 1991.

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Can an employer use unlawfully obtained evidence in order to justify a dismissal for serious cause?

In a judgment of 9 September 2016 the Brussels Labour Court had to rule on a dismissal for serious cause (*Brussels Labour Court, 9 September 2016, AR 2015/AB/624, unedit*).

The facts can be summarized as follows:

An employee notifies his employer that he cannot get to work because he is not feeling well and asks to follow up on or to cancel two planned meetings.

The employer then checks the employee's mail box in order to verify what meetings are concerned. During this check the employer draws some conclusions based on the emails located in the employee's inbox. It concerns personal emails directed to a relative or to a friend of the employee. Based on these findings the employer terminates the employee's employment contract for serious cause.

It should be noted that the employer did not use any other evidence besides the emails found in the employee's mail box.

The question we need to ask ourselves is to what extent we can take into account the emails found by the employer in the employee's mail box.

The employee argues that these messages cannot be taken into account since they were obtained by violating his privacy. He invokes the provision of article 8 of the ECHR and the provisions of CLA n° 81 concluded in the National Labour Council on 26 April 2002, on the protection of the privacy of employees with respect to the monitoring of electronic online communication data.

The Labour Court starts by stating that the employee cannot invoke the provisions of CLA n° 81 since they only relate to electronic online communication data and not to the monitoring by the employer of the content of the emails sent and received by the employee from the company computer.

However, according to the Labour Court this does not prevent the employee from being entitled to the protection of his privacy, pursuant to article 8§11 ECHR and article 22 of the Constitution. The Labour Court finds that the aforementioned articles have been violated, based on the criterion of reasonable privacy expectation. The employee can reasonably assume that the employer will not read the content of emails that are clearly private, even when they are located in his mailbox on a computer provided to him by the employer.

The Labour Court also finds that the Act of 13 June 2005 on electronic communications has been violated, since the employer deliberately read the information concerned and even used it by invoking the information obtained as a serious cause.

Finally, the Labour Court examines whether this violation affects the evidential value of the materials obtained.

Taking into account case-law by the Supreme Court, the Labour Court states that when the unlawful act committed does not impair the right to a fair trial, does not affect the reliability of the evidence and does not deny the procedural requirement prescribed under penalty of nullity, the judge can take into account the question whether the unlawful act committed is in proportion to the seriousness of the infringement the unlawful act of which lead to

the findings.

According to the Labour Court's ruling, in the case at hand, the emails found by the employer in the employee's mail box cannot be taken into account. The employer's attitude (reading 1 email without permission and checking the other emails) is not in proportion to what was found during the verification. As such, the dismissal for serious cause has been rejected.

Unlawfully obtained evidence cannot be taken into account if the employer's behaviour is not in proportion to what was found during a verification.

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