

# BE AWARE

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## THE OBLIGATION OF PRIOR CONSULTATION OF THE HEALTH AND SAFETY AND WORKING CONDITIONS COMMITTEE (“CHSCT”) AS A RESULT OF A PROJECT OF ECONOMIC DISMISSAL

### Fanny Poulain

The First Instance Tribunal (“TGI”) of Toulouse ordered the adjournment of a project of suspension of activity and of the related project of economic dismissals, on the grounds that the employer had not previously consulted the CHSCT about the damage such project would trigger on the psychological and physical health of the employees concerned (TGI Toulouse, February 3rd, 2011, n°11/00114).

Is it likely that such position will also be taken by the High Court (“*Cour de cassation*”) in case of reorganization projects involving dismissals for economic reasons.

Article L.4612-8 of the French Labour Code indeed gives an extremely large consultative role to the CHSCT regarding all health and safety matters. Consultation is indeed required for “*every significant measure modifying the health and safety conditions or the working conditions*”, in addition to a non-exhaustive list of more specific obligations to consult when pure health and safety matters are involved.

The French Supreme Court (“*Cour de Cassation*”) already used the above-mentioned legal provisions in order to impose the obligation to consult the CHSCT prior to the implementation of numerous projects, including:

- a project consisting in regrouping employees on a single site, hence triggering transfer of employees out of their geographic area (Cass. Soc., June 30th, 2010, n°09-13.640);
- the construction of a new workshop (Cass. Crim., March 15th, 1994, n°93-82.109);
- the implementation of annual appraisals for employees, which may entail psychological pressure on the employees concerned (Cass. Soc., February 28th, 2007, n°06-21.964).

Given this case law trend, we may not exclude that the CHSCT be involved as soon as health and safety or working conditions are concerned, and namely on any reorganization project triggering collective redundancies. These projects indeed obviously generate stress for the employees and would therefore fall under the scope of the above-mentioned consultation requirements.

## **VARIABLE COMPENSATION AND MODIFICATION OF THE PROFESSIONAL TARGETS BY THE EMPLOYER**

### **Marie Durand-Gassel**

Modification to contractual terms of employment is traditionally, according to the case law of the *Cour de Cassation* (French Supreme Court), subject to the employee’s prior and express consent. Imposing a change of contractual term of employment on an employee, entitles the employee to claim for constructive dismissal and subsequently seek in Court the payment of statutory termination indemnities and damages for dismissal without real and serious cause.

As regards changes made to the employee’s contractual compensation, the *Cour de Cassation* repeatedly ruled that contractual provisions allowing the employer to change unilaterally the employee’s contractual compensation (both the base and variable components thereof) shall be considered null and void (*Cour de cassation*, Labour Section, May 30, 2000 – n°97-45.068).

The *Cour de Cassation* also made it clear that whatever the consequences and magnitude of the change (e.g., relating to the variable component of compensation only, or having a positive impact on the overall compensation of the employee), the express consent of the employee is required (*Cour de cassation*, Labour Section, May 5, 2010 – n°07-45.409).

In a recent ruling dated March 2, 2011 (*Cour de cassation*, Labour Section, March 2, 2011 – n°08-44.977), the *Cour de Cassation* took a slightly different approach with respect to the modification of targets for the payment and calculation of a performance bonus.

In this specific case, an employee had signed an amendment to his employment contract according to which the employee was entitled to a base compensation and, as the case may be, to a performance bonus upon achievement of targets set unilaterally by the employer under the company’s annual variable compensation plan. The employee sought in Court the resolution of his employment contract at the employer’s exclusive fault, claiming that the employer’s modification of the annual variable compensation plan, which had an effect not only on the value of the targets themselves but also on the structure and calculation formula of the variable compensation (the payment of the bonus under the plan had become conditioned by the reaching of a new target) was subject to his prior consent and as a result should not have been imposed on him.

Whereas the Court of appeal ruled in favor of the employee, stating that the employer’s unilateral change to the targets directly and negatively impacted the amount of the employee’s variable compensation and as a result was subject to the employee’s prior consent, the *Cour de Cassation* rejected this decision, ruling that given the terms of the amendment to the employee’s employment contract, which expressly stated that the targets were set unilaterally by the employer, the employer was entitled to do so, without such change being subject to the employee’s prior consent.

The *Cour de Cassation* states two conditions for the employer’s change of targets to be enforceable: (i) the targets set by the employer shall be achievable and (ii) the employee shall be informed of the applicable targets at the beginning of the fiscal year.

Companies should however remain cautious when implementing changes to bonus plans and ensure that employees are well informed of the changes and that the targets to be reached had not been contractualized.

## **THE EMPLOYER IS RESPONSIBLE FOR ANY MORAL HARASSMENT COMMITTED OVER ITS EMPLOYEES, EVEN WHEN COMMITTED BY A THIRD PARTY TO THE COMPANY.**

### **Gaétan Rivet**

On November 8, 2005, a manager employed by a restaurant was dismissed for professional insufficiency. Challenging her dismissal, she also claimed for

damages, pretending she had been morally harassed by the representative of the commercial brand with which her employer was linked through a trademark licence agreement. This representative had been entrusted by the company with the mission to train the restaurant manager and her team to new management tools.

The employer was denying any liability, arguing that the business relationship between, on the one hand, the company, and, on the other hand, the representative involved, was not a work relationship, excluding any possibility to supervise said representative or take any preventive and/or disciplinary measures against him as a result of the alleged harassment. The employer further claimed that it could not be held liable towards its employees for moral harassment committed by a third party.

Employees were however claiming that the third party acted in fact as their employer since they were trained and were receiving directives from the trademark representative. They were followed by the French Supreme Court.

It is not the first time that French case law takes a strict approach against employers, considering they are obliged to an absolute protection of their employees' health and safety within the company.

First step of this evolution: on May 10, 2001, a laundry manager was sentenced for moral harassment by the French Supreme Court in consideration of the harassing behaviour of his spouse over one of his employees. Through this case, the judges decided to hold employers liable for acts committed by "*all persons exercising, either legally or actually, any authority over the employee*". (Cass. soc., May 10, 2001, n°99-40.059).

Second step: on February 3, 2010 and December 15, 2010, the French Supreme Court ruled that the employer was responsible for any moral harassment committed over one its employees, even if the relevant measures had been taken in order to make said harassment cease. (Cass. soc., February 3, 2010, n°08-40.144; Cass. soc., December 15, 2010, n°09-41.099).

Considering this evolution, and notwithstanding its heavy coming consequences, it was nothing but predictable that French Supreme court would rule, in the case at hand, that the employer was responsible for the harassment committed by a third party over its employees (Cass.soc., March 1st, 2011, n°09-69.616).

From now on, and even in the absence of any negligence, employers can be held liable for any harassment committed by a third party exercising in fact an authority over their employees.

## A NEW LEGAL FRAMEWORK FOR ALLOWANCES ALLOCATED TO EMPLOYEES BY A THIRD PARTY

Frédérique Sallée

Article 21 of the Law n° 2010-1594 relating to the Financing of the Social Security System for 2011 (LFSS) of December 20th, 2010 inserts a new Article L. 242-1-4 within the Social Security Code, whose purpose is to provide a legal framework for benefits and sums paid by a third party to an employee. The provision thus aims at subjecting the providing of vouchers or other benefits by third parties to employees to social security contributions.

According to these new provisions, cash bonuses (including vouchers) and fringe benefits granted to an employee by a third party who is not his/her employer (which presupposes the lack of subordination), in return for an activity performed in that third party's interest, shall be subject to social security contributions or, under specific conditions, to a lump-sum contribution in full discharge.

It is then the third party's responsibility to fulfil the obligations relating to statements and payments of the applicable social security contributions. It is also its responsibility to inform the employer of the benefits allocated to the employees concerned.

When the employee performs a "*commercial activity or an activity which involves direct contact with clients and in which it is common practice*" for a third party to allocate such sums or benefits to the employee in return for this activity, the law provides that the third party will then be able to pay off its social taxes and contributions in the more advantageous form of a lump-sum contribution in full discharge.

We may therefore wonder about the types of activities concerned: the bill n°2011-000039 of March 29th, 2011 mentions two industries, the banking and tourist industries, without this list being limitative. The upcoming ministerial decree could mention more industries in which such custom would be deemed to exist (the pharmacy/chemists, car, mass-market retailing and hotel business industries in particular are to be expected). Otherwise, it will be up to companies to demonstrate that they fall under the scope of the above-mentioned regulation, i.e. that there is a common and regularly observed practice to grant employees with said allowances. Otherwise, companies will not be entitled to benefit from the lump-sum contribution but will have to pay full social security charges.

The rate of the lump-sum contribution in full discharge is set at 20% by the law and is calculated on the part of the remuneration allocated to the employee over the calendar year comprised between 15% of the value of the monthly national minimum wage (SMIC) (i.e. around €205) and the value of the gross monthly legal minimum wage (SMIC – i.e. €1,365 in 2011). Above that threshold, benefits will be subject to usual social taxes and contributions.

There are still two cases in which the third party will not be entitled to claim the application of this lump-sum contribution: (i) when the third party belongs to the same group as the employer, and (ii) when the third party and the employer have performed acts aiming at avoiding, in whole or in part, payment of social taxes and contributions. The lack of precisions with regard to this type of “collusion” incites a careful approach.

In that respect, one may wonder if the allocation by the third party of sums or benefits directly to the employer (rather than to the employee), in order for the latter to allocate them to its employees, without the third party being informed of the process of this allocation or of the identities of the beneficiaries, would allow to escape the application of the law, and as a result the liability provided for by the legal provisions. It is very likely that the granting methods agreed upon between the parties will not allow the third party to avoid payment of social taxes and contributions, insofar as they could be viewed as aiming at avoiding payment of the said taxes or contributions. Collection organizations will be on the watch.

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