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General labour market and litigation trends

Legislation

The programming and justice reform law of 23 March 2019[1] merges the primary courts and intermediate courts as from 1 January 2020 by creating the courts of justice. When a Labour court is located in the same city as a court of justice or one of its sections dealing with EUR 10,000 or less disputes, the registry of the court of justice comprises the services of the registry of said court and the service of registry of the Labour court. The absence of mandatory representation by a lawyer is maintained before the Labour courts. In any proceedings, including in emergency interim proceedings, when a judge considers that an out-of-court settlement is possible for the dispute, he or she can now enjoin the parties to meet a mediator. Decisions made by the judicial courts are made available to the public electronically free of charge. Reusing the magistrates' and court registry's members' identity data for or resulting in the assessment, analysis, comparison or prediction of their real or assumed professional practices shall notably be punishable by imprisonment and a EUR 300,000 fine.

The Pacte law of 22 May 2019[2] includes several measures impacting Labour relations, notably regarding retirement savings, employee savings and shareholding. It also reduces the number of thresholds (10, 50 and 250) and also harmonises the calculation of employment thresholds between the different legislations resulting from the Labour Code and the Social Security Code. Article L. 130-1 of the Social Security Code now constitutes the reference text in this respect. It provides that the employer's annual workforce shall correspond to the average of the number of persons employed in each of the months of the preceding calendar year. A decree is to set the number of persons to be included in the workforce and the way they shall be counted. Crossing a workforce threshold upwards shall be taken into account when said threshold has been reached or exceeded for five consecutive calendar years – the five-year rule shall not apply, however, when a company's workforce exceeds the threshold applicable on 1 January 2020. Crossing a workforce threshold downwards over a calendar year will result in triggering once again the rule of crossing a threshold upwards over the last five years.

Employment litigation trends

A report issued by the Ministry of Justice[3] notes a decrease in the number of actions brought before the Labour courts over the past 10 years. The number of actions on the merits or in emergency interim proceedings brought before the Labour courts went from 207,770 in 2004 to 119,801 in 2018. After peaking at 228,901 in 2009, there has been a constant downward trend for the past 10 years. In 2018, 95.4% of the actions were brought by "ordinary"

employees. 92.1% of the claims are related to employment contract termination; in 79.9% of the cases, the dispute aims primarily at contesting the ground for termination and, most often, the non-economic ground for dismissal (78.3%). The other actions are brought by employees in connection with insolvency proceedings (2.3%), employers (1.9%), apprentices (0.2%) or employees protected against dismissal because of their representative function (0.3%). The framework for compensating a dismissal without real and serious cause set by the Macron orders would not have had, on the other hand, any impact on a decrease in litigation, and would actually tend towards a gentrification of employment litigation on older employees with seniority and high wages.

Redundancies, business transfers and reorganisations

A business transfer often entails a modification of the transferred employment contracts, notably regarding the workplace. The Cour de cassation had to give an opinion on the regime applicable to a dismissal decided following an employee's refusal to accept a modification of his workplace, in a decision of 17 April 2019.[4] It decided that when the application of article L. 1224-1 of the Labour Code, which provides the transfer of the employment contracts in the case of a business transfer, entails a modification of the employment contract other than the change in employer, an employee is entitled to oppose it. It adds that termination which would result from the refusal by an employee to accept a modification of their employment contract, proposed by the employer for a reason non-inherent in their person, constitutes an economic redundancy. In this case, the court of appeal noted that the modification of the employees' employment contracts came within the scope of the company's will to keep only one place of production in order to enable savings, that the stated objective was the sustainability of its internet activity and thus that the real ground for dismissal resulted from the reorganisation of the transferee company following the purchase of one of the transferor's business lines. It rightly concluded, according to the Cour de cassation, that the dismissal had the legal nature of an economic redundancy. Having been decided on personal grounds, it lacked real and serious cause.

Discrimination protection

Equal treatment

- Legislation

The law of 5 September 2018 for the freedom to choose one's professional future reinforced the obligations relating to equal payment between men and women for companies with at least 50 employees, by imposing on the employer an obligation of result. Since 1 January 2019, companies must, prior to any negotiation or, in the absence of any negotiation, any establishing of an action plan, create an index of equal payment between men and women. Afterwards, they must publish their results. A decree of 8 January 2019[5] clarifies the calculation methodology of the indicators which must appear in the index, the way it should be published and the conditions for fixing the financial penalty applicable when a company fails to reach the required result, and the result below of which corrective measures should be taken.

The equal payment indicators are to be assessed out of a total of 100 points, over a consecutive 12-month period (or multiyear, up to three years, at the employer's option in companies with 50 to 250 employees). Below 75 points, the decree considers that the employer fails to meet its obligations. Corrective measures shall then be taken subject to a financial penalty being applied of up to 1% of the payroll. The index is made up of four (companies with 50 to 250

employees) to five (companies with more than 250 employees) indicators: the difference in pay between men and women (up to 40 points); the difference in individual salary increase rates which do not result from promotion between men and women (up to 20 points); the difference in promotion rates between men and women (up to 15 points); the percentage of employees having benefitted from a pay increase in the year of their return from maternity leave if increases occurred during their maternity leave (up to 15 points); and the number of employees of the under-represented sex among the 10 best paid employees (up to 10 points).

The workforce head count used to calculate the indicators, assessed over the chosen reference period, does not include apprentices, holders of a professional training contract, employees supplied to a company by an external company, expatriate employees and employees absent during more than half of the reference period. Regarding pay elements, the following are excluded: severance pay and retirement benefits; bonuses relating to a specific subjection which is unrelated to the employee as a person; seniority bonuses; extra hours; additional hours; and payments in relation with incentives and profit sharing.

The results obtained shall be published yearly, at the latest on 1 March of the then current year, regarding the previous year, on the company's website when there is one, and if not, they shall be made available to the employees by any means.[6] The indicators, the level of the obtained results and, as the case may be, any contemplated corrective measures or measures already in place shall be made available to the social and economic committee (CSE) through the BDES. They shall come with any useful information in order to understand the communicated data.

Companies with at least 50 employees which obtain results that are too low have three years, starting from the publication of the company's result level, to make it right.[7] The annual negotiation on equality or the employer's action plan shall provide for adequate corrective measures and, if necessary, financial measures of pay catch-up raise.[8] On expiration of the three-year period, if the obtained results are still below the required level, the employer may incur a financial penalty of up to 1% of the payroll, to be decided by the Direccte of the company's registered office.[9]

As of 1 September 2019, all companies of more than 250 employees must calculate and publish their professional equality index. It results therefrom that only few companies have a close-to-100 result, that the obtained average score is 82, and that 17% of the companies are on "red alert" for obtaining less than 75. To help companies meet their obligations, 120 gender equality advisers have been appointed in the regions and departments (i.e., French territorial collectivities).

- Case law

The employment division of the Cour de cassation rendered a fundamental decision regarding differences in treatment made by a collective Labour agreement on 3 April 2019.[10] Admitting a general presumption of the justification of any differences in treatment between employees made by collective agreements, so that it is up to the person contesting them to demonstrate that these differences are unrelated to any consideration of a professional nature would be, in the areas where the law of the Union is applicable, contrary to the latter in that it would place on the employee alone the burden of proof regarding the infringement of the equality principle, and in that a collective agreement is not in itself likely to justify a difference in treatment. It results therefrom that having admitted that a collective agreement make, between employees a difference in treatment due only to the date of presence at a designated site, that the employees are placed in an exactly identical situation regarding the advantages of this agreement the purpose of which is to take into account the professional, economic and

family impact on the geographical mobility entailed by the transfer of the services to another site and to assist the employees in order to preserve their employment conditions and family life, the court of appeal rightly concluded that, being a difference in treatment based on the date of presence at a site, the latter shall not be presumed justified.

By this decision, the employment division of the Cour de cassation gives its opinion on the argument tending towards the recognition of a general presumption of the justification of differences in treatment made by way of a collective agreement. It results from established case law that collective agreements are subject to the principle of equal treatment so the Court ruled that the differences in treatment they institute between employees placed in an identical situation regarding the considered advantage shall be based on objective reasons whose reality and consistency shall be concretely controlled by the judge.[11] However, since they are made by way of collective Labour agreements, negotiated and signed by representative union organisations vested with the defence of the employees' rights and interests and whose authority results from the latter's direct participation through their vote, the Court had to admit that certain categories of differences in treatment are presumed justified so that it lies with anyone contesting them to demonstrate that they are unrelated to any consideration of a professional nature. Yet, the recognition of a general presumption of the justification of any differences in treatment between employees made by way of any type of collective agreements would be, in the areas where the law of the Union is applicable, contrary to the latter in that it would place on the employee alone the burden of proof regarding the infringement of the equality principle and in that it results from early established case law of the Court of Justice of the European Union[12] that a collective agreement is not in itself likely to justify a difference in treatment. Such a presumption would become, in these areas, deprived of any effect since all the rules of evidence peculiar to the law of the Union would become applicable. Consequently, the employment division dismissed such a recognition.

From then on, the following differences in treatment shall be presumed justified, so that it lies with anyone contesting them to demonstrate that they are unrelated to any consideration of a professional nature:

- between professional categories, made by way of any type of collective agreement;[13]
- between employees carrying out, within the same professional category, distinct duties, made by way of any type of collective agreement;[14]
- between employees belonging to the same company but to distinct establishments, made by way of an establishment-level agreement or by a company agreement;[15] and
- between employees belonging to the same cleaning company but assigned to distinct sites or establishments, made by way of collective agreement.[16]

In the presence of other differences in treatment established by the employee, it lies with the employer to justify the objective reasons, the reality and consistency of which shall be concretely controlled by the judge.

Discrimination

An employer shall be liable for the discriminatory acts committed by volunteers. This results from a decision rendered by the employment division of the Cour de cassation on 30 January 2019. An employee of the Stade poitevin tennis club association, hired pursuant to a job placement contract, was subject to gender-based insults and to the throwing of various detritus by several volunteers. She reported it to her employer and was then put on leave. She referred her case to the Labour court seeking compensation for moral and financial damage due to discrimination and violation, by the employer, of his safety obligation. The Cour de cassation was requested to rule on whether the employer, as part of his safety obligation, shall

be held liable for discriminatory acts committed by volunteers of the association. The answer was yes: "*an employer, who is bound by a safety obligation in relation to workers' health protection and safety, especially regarding discrimination, must be held accountable for wrongdoings committed by persons who have, in fact or in law, authority over employees.*" Vicarious liability requires a master and servant relationship,[17] which is not necessarily established with respect to volunteers. The referal by the Cour de cassation to the obligation of safety allows to get around the difficulty inherent to the vicarious liability regime.

Harassment

In a decision of 23 January 2019, the employment division of the Cour de cassation reached a quite harsh solution: psychological harassment is not enough to invalidate a mutually agreed termination.[18] Hence, even in the case of a harassment duly established at the time the termination agreement was signed, it lies with the employee to prove that his consent was lacking, without which the termination agreement cannot be annulled. The mutually agreed termination has been very successful since its confirmation in 2008.[19] It shall be valid only if each one of the parties expressed its free and informed consent, which can be thrown into doubt when the employee has signed a termination agreement in a context of duly established psychological harassment. On this point, the Cour de cassation has already considered that it was justified to annul the termination agreement signed by an employee facing a situation of psychological violence due to harassment.[20] But shall an annulment, in such a context, be systematic? For the court of appeal, any termination of an employment contract which occurred in breach of the protective provisions relating to psychological harassment being null,[21] an employee can obtain the annulment of a termination agreement signed in a context of harassment without having to demonstrate a lack of consent. The Cour de cassation does not share this opinion. It states "*that in the absence of a lack of consent, the existence of psychological harassment acts does not affect in itself the validity of the termination agreement*". If a termination agreement is signed in a context of psychological harassment, it is possible to request its annulment. However, to obtain it, the employee must prove that the harassment was indeed the cause of the lack of consent. Consequently, a recognised situation of psychological harassment does not automatically entail the nullity of a termination agreement.

Protection against dismissal

Compensation for a dismissal without real and serious cause

In two opinions of 17 July 2019, the Cour de cassation in a plenary session confirmed the Macron schedule, instituted in relation to compensation for dismissals without real and serious case, by dismissing the direct effect of article 24 of the European Social Charter, and by considering that it is compatible with article 10 of the ILO convention No. 158 and that is does not fall under the scope of article 6§1 of the ECHR.[22] We could think that the match between the pro-schedule and anti-schedule is over, and it is now no longer possible to contest the validity of the schedule in light of the European and international standards. It is, however, not the case since there are many trial judges seeking extensions by resisting the position of the Cour de cassation, especially by adopting decisions calling into question the conventionality of the schedule. Besides, the European Committee on Social Rights should shortly give its opinion as to the question of the compliance of article L. 1235-3 of the Labour Code fixing the minimum and maximum amounts with article 24 of the European Social Charter. The decisions it has adopted so far regarding similar schedules adopted elsewhere (for instance in Finland or in Italy) allow to confirm that the Cour de cassation, by its 17 July 2019 opinions, by no means blew the final whistle.

Acknowledgment

When an employee reproaches his employer with serious enough facts, he can acknowledge the termination of his employment contract at the employer's expense. If it is justified, the acknowledgment, which immediately terminates the employment contract, has the effects of a dismissal without real and serious cause. The employment division of the Cour de cassation had the opportunity to add, in an important decision, that an acknowledgment does not require prior formal notice.[23] Article 1224 of the Civil Code, in its drafting resulting from the order No. 2016-131 of 10 February 2016 provides that the rescission of a contract results either from the application of a termination clause, or, in case of sufficiently serious non-performance, from a notification from the creditor to the debtor or from a court decision. Article 1225 of the same code provides for the conditions of implementation of the termination clause. Pursuant to the provisions of article 1226 of the Civil Code, a creditor may, at his own risk, rescind the contract by way of notification. Save in cases of urgency, he shall give a formal prior notice to the defaulting debtor to carry out his undertaking within reasonable time. The formal notice shall expressly indicate that unless the debtor meets his obligation, the creditor shall be entitled to rescind the contract. Shall non-performance persist, the creditor shall notify the rescission of the contract and the reasons therefor to the debtor. The debtor may at any time refer the case to a judge in order to contest the rescission, the creditor shall in this case prove the seriousness of the non-performance. The termination methods of an employment contract, on the employer's initiative as on the employee's, are governed by specific rules and entail specific consequences, so that the provisions of article 1226 *et seq.* of the Civil Code are not applicable thereto, according to the Cour de cassation.

Worker consultation, trade union and industrial action

Establishment of the CSE

The order of 22 September 2017 which instituted the CSE provided for the progressive establishment of this new institution merging the previous bodies (DP, CE and CHSCT) in order to open up social dialogue. Year 2019 was the last year of survival of the former model, the establishment of the CSE having to be effective for all companies with at least 11 employees as from 1 January 2020.

With the new body, companies and elected representatives may reexamine social dialogue from every angle, invent new staff representation, taking into account their specific requirements and their geographical, operational or structural configurations. The legislator fully gives priority to collective bargaining. The CSE is in principle set up at the level of a distinct establishment, and the agreement setting up the CSE can itself provide for the definition of a distinct establishment, without it being based on the criterion of management autonomy. The agreement can equip the CSE with commissions, sometimes mandatory such as relating to health/safety within companies of 300 employees or more or classified as Seveso; it can also provide for local representatives to support the CSE, sometimes in charge of addressing the questions related to health, safety and working conditions and sometimes in charge of handling individual claims.

If they are not determined by a company agreement, the number and perimeter of the distinct establishments for the setting up of the social and economic committees are fixed by the employer's decision.[24] According to the legislator's will, the Cour de cassation intends to give collective bargaining its full noble reputation. It indeed specified that it is only when, after a loyal bargaining attempt, a collective agreement cannot be reached that an employer can fix by way of a unilateral decision the number and perimeter of these establishments.[25] One must thus first negotiate, in a loyal way, to try to set up the CSEs by agreement, before

an employer can decide to use the unilateral decision option. Only after having loyally, but vainly, trying to negotiate an agreement about the number and perimeter of the distinct establishments for the setting up of the CSEs can an employer fix them in a unilateral way. The employer's decision shall be supplemental and in no way an alternative.

Professional elections

In an important decision of 13 February 2019, the employment division of the Cour de cassation gave an opinion on the obligation to ensure parity with which professional organisations are burdened when establishing electoral lists.[26] First of all, the Court states as a reminder that the Charter of Fundamental Rights of the European Union forbids any gender-based discrimination and that the Convention for the Protection of Human Rights and Fundamental Freedoms forbids any gender discrimination in relation to working conditions. It then states as a reminder that the ILO Convention No. 111 concerning discrimination notably forbids any gender distinction, exclusion or preference which has the effect of destroying or altering equal opportunities or treatment in relation to employment or occupation. It states that consequently, the obligation made to union organisations to submit in professional elections lists that alternately comprise candidates of both sexes in proportion to the number of women and men in the concerned electoral college addresses the legitimate objective of ensuring an employee representation that reflects the reality of the electoral body and promoting effective gender equality. This obligation does not constitute a disproportionate infringement to the principle of freedom of association also recognised by the European and international texts, since the legislator has provided for, on the one hand, not some abstract parity, but a proportionality of the candidacies to the female and male employees present in the considered electoral college and, on the other hand, a sanction limited to the cancellation of the election of the supernumerary elected representatives of one or the other sex, with a possibility of partial elections if the cancellation leads to too great an under-representation within a college. On the contrary, the mechanism provides a necessary and balanced conciliation between freedom of association and the fundamental right to gender equality.

Other recent developments in the field of employment and labour law

After inputting data into the digital Labour Code throughout 2019, the latter has just been officially launched on 16 January 2020. It should bring free and reliable answers to employees and their representatives and employers. It is indeed a Code in the legal meaning of the word, but, due to its digital format, it is more than a paper code. A digital code exploits the full potential of artificial intelligence. The digital format thus provides access to the same texts than Légifrance's while facilitating searches and completing the answers by cross-references to the forms, to simulators and, more generally to any useful document such as models or additional documentation. Anyone can find there personalised answers and, as the case may be, could claim acting in good faith invoking information obtained on the digital Labour Code but which would be erroneous.

* * *

Endnotes

1. L. No. 2019-222, Official Journal 24 March.
2. L. No. 2019-486 relating to companies' growth and transformation of 22 May 2019, Official Journal 23 May.

3. DACS, Mr. Guillonneau and E. Serverin, Labour Court Cases from 2004 to 2018, Decrease in the claims, concentration of the disputes, increased role of the courts in their handling, 2019.
4. Cass. soc., 17 Apr. 2019, No. 17-17.880.
5. D. 8 Jan. 2019, No. 2019-15, Official Journal 9 Jan.
6. Article D. 1142-4 of the Labour Code.
7. Article L. 1142-10 and article D. 1142-8 of the Labour Code.
8. Article L. 1142-9 of the Labour Code.
9. Article D. 1142-9 *et seq.* of the Labour Code.
10. Cass. soc., 3 Apr. 2019, No. 17-11.970.
11. Cass. soc., 1 July 2009, No. 07-42.675.
12. CJUE, 8 Apr. 1976, Defrenne, Case 43-75 and 13 Sept. 2007, Del Cerro Alonso, Case C-307/05.
13. Cass. soc., 27 Jan. 2015, Nos 13-14.773, 13-14.908, 13-22.179, 13-25.437.
14. Cass. soc., 8 June 2016, No. 15-11.324.
15. Cass. soc., 3 Nov. 2016, No. 15-18.444 and Cass. soc., 4 Oct. 2017, No. 16-17.517.
16. Cass. soc., 30 May 2018, No. 17-12.925.
17. Article 1242 of the Civil Code.
18. Cass. soc., 23 Jan. 2019, No. 17-21.550.
19. Article L. 1237-11 *et seq.* of the Labour Code.
20. Cass. soc., 30 Jan. 2013, No. 11-22.332.
21. Article L. 1152-3 of the Labour Code.
22. Cass. opinion, 17 July 2019, Nos 15012 and 15013.
23. Cass. soc., 3 Apr. 2019, No. 19-70.001.
24. Article L. 2312-2 and L. 2312-4 of the Labour Code.
25. Cass. soc., 17 Apr. 2019, No. 18-22.948.
26. Cass. soc., 13 Feb. 2019, No. 18-17.042.

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