WilhelmGilliéron
AVOCATS

Auteur: Sandra Gerber | Le : 19 August 2018

The social plan: when must it be negotiated and what must it contain?

Since 1 January 2014, the Swiss Code of Obligations (CO) has required Swiss employers to "hold negotiations with the employees with the aim of preparing a social plan", in the event of mass redundancies, but only in certain situations.

The social plan is defined in the CO as "an agreement in which an employer and employees set out measures to avoid redundancies or to reduce their numbers or mitigate their effects. It must not jeopardise the continued existence of the company". According to the definition given by the Swiss Federal Supreme Court, "the purpose of a social plan is to mitigate the effects of redundancies for economic reasons on the workers concerned. In the broad sense, it is one of the measures intended to protect the worker in the event of mass redundancies" (Federal Supreme Court judgement ATF 133 III 213; 4A_335/2016).

CO Article 335*i* stipulates that the employer is only required to hold negotiations with the aim of drawing up a social plan if certain thresholds are reached. If these thresholds are not reached, the employer is under no obligation to formulate a social plan.

CO Article 335*i*, para. 1, reads as follows: "The employer must hold negotiations with the employees with the aim of preparing a social plan if he:

1. normally employs at least 250 employees; and
2. intends to make at least 30 employees redundant within 30 days for reasons that have no connection with their persons".

It is important to bear in mind that the employer cannot avoid his obligation by staggering redundancies over time. CO Article 335*i*, para. 2, specifically stipulates that "redundancies over a longer period of time that are based on the same operational decision are counted together".

It is also important to note that the employer's obligation to hold negotiations with the aim of drawing up a social plan does not apply to mass redundancies that might occur during bankruptcy or composition proceedings that are concluded with a composition agreement.

Although the CO requires the employer to hold negotiations for the purpose of drawing up a social plan, the legislation is completely silent on the necessary content of the social plan, the only stipulation being that the employer must negotiate the social plan in good faith.

In our view, this silence is justified by the fact that the social plan is in reality an agreement or a contract and that, as such, the principle of contractual freedom therefore applies, so its content is left to the entire discretion of the parties.

However, we would highlight the fact – without elaborating further on this point in this article – that, if a collective employment agreement applies to the relationship between employers and employees, the collective agreement may lay down additional rules as to the social plan and its mandatory content.

To the extent that the CO is silent on the content of the social plan, this plan may apply to all employees made redundant or only some of them. It may also stipulate different solutions depending on the employees made redundant. However, these distinctions and differences are only permissible if based on objective criteria and conforming to the principle of equal treatment. Distinctions and differences may therefore be justified depending on employees' length of service, hierarchy within the business, closeness to retirement age, family circumstances, etc. However, the employer must provide identical solutions for employees who are in identical situations.

Similarly, the social plan does not necessarily have to make provision for payment of severance pay to the employees being made redundant. The commonly held view that the employer necessarily has to pay severance pay depending on employees' length of service, amounting to around one month's salary or one half-month per year of length of service, is wrong. The social plan may make provision for such indemnification, but the law lays down no obligation to do so.

However, some company regulations, which do not have the force of law, may stipulate payment of such indemnification in certain particular situations.

Lastly, while the CO is silent on the content of the social plan, as we saw earlier, the aim of the social plan is to mitigate the impact of redundancies for economic reasons on the workers concerned.

The measures designed to mitigate the effects of a redundancy on economic grounds may be of different kinds and vary widely. On this very point, the following examples are usefully given by the City of Lausanne. This list is not exhaustive however and the measures indicated may, of course, be taken either individually or together:

- stipulation of a shorter notice period, extension of the advance notice period, release from the obligation to work;
- payment of severance pay depending on the worker's situation (age, length of service, position in the hierarchy);
- support for professional redeployment, making contact with other businesses, help with preparing job applications (covering letter, curriculum vitae, etc.);
- payment of the costs of continuing training with a view to a worker's return to employment;
- pay compensation if the new job is less well paid or the person concerned is unemployed for some time;
- encouragement to take voluntary redundancy accompanied by an indemnification package;
- priority for re-employment of workers to another group member company;
- payment of 'bridging pensions' until the worker reaches retirement age;
- payment of travel expenses for the worker whose new employment involves longer travel to work or provision of staff accommodation and payment of the rent;
- extension of accident insurance cover for 180 days at the employer's expense or transfer to the individual loss-of-earnings insurance scheme with premiums (or part of the premiums) being paid by the employer.

(Source : http://www.lausanne.ch/lausanne-officielle/administration/sports-et-cohesion-sociale/service-du-travail/protection-travailleurs/travailleur/contrat-travail-regles/licenciement-collectif.html)

CO Article 335*j* stipulates that "if the parties are unable to agree on a social plan, an arbitration tribunal is appointed". However, the CO does not indicate to which arbitration tribunal the matter should be referred or which procedure should be followed.

If a collective employment agreement governs the relationship between employer and employees, that collective agreement may possibly make provision for an arbitration tribunal and the procedure whereby the matter is referred to such a tribunal. If no collective employment agreement applies, the parties may submit the case to the Swiss Federal Conciliation Office or a cantonal conciliation office.

******

In conclusion and to sum up, as the social plan is an agreement between an employer and the employees, the principle of contractual freedom applies, and the parties are at liberty to determine the content and terms of the social plan. In our view, the only limits placed on this freedom of the parties are the obligation for the employer to negotiate in good faith, the possibility of referring the matter to an arbitration tribunal if no agreement can be found (that tribunal having the authority to impose a compulsory social plan on the parties), and any limits that may be set out in a collective employment agreement applicable to relations between the parties in a particular case.

Source :
https://www.wg-avocats.ch/en/news/labour-law/the-social-plan-when-must-it-be-negotiated-and-what-must-it-contain/