

Newsletter

Change in Cantonal Court Formula

November 2008

The Cantonal Court Judges have obliged trade and industry with a downward adjustment of the formula that they use in calculating severance pay, also known as the Cantonal Court Formula. Employers will be pleased to hear this, since severance pay amounts were snowballing. However, politicians have never wished to burn their fingers on this problem. The Cantonal Court Judges have now taken the matter in their own hands. On 30 October 2008 the Circle of Cantonal Court Judges announced the following changes in its recommendation:

- a different calculation of the years of service;
- more attention for the employee's position on the job market and the employer's financial position;
- custom-made solutions for older employees; and
- clarification of the severance pay arrangement after short employment periods.

Calculation of years of service

In the current formula, the severance pay is calculated by multiplying the number of years of service by the gross monthly salary and by a factor expressing the special circumstances of the case.

The years of service up to the age of 40 count as one month's salary, from 40 to 50 as 1.5 and after 50 as 2.

The Cantonal Court Judges intend to change that recommendation as from 1 January 2009, whereby the years of service up to the age of 35 count as 0.5 month's salary, from 35 to 45 as 1, from 45 to 55 as 1.5 and after 55 as 2. An example: an employee aged 52 who has worked for the same employer for 30 years would currently receive 37 months' salary. After the introduction of the new recommendation that will be 27 months. A young employee aged 34, being employed for three years, would now receive three months' salary, but will receive half that amount in the future situation.

The Cantonal Court Judges wish to better reflect the improved job market position of

younger employees, while taking the protection of older employees into account.

Position on job market and financial position

The second change relates to the individual position of both the employer and the employee. Each case is different, and the Cantonal Court Judges wish to pay more attention to those differences in the future.

If, for instance, an employee works in a sector in which there is a great shortage of staff, the Cantonal Court Judges believe that he or she needs less protection than an employee who works in a sector with serious unemployment. An employee's severance pay can also be lower if his employer has enabled the employee to maintain or increase his knowledge by means of training and courses. That employee will have a better position on the job market and will need less financial protection than other employees, according to the Cantonal Court Judges.

The employer's financial position also plays a part in the new formula. Provided that the employer can prove by means of annual

reports and substantiated prognoses that the severance pay is disproportionately high, the amount may be adjusted downwards.

Custom-made solutions for older employees

Another change relates to the position of older employees who are close to their retirement. The 'old' recommendation provides that the severance pay may not be higher than the expected loss of income up to the retirement age. That recommendation has become difficult to apply now that the term 'retirement age' need no longer mean 65, as it did in the past. In determining the severance pay for those employees, the age at which they were expected to retire if they had not been dismissed will be taken into account.

Brief employment periods

Finally, a separate arrangement has been made for employment contracts that will end within two years. In the event of a fixed-term employment contract that cannot be prematurely terminated, for instance, the severance pay will be equal, in principle, to the salary for the remaining period. In all other cases the severance pay will be calculated in the customary manner.

Agreements among social partners on maximum severance pay

The question is how this change in the formula relates to the agreement between the social partners of September 2008. That agreement limits the severance pay for employees with an annual salary of € 75,000 or more to one year's gross salary. If that agreement becomes law, the amount of the severance pay could be reduced even further.

Conclusion

The Cantonal Court Judges intend to apply the new recommendations as from 1 January 2009. What will that mean in practice? After all, the Cantonal Court Formula is not binding, but rather a professional recommendation to fellow professionals. Moreover, a Cantonal Court Judge is entitled to depart from the

recommendation, since he always has discretionary powers of his own.

We will of course keep you informed of the developments.

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