

BE AWARE

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WORKING TIME: THE HIGH COURT CONFIRMS THE VALIDITY OF FIXED NUMBER OF WORKING DAYS PER YEAR, SUBJECT TO CERTAIN CONDITIONS

Fanny Poulain

A decision of the French High Court was awaited since the European Committee for Social Rights (ECSR) of the European Council ruled that the French working time scheme providing for a predefined number of working days per year, without any reference to working hours (“*forfait jours*”), was in breach of the Revised European Social Charter (decision rendered on June 23, 2010 and published on January 14, 2011). The CEDS indeed considered that French laws were likely to impose excessive working time to employees with management level and/or with great autonomy, since they were not subject to maximum daily and weekly working hours.

Exactly one year following the decisions of the ESCR, the French Supreme Court (Supreme Court, June 29, 2011, No 10/11.581) confirmed that employees’ working time could be set as a fixed number of working days per year provided that such scheme is implemented through a collective bargaining agreement and an amendment to the employees’ employment contracts.

As an additional condition, the Supreme Court expressly stated that the provisions of the above-mentioned collective bargaining agreement must “*ensure that the maximum working hours or daily and weekly rests are complied with*”.

In the present case, the provisions of the branch-level collective bargaining agreement applying to metallurgical industries were considered as compliant with these rules, however, the Court considered that the employer had not

ensured in practice that the limits provided in the collective bargaining agreement were applied to its employees. As a result, the employees' working time organization based on a fixed number of working days per year was found illegal and the employees were declared eligible for the payment of all overtime hours performed in excess of 35 hours per week.

In this regard, this decision constitutes a significant change to the Supreme Court's previous case law. Indeed, the Court previously considered that employees were in such case only entitled to damages as a result of the violation of the provisions of collective bargaining agreements but not to payment of overtime (Cass. Soc., 13 January 2010, n° 08-43.201).

The implementation of fixed number of working days per year, even if still possible, will therefore have to be applied with great precaution, depending on the validity of the provisions contained into the reference collective bargaining agreement applied within the company.

A REDUNDANCY PLAN IS NULL AND VOID IN THE ABSENCE OF VALID ECONOMIC GROUNDS

François Millet

According to Article L. 1235-10 of the French Labour Code, the dismissal procedure null and void in the absence of internal redeployment measures aiming at reinstating the employees inside the group as part of a social plan on which employee representatives must be informed and consulted. Based on these general provisions, the High Court decided that the dismissal pronounced in the absence of social plan, or even in case of insufficient social measures given the company's or group's financial means, had to be declared null and void. The consultation procedure can therefore be cancelled as well as the dismissals subsequently pronounced (employees dismissed are entitled, subject to certain conditions, to damages amounting to one-year compensation or their reinstatement within the company).

It is therefore only the absence or insufficiency of the social plan that triggered the nullity of the dismissal procedure.

The Court of appeal of Paris (CA Paris, Pôle 6, ch. 2, 12 mai 2011, *Viveo France vs. Works council*) however recently extended the employees' opportunities to claim for the nullity of their dismissals. The Court indeed ruled that the absence of valid economic reasons invalidates the dismissal procedure, since the works council cannot be validly informed and consulted regarding a redundancy plan if the economic grounds surrounding said plan are lacking.

In the present case, a company, Viveo France, informed and consulted its works council regarding a job suppression plan, starting on December 2009. After about one year of consultation procedure, the company intended to terminate the consultation process in October 2010, considering that the works council had been sufficiently informed about the restructuring plan. The employee representatives therefore brought an action before the Civil court of Paris in order to obtain the suspension of the plan up until properly consulted.

Their claim was rejected by Civil court and they therefore appealed before the Court of Appeals of Paris.

The Court however pronounced the nullity of the dismissal procedure and therefore asked that the consultation procedure be reinitiated as from the beginning. The Court indeed analyzed both the economic note provided to the works council as well as the report provided by the expert appointed by the employee representatives within the frame of the consultation procedure and considered that even if the operating income of the group and its turnover decreased in 2009, these financials were contradicting the positive messages sent by the group through press releases.

The Court also expressly stated that the consultation procedure had to be based on the demonstration of valid economic grounds (i.e. mainly the economic difficulties or the need to safeguard the competitiveness), absent which the procedure was deemed null and void.

This decision is therefore particularly innovative since it strongly contradicts the main principles raised by the High Court in its constant case law. An appeal was made by the company before the French High Court.

EVOLUTION OF THE MUTUALLY AGREED TERMINATION PROCESS ("RUPTURE CONVENTIONNELLE")

Gaëtan Rivet

Since its introduction in April 2008, the success of the mutually agreed termination ("*rupture conventionnelle*") as a mean to terminate an employment contract went growing. With 600,000 agreements concluded over the last three years, it represents today 11% of the processes used to terminate an indefinite-term employment contract (to be compared with 59% by resignation, 9% by economic dismissal, and 11% by any other kind of dismissal), which means a 4% growth in only one year.

Popular, this termination process remains however strictly regulated by French laws, while French judges carry out an always more strict control of the terms and conditions under which these mutually agreed terminations are signed.

As a first example, the control carried out by these authorities when the mutually agreed termination is entered into while the company is facing some economic difficulties has been considerably enhanced. Even if such a difficult context does not prohibit *per se* any recourse to the mutually agreed termination, a particular attention is usually paid by the legislative, judicial and administrative authorities to the possible attempts to bypass the French regulations governing collective redundancies.

This is the reason why French Supreme Court reminds that when the mutually agreed terminations proceed from an economic ground and is deriving from a restructuring plan, they have to be considered while determining the thresholds relating to applicable employee representatives' information and consultation process, as well as the employer's obligations with respect to the implementation of social plans. In other words, these mutually agreed terminations have to be computed while assessing the threshold of at least 10 dismissed employees over a 30-day period, triggering the compulsory implementation of a social plan and the related obligations binding the employer (*Supreme court, 9 march 2011, No 10/11.581*).

Moreover, any recourse to mutually agreed terminations when the company is facing some economic difficulties shall not deprive the employees concerned from the guarantees proceeding from any collective bargaining agreement relating to staff adaptation plans ("*GPEC*"), or any social plan in force.

In line with the administration standpoint expressed via a DGT ministerial directive dated 23 March 2010, the French Minister of labour recently pointed out in one of his answer to a member of Parliament, that the employee concerned shall "*be duly informed beforehand about his/her rights in order to be able, should his/her position be eliminated, to knowingly opt for a rupture conventionnelle if the guarantees proceeding from redundancy are less favourable to him/her*" (*Ministerial answer No 106030: JOANQ, 31 may 2011, p.5884*).

Thus, the employer shall inform the employee voluntarily opting for the mutually agreed termination about the benefits he/she would have been entitled to within the framework of a social plan or a voluntary departure plan; otherwise, he/she may claim for the cancellation of the mutually agreed termination entered into, arguing that his/her consent was forced due to a lack of information.

The integrity of the employee's consent is obviously a main concern for the judges, who are particularly vigilant when verifying that this consent was not obtained under pressure. This is particularly the case when the mutually agreed termination was entered into within a conflicting framework, such as immediately following a pre-dismissal

meeting during which a number of grievances were reproached to the employee by the employer, before the latter finally gave up the dismissal process and invited the employee to sign a mutually agreed termination (*Court of Appeal of Riom, 18 January 2011, No 10/00658*). This is also the case when the employer sent to the employee a project of mutually agreed termination during her sick leave directly related to her work conditions and to the moral harassment she suffered at work, before signing the agreement with her as soon as she was back to work (*Court of Appeal of Toulouse, 3 June 2011, No 10/00338*). In both cases, the judges did not hesitate to consider the mutually agreed termination null and void due to employee's vitiated consent, and the related termination of employment contract as an unfair dismissal.

DOCUMENTS SETTING OBJECTIVES TO BE ACHIEVED FOR THE PAYMENT OF A VARIABLE COMPENSATION SHALL BE DRAFTED IN FRENCH

Marie Durand-Gassel

The French Supreme Court ("Cour de cassation") ruled on June 29, 2011 that documents setting the objectives to be achieved for the payment of a variable compensation shall be drafted in French. The objectives are otherwise unenforceable.

The decision of the Supreme Court expressly refers to article L. 1321-6 of the French Labour Code ("FLC"), which states: "*The company Internal rules shall be drafted in French. It can be accompanied with translations thereof in one or more foreign languages. This rule applies to all documents that set obligations for the employee or provisions the employee shall be aware of for the execution of his/her work. These provisions do not apply to documents received from a foreign country or intended for foreign people*".

In the case at hand, the employment contract of the plaintiff, executive manager of a French subsidiary company, provided that the employee was eligible to a variable compensation of up to 40 percent of his annual base salary upon achievement of objectives set forth by the group managers variable compensation plan. Said group variable compensation plan was drafted in English.

Following his dismissal, the employee challenged, in particular, the amount of his variable compensation over the last five years.

Both the Court of Appeal and the Supreme Court ruled that the group variable compensation plan was unenforceable since it was drafted in English, notwithstanding the fact that (i) the document was a

group document applicable to all managers of the group, and (ii) the employee was fluent in English and worked in English on a regular basis.

Whereas the Court of Appeal had assessed the amount of the variable compensation owed to the employee based on elements of the group variable compensation plan, the Supreme Court ruled that the plan being unenforceable, it could not be used by the judges to decide on the amount of the employee's variable compensation. As a result, the employee was found entitled to the payment of the maximum variable compensation as stated in his employment contract.

Even though the company was not in this case held criminally liable for non-compliance with article L. 1321-6 of the FLC, it shall be noted that non-compliance with these provisions constitutes a criminal offence that may be sanctioned by a fine up to € 750 for the Management and/or up to € 3,750 for the company as a legal entity.

NEW PROFIT SHARING PREMIUM ("DIVIDEND PREMIUM")

Safia Benlakhhal

The Act completing the Law for financing the Social Security for 2011 and implementing the new obligation to pay to employees a specific premium linked to the distribution of dividends in commercial companies has been adopted by the French Parliament on July 13, 2011. Subject to the intervention of the French Constitutional Court ("*Conseil Constitutionnel*"), this Act should become definitive following its publication in the French Official Register.

Pursuant to this Act, any commercial company with at least 50 employees should grant to each employee a specific premium ("dividend premium") provided that (i) it has distributed dividends to shareholders which amount, per share, exceeded the average dividends distributed, per share, over the last two fiscal years or (ii) it belongs to a group which has to set up a group committee and the dominant company of which has distributed said dividends to shareholders.

The concerned companies should enter into negotiations according to one of the modalities provided by the Labour Code for optional or mandatory profit sharing agreements within three (3) months as from the date of the shareholders assembly to find an agreement relating to the amount and modalities of said dividend premium. Should no agreement be reached, the dividend premium must be implemented unilaterally by the employers after consultation of the employee representatives. No instruction has been given regarding the calculation and amount of such premium which is freely negotiated in the company.

Such premium would be anyway free of social charges up to €1,200 per employee and per year subject to strict compliance with legal provisions and the registration of the agreement or the employer's unilateral decision with the competent Labour Authority (*Direccte*).

IMPLEMENTATION OF THE PROFESSIONAL SECURING CONTRACT ("CONTRAT DE SÉCURISATION PROFESSIONNELLE")

Safia Benlakhhal

The Act relating to the development of internship programs and career securing adopted by the Parliament on July 13, 2011 (so-called "Cherpion Act") implements a new repositioning program, the Professional Securing Contract ("*Contrat de sécurisation professionnelle*"-CSP).

The CSP will replace the Personal Repositioning Agreement ("*Convention de Reclassement Personnalisé*"-CRP), and the Professional Transitional Contract ("*Contrat de transition professionnelle*"-CTP) applicable in certain French region. The CSP will consist in specific redeployment programs which must be proposed to employees whose dismissal for economic grounds is contemplated in companies employing less than 1,000 employees or belonging to a group of less than 1,000 employees.

ILLEGAL LENDING OF WORKMANSHIP

Gaëtan Rivet

Pursuant to Article L. 8241-1 of the French Labor Code, "*any profit-making operation only aiming at lending workmanship is prohibited*". Any operation qualifying an illegal lending of workmanship is considered as criminal offence and may be punished by two-year imprisonment and/or a fine up to €30,000 against the legal representative of the company (a fine up to €150,000 against the legal entity) and possibly accompanied by ancillary sanctions.

Until recently, French case law considered that the operation was illegal when profit-making. This was the case when the lending company was invoicing fees exceeding the only wages and related social contributions corresponding to the seconded employees.

However, in a recent decision, the French Supreme court tried to restrict the conditions under which the recourse to lending of workmanship is allowed, pointing out that the profit-making nature of the operation may result from any savings, of any kind whatsoever, earned by either company, including "*an increase of flexibility in managing the staff and the related contributions savings earned by the company*" (*Supreme court, 18 May 2011, No 09-69.175*). In the case at hand, the costs proceeding

from the management of the staff made available were not borne by the user company. Once can admit the important impacts such a decision could have lead on the lending of workmanship operations currently in force within groups of companies.

The French Parliament however took an adverse approach by voting on 13 July 2011 the so-called “Cherpion” law, according to which “*A lending of workmanship operation is not considered as a profit-making one when the lending company only invoices to the user company, with respect to the period during which employees are seconded, the employees’ wages and related social contributions, as well as the professional expenses generated by the lending operation and reimbursed to them*”.

In addition, this law also specifies the terms and conditions under which the recourse to non profit-making lending of workmanship is allowed, notably by defining its conditions of implementation (i.e., offer to the employee concerned to sign an addendum to his/her employment contract, lending of workmanship agreement between the lending and user companies, prior consultation of the relevant employee representatives’ bodies, trial period, seconded employee’s status...).

FINANCIAL PENALTIES IN ORDER TO ENSURE EQUAL TREATMENT BETWEEN MEN AND WOMEN

Frédérique Sallée

As from January 1st, 2012, undertakings with at least 50 employees, which will not comply with the principle of equal treatment between men and women will face a penalty equal to 1% of their total payroll.

The Law No. 2010-1330 of November 9th, 2010, reforming pensions, indeed provides that these undertakings, which would not be covered by a collective bargaining agreement or action plan (to be included in the company’s annual report) with regard to professional equality, will face a penalty up to 1% of their total payroll.

Same law provides the obligation to negotiate and agree on work-related hardness (“*pénibilité*”) within undertakings or group of undertakings with at least 50 employees, which part of its workforce is subject to certain work-related hardness factors.

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