

TETRALERT – LABOUR LAW

CAFETERIA PLAN: IT'S GRIMACE SOUP FOR THE ONSS

I. DESCRIPTION OF THE PROBLEM

A ruling delivered on 8 March 2017 by the Labour Court of Liege, Neufchâteau division, provides us with the occasion to look into the question of introducing a “Cafeteria Plan” in one’s company and its admissibility by the ONSS.

II. FACTS UNDERLYING THE DISPUTE

A company employing 135 persons called upon an advisory firm for assistance with its salary strategy. The latter found that the average salary of the employees was higher than the scales of the Joint Committee under which the company finds itself. In its report, the advisory firm suggested reducing the gross professional income of the employees by putting in place an alternative income which could take the form of a family allowance outside what is legally mandated and exempt from social security contributions.

Pursuant to this report, the company put in place a “cafeteria plan” for its employees, i.e., a flexible form of remuneration which lets the worker put together himself or herself or amend a part of his or her salary package. In this context, numerous employees opted for a conversion of their gross monthly remuneration into the non-mandated family allowance.

The cafeteria plan which was introduced did not alter the sum of the workers’ pensions; it did not

modify their rights to unemployment pay and respected the minimum scales of the competent Joint Committee.

III. ONSS INSPECTION

A little more than three years after the introduction of the cafeteria plan, the ONSS carried out an inspection within the company and decided to make adjustments to the quarterly declarations filed by the company.

The ONSS decided to subject the complement to legally mandated family allowances to the social security contributions, explaining that the compensation paid by the employer as an addition to the benefits accorded by one of the branches of the social security are exempt from social security contributions only when:

- The employer’s objective is effectively to grant an addition to the benefits accorded by one of the branches of social security;
- The compensation retains its character of complement, a condition which the ONSS considers fulfilled if the benefit does not exceed the sum of 600 EUR per child per year.

Thus, in this instance, according to the ONSS none of these conditions is fulfilled.

On the one hand, the compensation exceeds the maximum amount authorised. On the other hand, the Office believes that the intention of the employer is not to add to the legally mandated family allowances because the supplement is not granted to all company workers who have children but only to those with whom a part of the remuneration has been negotiated.

Consequently, the ONSS has decided to subject the total amount paid out as extra-legal family allowances to the contributions of social security and not just the part exceeding the sum admitted per child and per year.

IV. JUDGMENT OF THE LABOUR COURT OF LIEGE, NEUFCHÂTEAU DIVISION

After having unsuccessfully requested that the ONSS withdraw its decision on adjustments, the company sought relief from the Labour Court, believing in particular that no provisions of the law determine an amount above which a benefit must be considered as remuneration.

The Labour Court ruled that a family allowance outside what is legally mandated constitutes remuneration liable to the social security tax. The company was the losing party.

V. JUDGMENT OF THE LABOUR COURT OF LIEGE

The Labour Court of Liege revised the judgment and found ONSS to be in the wrong after examining the two arguments which it broached.

The first ONSS argument consisted of saying that by converting a part of its employees' gross

remuneration into an addition to the legally mandated family allowances, the employer was not pursuing a social objective but a business objective, the employer wishing in reality to reduce the employer's expenses.

The Labour Court dismissed this argument.

The law does not require that the intention of the employer be principally or exclusively social when he or she grants an additional social benefit and does not exclude that the employer also may be pursuing a business objective. It adds that the conclusion of a contract by which an employee agrees to forgo part of his or her remuneration in exchange for an additional compensation to an element of social security is not pursuing an illicit goal. Finally, the Court observed that if the objective pursued is effectively a business one for the employer, that does not make it less social for the worker, since the latter saw the amount of his or her net annual remuneration grow by approximately 3%.

Secondly, the ONSS raised the issue that the benefit was granted in a discriminatory manner insofar as only employees who had negotiated a part of their salary benefited from the supplement to the legally mandated family allowances. This did not convince the Court.

If the law requires that an employer who grants benefits complementary to the social security to his personnel must grant them without distinction to all workers belonging to the same category, this obligation is imposed on the employer and does not affect the notion of remuneration. Failure of the employer to respect this obligation cannot by itself justify the benefits in question being considered as remuneration. It

is up to the company employees and not the ONSS to assert their right to a non-discriminatory scheme of social benefits.

VI. CONCLUSION

In this judgment, the Labour Court endorses, in principle, the “cafeteria plan” put in place by the company, allowing the employer and his or her workers to make the overall salary package flexible, in particular by reducing the gross monthly remuneration on which the social security contribution is calculated and by opting for a supplemental social benefit exempted from social contributions.

The Court also notes that the sole condition for a benefit granted by the employer as complement to the benefits accorded for the various branches of social security to be exempted from social security contributions is that the benefit or compensation granted have the purpose of offsetting the loss of income from work or to compensate for the increased expenses caused by one of the risks covered by the various branches of social security occurring. The exclusion of the notion of remuneration liable to social contributions is valid without any other restriction.

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