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Variable remuneration - two recent decisions of the Supreme Court to keep in mind

1. Variable remuneration and computation of the indemnity in lieu of notice

To calculate an indemnity in lieu of notice, not only the remuneration to which the employee is entitled when the employment contract is terminated is taken into account but also the benefits that were granted according to the employment agreement. The Law of 3 July 1978 on employment contracts, explicitly provides that where remuneration or benefits are entirely or partly variable, one should take into account to calculate the variable part, the average over the previous 12 months, or the part of those 12 months during which the employee was in service.

In its judgement of 6 May 2019, the Court of Cassation explained that this rule does not have as a consequence that any variable remuneration or benefit paid during the 12 months prior to the dismissal forms part of the remuneration and benefits at the time of dismissal.

According to the Court, when a bonus had been paid in the year prior to dismissal and the individual employment agreement stated that granting the bonus in a certain year did not entitle the employee to a bonus in any consecutive year, the judge may consider, according to specific circumstances (in the case at hand, the fact that no one in the same category of staff received a bonus due to the company's negative economic results), that the employee was not entitled to a bonus at the time of the dismissal, even if the employer had not yet informed the employee that he would not be granted a bonus for that year.

Therefore, the Court concluded that even if the variable remuneration was paid over the previous 12 months, it should not be taken into account for the computation of the indemnity in lieu of notice, given the absence of a right to a variable remuneration at the time of dismissal.

2. Variable remuneration paid by a third party are subject to social security contributions

Based on the general definition of the employment contract, remuneration is the counterpart for the work performed.

The Law of 12 April 1965 on the protection of the workers' remuneration applies a much broader "remuneration" definition, being all salary in cash or benefits in kind to which the employee is entitled by virtue of his employment chargeable to the employer.

According to the Supreme Court in its decision of 20 May 2019, these two definitions are not exclusive.

The remuneration granted to employees as the counterpart for the work performed in the framework of their employment contract qualifies as remuneration subject to social security contributions.

Hence, according to the Court, premiums paid to employees by a third-party (in the case at hand, a distributor), who is not their employer, are subject to social security contributions, if it is received as a result of the work performed in the execution of their contract. It is therefore not necessary for the Court to examine whether the employees cannot assert a right to these premiums to their employer or, in other words, if these premiums are chargeable to the employer or not.

This decision confirms the last position of the National Security Office in its last administrative instructions (version 2019/2).

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