THE LABOUR AND EMPLOYMENT DISPUTES REVIEW

Fifth Edition

Editor
Carson Burnham

THE LAWREVIEWS

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CONTENTS

PREFACE

It is my honour and great pleasure to have been selected as editor of this year's *Labour and Employment Disputes Review*. Our distinguished contributors continue to show us a variety of perspectives as we consider how best to advise our clients seeking a global approach to employment concerns.

While the pandemic continues to influence all aspects of the employment relationship, we are seeing structural changes beyond any that could have been predicted in a pre-pandemic era. Employers are learning to accept the reality that employee expectations for flexible work arrangements have changed, and accommodating these expectations has become critical to maintaining employee engagement and retention. We also notice a shift in the power structure of the relationship, where employers no longer have a settled expectation regarding the willingness of employees to devote their full lives to work. With the advent of 'soft quitting' and employees' persistent intentions to work remotely from the location of their choosing, employers are having thoroughly to rethink their long-established methods of attracting and retaining top talent.

These shifts in the workplace are reflected in the increase in employment disputes noted throughout this Review, and particularly disputes in the arenas of bullying and moral harassment, whistle-blowing, and the right to disconnect from work that have been particularly noted throughout these chapters.

We also see trends resulting from employers' attempts to adjust to shifts in employee expectations. On the one hand, employment disputes arising from remote working relationships have increased, such as those concerning whether and to what extent an employer must pay for employees' expenses incurred to facilitate the employee's ability to work. On the other hand, we note a marked increase in employers' attempts to circumvent the strict requirements of the employment relationship altogether, such as by engaging independent contractors and leased workers or by using fixed-term contracts to limit exposure to employee-favourable legislation or collective bargaining agreement terms designed to protect employees' right to continued employment on favourable terms.

As trends in employment disputes continue to influence adjustments in legislation to accommodate new realities in the working relationship, we look forward with interest to continued developments in the years to come.

Carson Burnham
Ogletree, Deakins, Nash, Smoak & Stewart, PC
Boston
September 2022

Chapter 9

LUXEMBOURG

Philippe Schmit[1]

I INTRODUCTION

In Luxembourg, the labour courts are responsible for resolving employment law disputes, with exclusive jurisdiction over all such disputes regardless of the amount at stake. The labour courts thus have sole jurisdiction over all issues arising from or in connection with employment relationships, including those related to dismissals, supplementary pension schemes and apprenticeship agreements.

There are three labour courts in Luxembourg: one in Diekirch (in the north of the country), one in Luxembourg City (the capital) and one in Esch-sur-Alzette (in the south). Each court covers all towns and cities within its jurisdiction. To determine which court is competent to rule on a case, one must know the jurisdiction in which the employee performed their employment contract. If the employee has performed work all over Luxembourg, the Labour Court of Luxembourg City will have jurisdiction.

The parties do not need to be represented by a lawyer before the labour court. An individual may either defend themselves or be represented by a lawyer or their spouse or partner, a relative in the direct or collateral line up to the third degree, or a person from their company, as the case may be. If a party is represented by someone other than a lawyer, the representative will need a special mandate to represent one of the parties before the court.

Generally, a labour court is composed of one professional judge and two non-professional assessors.

Luxembourg procedural rules provide for certain specific cases in which labour court decisions are made by a single judge. This is the case, for instance, for requests for reinstatement of an employee if a dismissal has been declared null and void (e.g., dismissals of staff delegates or those made during a declared pregnancy, or redundancy performed in the run-up to signing a redundancy scheme ('plan social')), or for requests to receive unemployment benefits following a dismissal or resignation with immediate effect.

Except for the document introducing proceedings and any documentary proof, no written documents are submitted to the labour court, and all arguments before the court must be made orally. While for complex cases it is common practice to submit a pleading note to the opposing counsel and the judge before the hearing, the court will in principle only base its decision on what is discussed orally between the parties during the hearing.

If a party is not satisfied with a decision of the labour court, depending on the circumstances, it may oppose the judgment within 15 days or lodge an appeal up to 40 days after the notification of the judgment. While Luxembourg has three different labour courts, it

1 Philippe Schmit is a partner at Arendt & Medernach.

has only one court of appeal, the Luxembourg Court of Appeal, which deals with all appeals against a labour court judgment. This court has three chambers with exclusive jurisdiction over labour law disputes.

Unlike proceedings before the labour courts, proceedings before the Luxembourg Court of Appeal are made in writing and require the parties to be represented by qualified lawyers. In written proceedings, the legal arguments are expressed in written submissions called 'conclusions', which are communicated by the concluding lawyer to the opposing lawyer. Through these written submissions, the parties alternatively take a position on the arguments and merits expressed by their opponent.

As proceedings before the labour courts, and especially before the Luxembourg Court of Appeal, may be cumbersome and generally take at least a few months to complete, such disputes are usually settled out of court by the signature of settlement agreements.

Finally, although Luxembourg employment law may be considered business-friendly, some Labour Code provisions create a framework more favourable to employees than employers. The underlying rationale is that employees are considered the 'weaker party' in the employment relationship by virtue of their subordination to the employer during the performance of the employment contract. Consequently, when in doubt, labour courts tend to rule in favour of employees.

As a general rule, no government bodies or quasi-government bodies assist in resolving employment disputes. In this respect, it should merely be noted that employees dismissed with a notice period are entitled to unemployment benefits in Luxembourg if they are Luxembourg residents and meet the applicable conditions. Employees residing in Luxembourg who are dismissed or have resigned with immediate effect may file a request for unemployment benefits with Luxembourg's National Employment Agency (ADEM). In cases of dismissal, the ADEM must also be present or represented during the related court proceedings, as one of its roles is to pay unemployment benefits to employees. If the termination is declared wrongful by the court, the employer will have to reimburse ADEM for unemployment benefits paid to the Luxembourg resident employee (or in the case of commuters, to reimburse the relevant national public employment service).

II PROCEDURE

i Resolution of individual actions and labour disputes

Individual disputes are conducted between the employer and each employee separately, even where several employees have the same conflict with their employer. Each employee will bring their own action before the labour courts; there is no collective legal action (i.e., class action) under Luxembourg law. Each procedure will thus be treated as a separate, individual case. Such cases can, however, be joined if they are sufficiently related and they share at least one common party.

Before bringing an action before the labour court, employers and employees can try to reach an agreement, either by negotiating on their own or, in certain specific cases, through public authorities.

There are four public authorities that may intervene in an employment case: (1) the labour courts (while it is rare for a dispute brought before the court to result in conciliation, the judges have the preliminary task of reconciling the parties); (2) the Individual Conciliation Body, which is not yet operational, but will be available to consult upon mutual agreement between the parties to reach a settlement as an alternative to commencing legal proceedings;

(3) the Litigation Commission, whose role is to attempt mediation at the pre-claim stage in the area of apprenticeships; and (4) the Labour Inspectorate, whose role at the pre-claim stage is to intervene informally by hearing each party's side and attempting to find an extrajudicial solution.

In practice, the most common way to end litigation in an extrajudicial manner is to settle. In labour law, a settlement is a written contract concluded by and between the employer and the employee to end any dispute (most often in connection with the termination of an employment relationship), whereby the parties agree to make mutual concessions and to abide by covenants. Once the parties have signed a settlement, they can no longer bring an action before the labour courts concerning elements covered in the settlement. Settlement agreements are strictly construed and relate only to the points they explicitly address. Each party can only take legal action to compel the other to comply with the terms of the settlement agreement.

When individual disputes cannot be solved prior to litigation, employers and employees must bring their actions before the labour courts. Other parties may be involved as well. This happens when, at the end of the proceedings, the employer or the employee is likely to have to reimburse unemployment benefits. In this case, the Luxembourg state intervenes and becomes a party to the dispute. Trade unions may also intervene if they are signatories to a collective bargaining agreement (CBA) applicable to the employee who initiated the dispute, and if the outcome of the case may be of collective interest to the members of the trade union.

Proceedings are initiated by the employer or employee (usually through a lawyer) by filing a simple request with the court clerk's office in as many copies as there are parties. Unlike with other proceedings, it is not necessary to notify the opposing party by bailiff that such a request has been filed. The court clerk's office will then contact the opposing party. The parties will subsequently be summoned to an initial hearing at which the hearing date will be set for oral pleadings. Cases are rarely pleaded at the first hearing.

There is also a fast-track procedure, known as summary proceedings, which must be introduced before the president of the labour court (this usually applies to cases of unpaid wages). This procedure is generally aimed at allocating a provision for a specific amount. The president of the labour court grants such a provision only in the absence of a serious objection (otherwise, the president is automatically required to declare that they lack competence, and the case will be subject to the proceedings on the merits in accordance with the standard procedure).

Other specific procedures exist, subject to special rules. In particular, actions for nullity of a dismissal for certain specific employees (e.g., pregnant employees, employees benefiting from professional redeployment and staff delegates) or actions for provisional continuation of remuneration for protected employees who have been suspended.

Actions for payment of remuneration are barred after three years from the date on which the payment is due.

There are specific evidentiary requirements with regard to dismissals. The employee must prove (1) that a valid employment relationship existed, (2) that a dismissal took place (challenging in the case of oral dismissals), (3) the damage caused by the dismissal and (4) that active steps have been undertaken to find a new job. The employer must prove that the reasons for the dismissal are precise, serious and real.

ii Resolution of collective actions and labour disputes

Collective actions fall into two camps: the promotion of rights (aiming to ensure that the employer complies with positive law); and the struggle for rights (aiming to improve an existing situation).

Collective actions are not within the jurisdiction of the labour courts, but lead to a conciliation procedure before the National Conciliation Office (ONC). Where conciliation fails, employees still have the option to strike (although strikes are rare in Luxembourg). According to case law, a strike is lawful if it takes place after all possible conciliation means of settling conflicts have been exhausted and provided that a proper non-conciliation report has been made.

There are three categories of collective disputes, subject to three different conciliation procedures: (1) disputes relating to working conditions; (2) disputes relating to a CBA, in particular when the employer refuses to enter into negotiations or when negotiations do not yield a concrete result; and (3) disputes relating to collective redundancies, when the parties cannot reach an agreement on a redundancy scheme within the conditions set by law.

Disputes relating to working conditions

The ONC has jurisdiction to resolve collective disputes concerning working conditions (i.e., genuinely collective disputes concerning the collective interests of all, or most of, the company's staff), and disputes arising from problems of organisation, reorganisation or restructuring of the company that have an impact on the working conditions of all, or most of, the company's staff.

The ONC is composed of a president (the Minister of Labour, Employment and the Social and Solidarity Economy), a joint committee composed of eight assessors (four employee representatives and four employer representatives) and an administrative service. The joint committee is assisted by staff delegates who are directly involved in the matter at hand and who respectively represent the employer or the employee of the company concerned. This arrangement is intended to enable the assessors to make their decision in full knowledge of the facts.

The employer and employee representatives must refer the matter to the ONC by submitting a written request with reasons for the referral and relevant documentation, which must specify the subject matter and context of the dispute. The president of the ONC may request additional documents and will forward the request file to the joint committee, which will determine whether it is complete and ready to be submitted for conciliation.

The joint committee will investigate the case, meeting for the first time no later than two weeks after the dispute was referred to the ONC. The two groups of assessors may jointly formulate a conciliation proposal, which can be accepted by a simple majority vote on the part of each side. If the proposal is rejected by one or both the parties to the dispute, the president may submit a proposal on their own initiative. One or both parties' rejection of this proposal constitutes a declaration of non-conciliation. In that event, the parties (in practice, the employees) may decide to commence a strike. An employee's participation in a lawful strike does not constitute valid grounds for dismissal.

Disputes relating to collective bargaining agreements

During the term of a CBA, the parties are obliged to refrain from strikes and lockouts. Collective disputes regarding employment matters that are not subject to a CBA, or regarding the failure of the parties to reach a CBA (including cases in which an employer refuses to

engage in collective negotiations to establish a CBA when duly requested), must be referred to the ONC before any party to the dispute can take industrial action. During the ONC conciliation process, the parties to the dispute must not hold a strike or lockout.

In disputes relating to a CBA, a first conciliation meeting must generally be held by the first day of the sixth week after the date on which the dispute was referred to the ONC.

During the conciliation process, the ONC will seek to broker an agreement between the parties to the dispute. Conciliation ends when a collective agreement is reached, or if (1) it is agreed unanimously that conciliation has failed; (2) the president has, on their own initiative, submitted a conciliation proposal to the parties, which they have rejected or (3) no settlement has been reached 16 weeks after the first conciliation meeting. When conciliation fails, the ONC draws up a statement of the points still in dispute, and it becomes permissible for any party to the dispute to commence industrial action.

To mitigate the risk of such action, in the two weeks that follow, either group on the joint committee may ask the government to nominate an arbitrator (even while industrial action is under way). Within two weeks of the request, the government will propose an arbitrator to the parties, who will then have two weeks to accept or reject. If both parties accept the arbitrator, they will make an arbitration award, which is binding on the parties and has the effect of a CBA.

Disputes relating to collective redundancies

Collective redundancies are defined as dismissals made by the employer, for reasons not inherent to the employees concerned (usually economic reasons), affecting at least seven employees over a period of 30 days or at least 15 employees over a period of 90 days.

Before initiating collective redundancies, an employer must hold negotiations with employee representatives with a view to reaching an agreement on a redundancy scheme. For the purposes of negotiating a redundancy scheme, the employee representatives are the staff delegation (a body representing staff that is mandatory for all undertakings with 15 or more employees) and, in certain circumstances, trade unions.

Before starting the negotiations, the employer must inform the staff representatives about the planned collective redundancies and provide them with certain information. A copy of this information must be sent to public labour authorities. If, in breach of the Labour Code, no delegation was in place, staff delegation elections must be held to comply with the employer's related information and negotiation obligations.

The negotiations must encompass means of avoiding or reducing the redundancies, and of mitigating their consequences with accompanying measures, aimed, in particular, at redeploying or retraining redundant employees and returning them to the labour market immediately.

If no agreement on a redundancy scheme has been reached after 15 days from the commencement of negotiations, the parties must draw up a document setting out their respective positions on the various issues that were negotiated, and submit it to the public labour authorities. Then, within three days, the parties must jointly refer the matter to the ONC. Within two days of being notified, the ONC will invite representatives of the parties to a meeting, which must take place within three days of the invitation. The conciliation process, aimed at brokering agreement on a redundancy scheme, lasts no more than 15 days from the first meeting.

The employer may not notify employees affected by the planned collective redundancies before a redundancy scheme is agreed upon or, where agreement is not possible, before the

end of the conciliation process involving the ONC. Any notice of redundancy issued before the agreement is signed, or before the process ends, is null and void, and any employee dismissed in these circumstances can obtain a court order to this effect under an expedited procedure. Any redundancy occurring before the process ends is also deemed unfair.

When an employer notifies an employee of dismissal as part of a collective redundancy procedure, the minimum notice period before the dismissal may take effect is 75 days; the public labour authorities may extend this to 90 days in some circumstances. If employees are entitled to a longer notice period by law, or under their employment contract or a CBA, that period applies instead.

An employer preparing to execute collective redundancies must notify ADEM in writing, no later than at the start of negotiations with employee representatives for a redundancy scheme, providing the same information as that to be given to the employee representatives (see above). The employer must provide a copy of this notification to the employee representatives, who may submit their remarks about the planned redundancies to ADEM.

Furthermore, employers with 15 or more employees are obliged to report all redundancies to the Economic Committee. If an employer reports more than five redundancies over a period of three months, or eight redundancies over a period of six months, or if the social partners foresee financial or economic difficulties within the company, the Economic Committee can invite the employer and employee representatives to negotiate a job protection plan aimed at preventing further job losses. For the purposes of these negotiations, the appropriate employee representatives may be staff delegations or trade unions.

The negotiations for a job protection plan must broadly address the same issues as those covered for a redundancy scheme for collective redundancies (see above), plus several additional topics such as special measures for older employees. There is no obligation or deadline to reach an agreement on a job protection plan. If the negotiations lead to an agreement, that agreement must be sent to the Economic Committee, which will pass it on to the Minister of Labour, Employment and the Social and Solidarity Economy for approval. If a job protection plan is approved, the employer is eligible for certain benefits like training subsidies and partial reimbursement of early retirement costs. Employers that are covered by an approved job protection plan are not required to negotiate a redundancy scheme if they proceed with collective redundancies in the six months following the approval of the job protection plan.

III TYPES OF EMPLOYMENT DISPUTES

i Dismissal matters before Luxembourg courts

Most of the Labour court proceedings in Luxembourg handle unfair dismissal matters.

Under Luxembourg labour law, employees dismissed with a notice period can request to be provided with the reasons for the dismissal within one month of being notified of it. Within one month of receipt of this request, the employer must provide the employee with the reasons for the dismissal, which must be precise, serious and real. Upon receipt of those reasons, the dismissed employee has three months to contest the dismissal in court, or to lodge a formal complaint with the employer contesting the dismissal. If the employee formally contests the dismissal with their employer, they will have one year from lodging their formal complaint to challenge the dismissal in court.

If the employee files a claim before labour court, the court will consider whether the reasons for the dismissal are sufficiently precise, serious and real. If the court deems the reasons not to be sufficiently precise, serious or real, it will declare the dismissal unfair, thereby entitling the employee to damages.

In the event of unfair dismissal, the amount of the damages awarded by a court depends on the actual loss suffered by the employee as a result of the employment termination.

A distinction is made between material loss and non-material loss.

Material loss

The period between the date of termination and the date on which the employee has either found new employment or should have found new employment constitutes the reference period, which is it set by the labour court if it declares the dismissal to be unfair.

If the employee has been unable to find new employment, the courts set the reference period based on other criteria, such as the duration of the notice period (if the employee was released from work during the notice period, that time will be deducted from the reference period) or the employee's seniority, age, expertise and ability to find new employment, as well as the employment market.

During the reference period, the employee is entitled to damages for an amount equal to the remuneration they would have earned had they not been dismissed. Unemployment benefits or income derived from a professional activity conducted by the employee during the reference period must be set off against the amount of damages. If the dismissed employee lives in Luxembourg, they will be entitled to unemployment benefits from the Luxembourg state. For commuters, the Luxembourg state will pay the first three months of unemployment benefits to the relevant foreign public employment service. If the termination is declared unfair, the employer will be ordered to reimburse the unemployment benefits awarded to the employee to the Luxembourg state or to the relevant foreign employment service during the reference period.

Moral loss

In addition to material damages, the employee may be awarded damages to compensate for non-material loss suffered (i.e., moral damages). The key criteria for assessing these are the circumstances surrounding the termination and the inconvenience it caused to the employee (e.g., in light of their seniority, age or ability to find new employment, or if the dismissal was particularly vexatious). This assessment is made by the courts case by case, on a discretionary basis.

ii Psychological and sexual harassment claims

There has been a noticeable increase in claims before the labour courts relating to psychological harassment in the workplace.

Dismissed employees frequently make these claims together with a request for financial compensation for unfair dismissal.

Although the Labour Code provides a framework for sexual harassment claims, there is still no legal framework under Luxembourg law for psychological harassment claims, despite the increase in such cases before the courts. Only one CBA, of 25 June 2009, has been entered into with the Luxembourg trade unions with respect to harassment and violence in

the workplace. Consequently, decisions on psychological harassment are made on the basis of this agreement, and on the basis of Article 1134 of the Luxembourg Civil Code, according to which contracts must be performed in good faith.

In light of more frequent harassment cases and the lack of legislation in this respect, a bill of law is now under debate in Luxembourg.

iii Recharacterisation of the employment contract

Employment contracts are normally drawn up for an unlimited period, meaning that fixed-term employment contracts constitute the exception. Luxembourg labour law also provides that the reasons for using a fixed-term employment contract must be precisely indicated in that contract, and that the maximum duration of such a contract is 24 months.

However, employers often fail to respect these conditions, and the courts are frequently petitioned by employees to legally convert their fixed-term employment contracts into open-ended contracts.

IV YEAR IN REVIEW

i Significant legal developments

Luxembourg labour law is always evolving to adapt to changing social circumstances. In recent years, several important legal developments have been made with the aim, among other things, of coping with the covid-19 pandemic.

A large number of laws and regulations were adopted in a very short period to protect the health and safety of all workers in Luxembourg and to respond to the economic situation and social changes created by the pandemic.

Salary increases

Wage indexation is an automatic mechanism to adjust salaries in pace with evolving living costs, as determined by STATEC, Luxembourg's national statistics and economic studies bureau. Salaries are automatically raised when the cost of living increases by at least 2.5 per cent. The aim of this measure is to compensate loss of purchasing power due to inflation by increasing salaries accordingly.

The most recent indexations took place on 1 October 2021 and 1 April 2022, with the index applicable to employees' wages increasing from 834.76 to 855.62 and from 855.62 to 877.01, respectively.

From 1 April 2022, the gross minimum wage is €2,313.38 per month for unskilled workers and €2,776.05 per month for skilled workers.

Covid-19

The measures to fight the spread of covid-19 have changed constantly throughout the pandemic.

The law of 16 December 2021 tightened specific 'CovidCheck' obligations for facilities open to the public, gatherings, protests and events, as well as certain sectors. This law introduced new measures that applied from 15 January 2022 and imposed a '3G' CovidCheck regime in the workplace.

Most of these measures were later relaxed with the law of 11 February 2022. In light of improvement in the main indicators and the epidemiological situation, the Luxembourg government lifted almost all public health restrictions with the law of 11 March 2022.

The CovidCheck regime now only applies to care facilities (hospitals, retirement homes, etc.) and their staff due to the high concentration of people vulnerable to covid-19, and has been relaxed from 3G+ to 3G. To enter a care facility, persons must show proof of full vaccination of less than 270 days ago, proof of a booster shot, a negative PCR test less than 48 hours old or a certified covid-19 test less than 24 hours old, or a certificate of recovery of less than 180 days prior. Masks are no longer mandatory except on public transport and in care facilities for staff, visitors and external providers.

Home working and other remote working arrangements

On 9 April 2021, the national financial supervisory authority, the Financial Sector Supervisory Commission (CSSF), published valuable guidance on the governance and security requirements applicable to remote and home working in the form of CSSF Circular 21/769 on governance and security requirements for supervised entities to perform tasks or activities through remote working (amended on 31 March 2022 by CSSF Circular 22/804).

The circular does not impose any requirement for prior approval by the CSSF to implement remote working arrangements and confirms that supervised entities may generally allow staff to perform tasks through remote working, subject to the limits set by the circular. Such limits consist of three types of requirements:

a baseline requirements for the purpose of ensuring that entities can continue to perform their activities and meet their regulatory requirements in an effective and secure manner;

b requirements pertaining to the entities' internal organisation, and to the review of implementation of the remote working policy and its compliance with applicable requirements by the entities' internal control functions, such as (where applicable) compliance, risk management including information security (chief information security officer) and internal audit; and

c requirements aimed at keeping ICT and security risks at acceptable levels.

The circular is applicable from 1 July 2022.

ii Significant case law

The Luxembourg Court of Appeal clarified the requirements for terminating a contract with immediate effect during the probationary period. Luxembourg was also impacted by an EU court decision ruling that the national law on parental leave was not compliant with EU law. Finally, the Constitutional Court of Luxembourg also ruled that a Luxembourg law provision on professional redeployment was not compliant with the Luxembourg Constitution regarding equal treatment.

Luxembourg Court of Appeal, judgment of 4 February 2021, docket No. CAL-2019-00993

The Court ruled that termination with immediate effect for serious misconduct is permitted throughout the probationary period, provided that there is a serious reason for it that has been clearly communicated in the termination letter.

The Court reached this conclusion by analogously applying the rules on immediate dismissal for serious misconduct under a permanent employment contract to contract

termination during the probationary period. Hence, if no reasons were communicated or if they were not sufficiently detailed and precise, a termination with immediate effect during the probationary period will be deemed unfair.

The Court held that 'the generality of the terms of Article L.124-10 of the Labour Code implies that, in the absence of a specific legal provision saying otherwise, these provisions also apply in the event of termination of the employment contract with immediate effect during the probationary period'.[2]

The Court confirmed that, while no reasons need be given when an employment contract is terminated during the probationary period with notice, this is not the case for termination without a notice period, which must comply with the legal provisions governing dismissals with immediate effect (i.e., Article L. 124-10 of the Labour Code).

Court of Justice of the European Union, case C-129/20 of 25 February 2021

In case C-129/20, the Court ruled that the Luxembourg law on the right to parental leave did not comply with Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BusinessEurope, UEAPME, CEEP and the European Trade Union Confederation and repealing Directive 96/34/EC.

The case involved a dispute between a mother and the Fund for the Future of Children (CAE). The CAE had refused to grant her parental leave to care for her twins because she was not employed on the date of their birth.

The applicant had requested parental leave commencing one year after the start of her permanent contract. Her application was rejected by the CAE on the grounds that to be entitled to parental leave, the applicant must have been legally employed and registered under the relevant social security regime at the time of the birth. The employee contested this decision until her case reached the Court of Cassation, which referred a question for preliminary ruling to the Court of Justice of the European Union: whether Luxembourg law was compliant with the EU law in making the right to parental leave subject to the twofold condition that the worker be lawfully employed in a workplace and duly registered under the relevant social security regime (1) without interruption for a continuous period of at least 12 months immediately preceding the start of the parental leave and (2) at the time of the birth or of the reception of the child to be adopted, even if it occurred more than 12 months before the start of the parental leave.

With respect to the first condition, the Court answered in the affirmative. With respect to the second condition, that the parent be employed at the time of the birth or adoption, the Court observed that the right to parental leave is an individual right granted to workers to enable them to care for a child until they reach a certain age. However, while the birth or adoption and the parent's employed status are conditions giving rise to the right to parental leave, it cannot be deduced from this that the parent concerned must be legally working at the time of the birth or adoption. The Court concluded that 'excluding parents who were not working at the time of the birth or adoption of their child would have the effect of precluding the possibility for those parents to take parental leave at a later point in time in their lives when they are employed again, parental leave which they would need to take in order to reconcile their family and professional responsibilities. Such an exclusion would therefore be contrary to the individual right of every worker to parental leave'.[3]

2 Luxembourg Court of Appeal, 4 February 2021, docket No. CAL-2019-00993, page 5.

3 ECJ, C-129/20, 25 February 2021, point 46.

The Court also held that, in practice, for births or adoptions that happened more than 12 months before the start of the parental leave, the double condition imposed by Luxembourg law resulted in an extension of the requisite period of employment, which, however, cannot be more than one year under the EU directive. Therefore, Luxembourg law could not make the right to parental leave subject to the requirement that the parent must have been in employment at the time of the birth or adoption.

Luxembourg Constitutional Court, judgment No. 00169 of 3 February 2022

The Court made a preliminary ruling on whether the difference in employee treatment imposed by Article L. 551-6 (2) and (3) of the Labour Code, 'which consists in excluding employees undergoing internal professional redeployment, unlike employees undergoing external professional redeployment, from maintaining their status as employees undergoing professional redeployment in the event of the loss of their job for a reason beyond their control other than the cessation of their employer's activity or a collective redundancy',[4] was compliant with the principle of equality before the law.

The plaintiff in this case had been internally redeployed following a decision of the joint redeployment commission. Several years later, she was dismissed for economic reasons. She asked to be redeployed externally on the basis of Article L. 551-6 of the Labour Code, which provides that employees undergoing internal professional redeployment may retain redeployment status (externally redeployed employee) if they were dismissed due to the cessation of the employer's activity or as a result of collective redundancy. As the employee had been dismissed for economic reasons and thus the reason for her dismissal did not meet the criteria of Article L. 551-6, the joint redeployment commission refused to treat her as having external redeployment status (decision of 14 August 2020).

The employee contested this decision until the court of last instance referred a question for preliminary ruling to the Constitutional Court: whether differentiating between employees under internal versus external redeployment when they are facing the loss of their job is compliant with the constitutional principle of equality before the law.

The Court observed that there was indeed a difference in treatment, as an employee under external redeployment retains the status of a redeployed employee if the loss of their job is the result of a 'reason beyond his or her control', whereas for someone under internal redeployment, this is subject to the more restrictive condition that the job loss is due to cessation of the employer's activity or collective redundancy.

Although the Court confirmed that 'the legislator may, without violating the constitutional principle of equality, subject certain categories of comparable persons to different legal regimes provided that the existing disparity between them is objective, rationally justified, adequate and proportionate to its aim', it declared that the Luxembourg state had not established how the difference in treatment was 'rationally justified, adequate and proportionate to the aim pursued'. In the absence of such justification, differentiating between these two categories of employees was not compatible with the constitutional principle of equal treatment. The Court also noted that if the legislator's aim was legitimate, in the sense of being intended to combat potential fraud, it could not rightfully be implemented by excluding all employees undergoing internal professional redeployment.

4 Luxembourg Constitutional Court, judgment No. 00169 of 3 February 2022.

The Court therefore ruled that Article L. 551-6 (2) and (3) of the Labour Code was not compliant with the constitutional principle of equal treatment.

V OUTLOOK AND CONCLUSIONS

In practice, employers tend to avoid court proceedings unless there is a matter of principle at stake. Hence, many labour law cases are resolved by way of a settlement, as a lawsuit may damage the reputation of both the employee and the employer, and because the public proceedings are likely to contain discussions of sensitive information. In the event of dismissals in particular, employers generally tend to prefer settlements.

Bills on moral harassment, the right to disconnect from work and whistle-blowing are now working their way through the legislature. We can expect to see more cases in these areas as they become law, as there will likely be a need for the courts to clarify some of their provisions.

Otherwise, in light of Luxembourg's stable legal environment, in which labour law is not over-regulated, no major upheavals in employment law procedure or litigation are anticipated.

Appendix 1

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Philippe Schmit is the partner of the employment law, pensions and benefits practice of Arendt & Medernach.

Philippe advises employers in the financial and industrial sectors on all aspects of the employment relationship (including termination). He also specialises in matters relating to restructuring and reorganisation, negotiation in the context of collective dismissals and collective bargaining procedures, as well as any other HR-related aspects triggered by corporate restructuring, including mergers and acquisitions (e.g., transfers of undertakings).

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Philippe also has extensive knowledge of expatriation matters and provides legal advice on business immigration and all related aspects.

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