



NEWSLETTER

LABOUR

MAY 2014

Golden Parachutes for Senior Executives in Times of Crisis

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The existence of redundancy payment clauses known in Anglo-Saxon Law as “golden parachutes” stems from the wide margin accorded by regulatory standards of the contract of Senior Management regarding the wishes of the parties involved, as is apparent in the nature of the Royal Decree 1382/1985 of the 1st of August, on the regulation of the professional relationship of a special nature with regards to Senior Management personnel.

In its Rulings of the 15th March 1989 and the 12th March 1997, the Supreme Court defines these terms, referring to them as follows:

“The golden parachute is not an economic compensation, rather a measure of persuasion or defence, an indemnity clause inserted in the contract of the senior executive, who thus becomes bulletproof and tries to reform the employee’s position within this special professional relationship with senior management, against the employer’s unilateral termination of the contract which is not protected by a disciplinary dismissal clause”.

On the basis of the above definition, the compensation established in the golden parachute clause will not only be granted when the Company terminates the Senior Executive’s contract without a justifiable cause, through the waiver of the contract or when it is terminated via the dismissal of the Senior Executive which is then declared unjust, but also when the Senior Executive finds themselves in a position where they must terminate the work contract, and the cause for it deemed to be just.

However, although the Law accords a great deal of freedom at the time of establishing the agreements that give rise to these clauses, this does not mean that they are all considered valid. It is the duty of our Courts to conduct a thorough assessment in order to determine whether these are abusive, not only in consideration of the obligations that they outline, but also reasons for compliance, the amount agreed and – most importantly – the economic capacity of the company at the time of accrual of the negotiated amount.

In relation to this matter our Superior Courts of Justice have come to the conclusion that, on settling the amount of the aforementioned clause, what must be analysed is the scenario in which the company finds itself at the agreed time, as this could have an influence when assessing the abusive conduct of the parties that signed the Senior Management contract, and on declaring an “abuse of rights” or “legal fraud” for the inclusion of disproportionate golden parachute clauses in relation to the professional category, compensation and responsibility of the Senior Executive who lacks a legitimate purpose and poses a clear threat or damage to the Company and to the rest of its partners.

Also questioned by the Courts are the cases in which the golden parachute clause can be claimed following the just dismissal and even withdrawal of the contract on behalf of the unilateral will of the Senior Executive, without a just cause. These situations would be at the full discretion of the employee, generating a rupture in the principle of reciprocity and balance between the parties.

In addition to the Courts, in 2012 on behalf of the Government there was an unsuccessful attempt to place limits on the amount of golden parachute clauses. In fact, upon analyzing the current panorama, we find that amongst Ibx firms there are 832 Senior Management and other executive contracts with such clauses in existence.

In short, it can be confirmed not only that the number of these clauses has not fallen in recent years, but has actually risen and also in terms of quantity received, and that this is in stark contrast with the ordinary compensation granted following the termination of ordinary work contracts, which have actually been reduced in recent labour reforms.

Given this current situation, it would be optimal for the Companies (i) if the amount of compensation contained in the golden parachute clause was variable and in accordance with the economic status of the Company and (ii) if the accrual was established taking into account the objective evaluation of the Executive's work-related performance, thus causing the Executive's inappropriate attitude towards the development of their work to generate a reduction in the amount given.

Hence the Directive 2010/76/UE of the 24th November 2010, which amends Directives 2006/48/CE and 2006/49/CE on capital requirements for the negotiation portfolio and re-securitizations and on the supervision of remuneration policies, where it establishes that these kinds of compensation "are based on results obtained over the course of time and are regulated in such a way that poor results are not met with reward".

Meanwhile, the European Commission in 2009 made a recommendation on the remuneration system of advisors, establishing that "it would

be advisable to ensure that termination payments do not represent a reward for failure" and proposed that the amounts of these compensations be limited to two annual payments.

Therefore, it would be reasonable to set limits on the establishment of clauses of this nature, in relation to the situation itself as well as the maximum amount of compensation.

In contrast to the lack of constraint within the private sector, the eighth additional provision of the Law 3/2012 of the 6th of July, on urgent measures for the reform of the labour market, introduces rational and logical adjustment criteria in the field of commercial and senior management contracts in the public sector, constituting an economic measure directed at containing or reducing the public deficit which is limited in that the employer's termination of the commercial or senior management contracts, whatever the date of finalization, with personnel who provide services in the state public sector, will only grant compensation amounting to no more than seven days of service per year of the annual fee in cash, with a maximum of six monthly payments.

These limitations were also extended to the managers of intervened banks, but absorbed banks were not included in the restrictions.

Notwithstanding the above, there will be no entitlement to compensation when the person, whose commercial or senior management contract is terminated on behalf of the company, holds an official career as a State civil servant, in the Autonomous Communities or local Entities, or enjoys job security from being employed by an entity belonging to the State, local or regional public sector.

FOR MORE INFORMATION

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