HERBERT SMITH FREEHILLS

'ORDONNANCE' ON THE PREDICABILITY OF WORKING RELATIONS AND SECURING THESE WORKING RELATIONS: IMPORTANT CHANGES TO RULES ON REDUNDANCIES

21 September 2017 | Paris
Legal Briefings – By **Emma Röhsler and Sophie Brézin**

This briefing summarises the Macron reforms in relation to the simplification of redundancy processes:

- Limiting the economic difficulties test to the business sector in France exclusively
- Defining what is a business sector
- Reducing the redeployment obligations – limiting these to France
- For companies making less than 10 redundancies in 30 days : simplifying the scope of employees within the pool for selection – to those employees within the same "employment zone"
- Reducing time limits for claims
- Reducing minimum damages payments where a social plan is

held to be null and void

TEST TO SATISFY FOR A LAWFUL REDUNDANCY

One of the major difficulties of the law as it currently stands (as defined by case law dating from 1995), is the requirement for an employer to demonstrate that there are real and serious economic difficulties within the business sector worldwide, for the redundancies to be lawful.

The Macron reforms will restrict the test to France – i.e. the employer will only have to demonstrate this within the relevant business sector in France (including all companies in France within the same business sector).

There is a safeguard against Groups artificially creating economic difficulties in France (e.g. via accounting mechanisms etc.), as the reforms exclude cases of "fraud" – if fraud is found to occur, the Courts could also look at the economic situation outside of France.

WHAT IS A "BUSINESS SECTOR"

The reforms also define this more precisely as being characterised in particular by the nature of the goods or services delivered, the target clients, the network and distribution methods, relating to the same market.

REDEPLOYMENT OBLIGATIONS

Over the past couple of years, one of the principal difficulties for an international group making redundancies has been to comply with the extremely exigent duty to seek out redeployment opportunities for employees worldwide (even where the employees at risk of redundancy may have very little interest in accepting redeployment overseas). A breach of the redeployment obligation, of itself, rendered the dismissal unlawful (i.e. even if the employer could satisfy the test for economic difficulties).

The position was slightly improved for employers as a result of an amendment to this requirement introduced recently, requiring the employer only to ask the employees if they wished to be considered for redeployment overseas. The *ordonnance* removes this obligation, restricting the employer's redeployment obligations to France.

Furthermore, instead of having to prepare individualised redeployment letters for each employee, detailing the redeployment opportunities which may be suitable for them, the reforms would permit the employer to simply refer the employee to a database where the available roles are listed (e.g. an intranet site).

CHANGES TO THE POOL OF SELECTION OF REDUNDANT EMPLOYEES: FOR COMPANIES MAKING FEWER THAN 10 REDUNDANCIES IN 30 DAYS

Currently, an employer must consider all employees within the business as being within the pool for selection (to which selection criteria are applied to select which employees are redundant). This has the effect, for example, of potentially resulting in the selection of an employee in Lyon for redundancy, when the site in Marseille is required to suppress a role, through the application of the objective selection criteria (e.g. age, start date, skills and experience etc.) to all employees.

The exception is where a collective agreement or the unilateral social plan document limits the pool for selection to certain sites.

As a result of the reforms, for companies making less than 10 redundancies in 30 days, the employer will be able, unilaterally, to limit the pool for selection to the employees within a defined "employment zone". This should be held to be a restricted geographic zone – but we will need to see how the case law develops this to understand exactly how the courts will interpret it.

REDUCED PERIOD TO BRING A CLAIM

Dismissed employees will now, after the reforms are passed, have only 12 months in which to challenge their dismissals (instead of the current 2 years for personal grounds dismissals).

REDUCED MINIMUM DAMAGES FOR DISMISSALS HELD TO BE NULL AND VOID

Where the social plan is held to be null and void, the employee has the right to seek reinsertion within the Company, or damages (damages only applies if reinsertion is not possible). The level of minimum damages will be reduced to 6 months (this is currently 12 months).

WHAT HAS NOT CHANGED...

Employees will still need to put a social plan in place in companies with 50 or more employees where 10 or more redundancies are envisaged in a period of 30 days. The initial proposals to apply different limits depending on the size of the company has not been included in the *ordonnance*.

WHEN WILL THE CHANGES APPLY?

These measures will all be in force the day after they are formally published in the Official Journal (which should occur after they are presented to the Council of Ministers on 22 September 2017).

For the measures relating to the reduction in the minimum level of damages – this will apply to claims made after the publication of the *ordonnance*.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.

EMMA ROHSLER
REGIONAL HEAD OF PRACTICE (EMEA) - EMPLOYMENT PENSIONS AND INCENTIVES, PARIS
+33 1 53 57 72 35
Emma.Rohsler@hsf.com

SOPHIE BRÉZIN
PARTNER, PARIS

+33 1 53 57 70 89
Sophie.Brezin@hsf.com

LEGAL NOTICE