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Labor Inspectorate

On 8 November 2022, the Directorate-General for Labor presented to the employers' organisations and trade unions the 2021-early 2022 report on the action of the Labor Inspectorate services and the prospects for action for 2023. We must first note that interventions are on the rise overall. In 2021, the Labor Inspectorate services carried out 255,647 actions, mainly relating to the fight against illegal work, the prevention of falls from heights, and the mobilisation in the face of the health crisis. More than half of the interventions took place in companies with fewer than 50 employees, mainly in the construction, industry and trade sectors. These inspections gave rise to more than 150,000 letters of observations, nearly 5,000 reports, nearly 6,000 formal notices and more than 5,000 project or activity stoppages. These figures are up compared to 2020. Since 2014, the Labor Inspectorate can impose administrative sanctions (fines or administrative closures) to repress certain breaches in terms of the cross-border posting of workers, working hours, remuneration and health at work. The number of notified sanctions increased in 2021; they mainly concerned working hours, posting and conditions relating to health.

Balanced representation in management positions

A decree of 27 October 2022 details the information that companies must send electronically to the administration from 2023 in order to enable it to control any differences in the representation of women and men among senior executives and the members of governing bodies. By a law of 24 December 2021 aimed at accelerating economic and professional equality, known as the Rixain law, the legislator created an obligation of balanced representation between women and men among senior executives and the members of the governing bodies of large companies, precisely those which have, for the third consecutive financial year, more than 1,000 employees. This requirement is accompanied by an obligation of transparency, since the companies that are subject to it must publish any differences in representation on their website or, in the absence of a website, communicate them to their employees and send them to the social and economic committee. From March 2023, these differences will also have to be made public on the website of the Ministry of Labor. To this end, the decree specifies the information that companies must send to the administration for publication. It contains, in particular, the contact details of the contact person, the year of calculation of the differences, and the data allowing the differences to be assessed. From 1 March 2026, companies must achieve a target of 30% of women-men representation and, from 1 March 2029, a 40% target.

Equality index

The Ministry of Labor published, on 7 March 2022, the results of the index of professional

equality between women and men. We note that 61% of companies with more than 50 employees have declared their index, a stable figure compared to 2021. However, only 2% of companies obtain the maximum score of 100. Thus, 98% of companies still must make efforts to improve equality between women and men, however, 92% of companies, have a score equal to or greater than 75/100. The indicator on the return from maternity leave and the indicator on parity in the 10 best salaries have particularly improved this year.

Redundancies, business transfers and reorganisations

Dismissal for economic reasons

The definition of the economic reason was revised by Law No. 2016-1088 of 8 August 2016, known as the Labor law, which enshrined accounting indicators with regard to economic difficulties. For the first time, the employment division of the French Supreme Court (Cour de Cassation) delivers its reading of this new definition.[1] An employee occupying the position of product development assistant in a company with more than 300 employees is dismissed for economic reasons. Based on Article L. 1233-3, 1° a to d of the Labor Code, the employer reports economic difficulties and more specifically a drop in its turnover which, under the terms of the law, must be for four consecutive quarters for a company with 300 or more employees. In this case, the dismissal for economic reasons was notified to the employee on 5 July 2017. The employer invokes the decline in turnover over four consecutive quarters in 2016 compared to 2015. Yet, the turnover increased by 0.50% in the first quarter of 2017. The Court of Appeal ruled that the dismissal was based on a real and serious cause. The trial judges agree to have the countdown of the four quarters start when the dismissal procedure is triggered and consider that the increase in turnover at the beginning of 2017 is not sufficient to signify a tangible improvement in indicators. The Cour de cassation disagrees. The reasoning of the employment division is held in two stages. First of all, it states as a reminder that the judge must place himself at the date of the dismissal to assess the reason for it. Here, the dismissal is notified in July 2017, and it is necessary to place oneself at that time to assess the economic reason, i.e., in the second quarter of the year 2017. Then, the Cour de cassation holds that the duration of a significant drop in orders is assessed by comparing the level of orders or turnover during the period contemporary with the notification of the termination of the employment contract compared to that of the previous year of the same period. Thus, it moves the cursor and can note that the turnover has not decreased for four consecutive quarters on the date of the dismissal. The quarter preceding that of the dismissal had to be included in the scope of the comparison.

Discrimination protection

Statistics

The 2021 activity report of the Defender of Rights (the Defender of Rights (*Défenseur des droits*) is an independent administrative authority in France whose mission is to protect the rights and freedoms of individuals, to promote equality, and to fight against discrimination), made public in July 2022, states that of the 115,000 complaints received in 2021, 7,096 concerned the fight against discrimination, representing an increase of 22.2% compared to 2020. The increase is certainly linked to the creation of the antidiscrimination.fr reporting platform, set up in early 2021, but also to an aggravation of the fractures in our society. Among the discrimination complaints, 26.4% relate to employment in the private sector. Origin, race and ethnicity are the most important discriminating factor, followed by state of health and disability.

Access to evidence

In a framework decision, the Defender of Rights states as a reminder the importance of the role of the judge in the access to evidence, often in the sole hands of the employer.[2] She denounces the blockages that persist before the courts and endanger access to the rights of individuals. Although the rules of evidence are favourable to the plaintiff, there is in reality an inequality of arms between the parties to the trial, linked to the fact that only the employer is likely to have in his possession certain elements enabling the difference in treatment of which an employee may consider himself a victim (colleagues' pay slips, CVs sent by other candidates, etc.). In face of this imbalance, the Defender of Rights states as a reminder that the judge must allow access to the evidence in the possession of the employer by adopting an active role in discrimination litigation. He can do so by means of investigative measures or expert opinions that he can order at any time, for example. He can also focus on the time criterion, to observe whether a potentially discriminatory measure was taken shortly after the evolution of a situation (maternity, mandate received, state of health, etc.) or whether a delay in career progress can be observed for employees affected by a situation that could give rise to discrimination (once again, maternity, mandate, state of health, etc.). He can also order the handing over of documents held by the employer, which will notably allow him to constitute a comparison panel necessary for the identification, if necessary, of a discrimination. The Defender of Rights states as a reminder that the right to evidence covers the right to obtain evidence that an employee does not have, for the defence of his right to have the suffered discrimination recognised.

Protection against dismissal

Disciplinary procedure

Consultation of a body responsible, by virtue of a conventional provision or an internal rule, to give its opinion on a contemplated dismissal by an employer constitutes a substantive guarantee. Therefore, the dismissal pronounced without this organisation having been consulted, if it is not null, is devoid of real and serious cause. The employment division of the Cour de cassation clarified[3] and reminded[4] that this rule applies. The irregularity that occurred in the course of the disciplinary procedure provided for by a conventional provision or an internal rule is equated to the violation of a substantive guarantee. Therefore, it renders the dismissal without real and serious cause when it deprived the employee of their rights of defence or when it is likely to have influenced the final dismissal decision taken by the employer. In the case that gave rise to the judgment of 29 June, under the terms of Article 60 of the national collective agreement for financial market activities, an employee dismissed for serious or gross misconduct has the right to refer their case to the joint committee provided for in Articles 30 and 31 within 15 days following notification of the dismissal. This appeal is not suspensive. According to Article 30 of the agreement, the joint committee is competent to express opinions on the characterisation of the professional misconduct invoked in the event of the individual dismissal of an employee for serious or gross misconduct. The option of referring one's case to the joint committee within 15 days following the notification of dismissal does not constitute a substantive guarantee. However, the collective agreement does not require employers to inform employees of their right to refer their case to the joint committee. The Court of Appeal considered the dismissal without real and serious cause in this case, holding that the consultation of the committee constituted a substantive guarantee and reproaching the employer for not informing the employee of their possibility of referring their case to the committee. The

Cour de cassation ruled that the Court of Appeal violated the texts, since it could not be found either in violation of a substantive guarantee or an irregularity that occurred in the conduct of the disciplinary procedure provided for by the collective agreement. It remains to be seen whether the Cour de cassation will maintain such solutions under the influence of the texts as they have been drafted since the Macron Orders, providing that the sanction for a procedural irregularity, including non-compliance with a conventional or statutory procedure, is not dismissal without real and serious cause but compensation corresponding to a maximum of one month's salary.

Redeployment obligation

The French Administrative Supreme Court (Conseil d'Etat) has drawn the delicate boundary of jurisdiction between the two levels of jurisdiction concerning the obligation of redeployment in matters of dismissal for economic reasons.[5] It results from its decision that in matters of redeployment, the administration controls, under the watchful eye of the administrative judge, the redeployment plan that the employment safeguard scheme must include, while the judicial judge examines compliance, by the employer, with the individual obligation of redeployment with regard to each employee. There is therefore exclusive administrative control over the collective obligation to redeploy, and exclusive control by the judicial judge over the individual obligation to redeploy. This border is not only material, it is also chronological, since the implementation of individual redeployment occurs after the establishment of the employment safeguard scheme containing the redeployment measures. Therefore, the decision to approve the employment safeguard scheme does not exempt the employer from their individual obligation to redeploy. Compliance with the individual obligation to redeploy must be ensured with regard to each employee, even if a scheme has been established. Thus, in practice, if a redeployment position is available following the departure of an employee after the establishment of the employment safeguard scheme, this position obviously cannot be included in the redeployment plan, however, the employer will be required to offer it to employees threatened with dismissal. Failing this, the employer will have fulfilled their obligation relating to the employment safeguard scheme but disregarded the obligation relating to individual redeployment.

Macron scale

The employment division of the Cour de cassation issued several decisions,[6] on the same day, validating the so-called Macron scale relating to the amount of damages due, on the basis of Article L. 1235-3 of the Labor Code, in the event of dismissal without real and serious cause. It considers first of all that the European Social Charter, in this case its Article 24, has no direct effect. For this, it notes that the Contracting States intended to recognise principles and objectives, the implementation of which requires that they take additional implementing acts, such as legislation, collective agreements or any other appropriate means. Only norms that create rights individuals can rely on have direct effect. This is not the case of international standards that set principles and objectives for States to implement in the internal order subsequently. The Cour de cassation then considers that Article 10 of ILO Convention No. 158 has direct effect. It provides for the payment of adequate compensation or any other form of redress considered appropriate in the event of unjustified dismissal. The Cour de cassation considers that because of the margin of appreciation left to the states in the choice and the methods of the sanction and all the sanctions provided for by French law in the event of unjustified dismissal, the scale is compatible with Article 10 of ILO Convention No. 158. Does the case law saga relating to the scale end like this? One can doubt it, the European Committee on Social Rights has rendered a decision

denouncing the non-compliance of the scale with Article 24 of the European Social Charter. This decision is devoid of binding effect but has revived the resistance of certain courts of appeal.

Statutory employment protection rights

Health at work

The new terms of the DMST, the occupational health medical file enshrined in a law of 2 August 2021, known as the Health Law, have finally been clarified by decree.[7] The DMST is now established in a secure digital format and must be kept for 40 years. It can be constituted by the occupational doctor, but also by the doctor collaborator, the medical intern, the occupational health nurse from the SPST (prevention and occupational health service). The DSMT must include identity data, including the worker's social security number and medico-administrative data, the information making it possible to know the current or past risks to which the worker is or has been exposed, the information relating to the worker's state of health, the correspondence exchanged between health professionals during the visits and examinations necessary for the individual follow-up of his state of health, the information concerning the certificates, opinions and proposals of occupational health professionals, the mention of the information of the worker on his rights in terms of access to the data concerning him and his DMST, as well as, where applicable, the consent or opposition of the worker to medical practices or remote care and to the transmission of the information contained in his file. If the worker may object to the transmission of data and access to his DSMT, he may not, however, object to its constitution and to its supply.

In addition, details relating to the Health Law have been provided by a series of other decrees.[8] The law created the liaison meeting during a leave from work of at least 30 days following an illness or an accident, occupational or non-occupational. This is not a medical appointment, but an appointment to maintain a link between the employer and the employee during their leave from work. During this meeting, the employee can be informed about the actions to prevent job abandonment, the medical examination prior to their return to work, and the measures for adjusting their position or working time, from which they can benefit. This meeting is not mandatory, and the employee can decline it. When it is organised, at the initiative of the employer or the employee, the occupational health and prevention service must be informed at least eight days before the meeting. The new article R. 4624-33-1 of the Labor Code provides that the personnel of the prevention and occupational health services responsible for the prevention of occupational risks or the individual monitoring of the state of health can participate if necessary. In addition, individual monitoring of remote workers can now be done remotely. However, under Article R. 4624-41-2 of the Labor Code, if the professional in charge of the monitoring finds that a physical consultation is necessary, or that specific equipment not available to the worker is necessary, a new visit, in physical presence, must be rescheduled as soon as possible.

Whistleblowers

The Waserman law on the protection of whistleblowers[9] entered into force on 1 September 2022. The system is intended to protect, simplify and promote internal reporting in the company, as an extension of the Sapin 2 law of 9 December 2016.

A decree dated 3 October 2022[10] sets the new terms of the alert procedure. It should be stated as a reminder that companies with more than 50 employees are now required to set up an internal procedure for collecting and processing reports. No penalty is provided for this obligation; however, a heavy criminal penalty is provided for in the event of the

violation of the obligation of confidentiality of reports. The employer must therefore put in place a procedure guaranteeing confidentiality. In this regard, the decree specifies that the procedure may provide for a method of collecting alerts, either orally or in writing, or both. If it is an oral report, it must guarantee a meeting in person or by videoconference with the employee, organised within 20 days of the request made by the latter. The employer must, within seven days of the report, whether oral or written, acknowledge receipt thereof and provide feedback within three months, said feedback indicating the measures contemplated or taken to assess the accuracy of the allegations and, as the case may be, the measures contemplated or taken to remedy the subject of the report. The procedure should also provide for a method for archiving reports and following up on anonymous reports.

In addition, the Cour de cassation issued three important decisions during 2022 specifying the use of internal investigations, which are essential to verify the veracity of the reported facts. First of all, the survey and its results are admissible even if the employer has not involved staff representatives when this is not necessary, and even if the employer has not heard all the witness employees since they can choose to interview all of them or none.[11] The Cour de cassation added a few days later that the internal investigations are not subject to any formalism, and with regard to acts of harassment, they can be reported by any means, regardless of whether the employer has selected employees to interview.[12] Finally, the Cour de cassation specifies that the internal investigation cannot replace the disciplinary procedure. The employer cannot draw hasty conclusions from the investigation without having completed the disciplinary procedure required by the Labor Code with regard to employees. This procedure specifically enables employees to have their rights of defence respected.[13] The freedom of evidence in labour law matters and the requirements of impartiality justify all of these solutions and the balance they establish.

Worker consultation, trade union and industrial action

Professional elections

- Electorate

The Law No. 2022-1598 of 21 December 2022 on emergency measures relating to the functioning of the labour market with a view to full employment modifies the rules relating to the electorate. From now on, all employees are entitled to participate in the electoral college, including those who represent the employer. The case law solution stating that employees who have a specific written delegation of authority allowing them to be equated with the head of the company, or who effectively represent the employer before the representative institutions, are excluded from the electorate is clearly condemned.[14] This case law also applied to eligibility, but it was challenged on its electorate-related part and then condemned by the Constitutional Council as disproportionately undermining the principle of worker participation.[15] Taking note of the constitutional decision, the legislator redrafted Article L. 2314-18 of the Labor Code: "*all employees aged sixteen or over, who have worked for at least three months in the company and who have not been subject to any prohibition, forfeiture or incapacity relating to their civic rights*". Senior executives, executives who represent the employer before staff representative institutions, but also employees who have received a delegation of authority allowing them to be equated with the head of the company are now invited to participate in the vote at the next professional elections. At the same time and conversely, the reform enshrines, in Article L. 2314-19 of the Labor Code, the case law on eligibility: employees who have a delegation of authority allowing them to be equated with the head of the company as well as the employees who

effectively represent the employer before the social and economic committee are excluded from eligibility.

- Vote

According to Article L. 2232-12 of the Labor Code and the general principles of electoral law, during the consultation of the employees called upon to decide on the validation of a non-majority company agreement, the employees have the ability to cast a blank or invalid vote, whether the vote takes place physically or electronically. Since this option is open to all voters in application of their fundamental freedom to vote, it matters little that it was not provided for in the pre-electoral protocol. As in political democracy, the blank vote or the invalid vote is likely to express an opinion in the context of social democracy. The white vote consists of depositing an empty envelope or one containing a blank ballot. The invalid vote concerns torn, annotated, multiple ballots, etc. Blank and invalid votes are not counted as votes for the purpose of determining the total number of votes cast. On the other hand, they must be counted as such and nothing can prohibit them. The Cour de cassation has just stated this as a reminder.[16] In this case, a vote is organised electronically for the purpose of validating a non-majority collective agreement. Of the 667 votes cast, two are invalid or blank. The cancellation of the vote is requested on the grounds that neither the pre-election agreement nor the information note sent to the employees provided for the possibility of an invalid or blank vote, which hindered the recognition of the two blank or invalid votes. The possibility of casting blank or invalid votes not being provided for, it was inadvertently that the two employees cast blank or invalid votes, and not by a deliberate choice, which distorted the sincerity of the consultation. The Cour de cassation disagrees and responds in several stages. It states as a reminder that "*according to Article L. 2232-12 of the Labor Code, the consultation of employees called upon to decide on the validation of a non-majority company agreement, which may be organized electronically, takes place in compliance with the general principles of electoral law and according to the procedures provided for in a specific agreement concluded between the employer and one or more representative trade union organizations having received more than 30% of the votes cast in favor of representative organizations in the first round of the last elections for the social and economic committee's delegates. The agreement is valid if it is approved by the employees by a majority of the votes cast*". The Cour de cassation continues by indicating that "*it follows from this text and from the general principles of electoral law that employees have the option of casting a blank or invalid vote, whether the ballot takes place by physical vote or by electronic means*". It then agrees with the court's decision to have "*rightly held that it matters little that the pre-electoral agreement did not provide for the possibility of a blank and invalid vote, this option, which is not prohibited by any text, being on the contrary open to all voters in application of their fundamental freedom to vote*". Thus, employees can decide to make their voice heard by slipping an invalid or blank vote into the ballot box, whether the ballot takes place by physical vote or by electronic means. The fact that the pre-electoral agreement did not provide for such a possibility is irrelevant, since it results from the fundamental freedom to vote.

Consultation of the CSE

- Articulation of consultations

Under the terms of Article L. 2316-20 of the Labor Code, the social and economic committee of the establishment has the same attributions as the social and economic committee of the company, within the limits of the powers entrusted to the head of this establishment. It is consulted on the measures to adapt the decisions taken at the company level specific to

the establishment and which fall within the competence of the head of this establishment. Unfortunately, the text is imprecise enough to cast doubt on the articulation of certain consultations. The case law of the Cour de cassation sheds some light. Thus, for example, it recently considered that the social and economic committee of the establishment is informed and consulted on any adaptation measure, falling within the competence of the head of the establishment and specific to this establishment, regarding major adjustments modifying the conditions of health and safety or the working conditions decided at the company level, when this measure is not common to several establishments.[17] The particularities of the establishment and the criterion of whether or not there is room for manoeuvre in the exercise of the management power that the head of the establishment would have with regard to the methods of implementation, in his establishment, of the measures decided at the company level are therefore two essential elements for assessing the sharing of advisory powers.

- Consultation on unfitness

This seems to be a common sense solution, and yet it did not prevail until then with all the judges: when the opinion of the occupational doctor mentions that the employee's state of health is an obstacle to any redeployment in a job, the employer, who is no longer required to seek redeployment, does not have to consult the staff representatives.[18] The solution thus closes the debate, puts an end to the old case law of the Cour de cassation in force under the former texts (before the reforms of 2016 and 2017), and should put an end to the discrepancies observed between the decisions of the courts of appeal. It applies both to unfitness of non-occupational origin (Article L. 1226-2-1 of the Labor Code) and to unfitness of occupational origin (Article L. 1226-12 of the Labor Code). In practice, if the occupational doctor has expressly mentioned in his opinion that any keeping of the employee in employment would be seriously detrimental to his health or that the employee's state of health is an obstacle to any redeployment in employment, the employer is not required to seek redeployment and, therefore, he is not obliged to consult the social and economic committee.

Trade union action

For the first time, the Cour de cassation had the opportunity to say that a trade union can request the suspension of the internal regulations in summary proceedings due to a lack of consultation of the staff representative institutions.[19] In this case, a company initiates a procedure to modify its internal regulations. Pursuant to Article L. 1321-4 of the Labor Code, in its version applicable at the time of the facts, the modification of the internal regulations requires the opinion of the works council or, failing that, of the staff representatives as well as, for matters within its competence, the health, safety and working conditions committee. Since the Macron Orders of 2017, it is the social and economic committee that must be consulted. Even though the staff representative institutions do not consider it useful to bring an action, a trade union does so according to the fixed-day procedure and asks the court to annul the internal regulations, due to the absence of consultation of the institutions. The court, then the Court of Appeal, declared the union's action inadmissible, for lack of interest in acting. The employment division of the Cour de cassation disagrees. It decides that a union may request interim measures of remediation intended to put an end to a patently unlawful infringement affecting the collective interest. The union is thus recognised to have a right of action for the defence of the company's employees' collective interest, taking into account the infringement which is caused to it because of the failure by the employer to carry out a substantial formality, the consultation of the staff representatives. On the other hand, the Cour de cassation, in its explanatory note, states as a reminder that a trade union

is not admissible to request from the court, by means of an action on the merits of the case, the nullity of all of the internal rules or their unenforceability against all employees of the company for this lack of consultation. This is probably because the consultation on the internal rules is not a condition of validity of the latter, but only a condition of their entry into force. Only a provisional measure, which can only result from a decision that does not have the force of *res judicata* on the merits, is possible.

Other recent developments in the field of employment and labour law

Working time

Overturning its case law under the impetus of European Union law,[20] the Cour de cassation ruled that the travel time taken by an itinerant employee between his home and the sites of the first and last customers can be considered as effective working time when the conditions are met and therefore give rise to the right to payment for overtime.[21] The case law position was, until then, exactly the opposite, on the basis of Article L. 3121-4 of the Labor Code.[22] However, in its 2019 annual report, the Cour de cassation warned about the non-conformity of the text with European law, stating as a reminder that it had already called for its redrafting in the 2015 report: "*in order to avoid infringement proceedings against France and liability actions against the State due to a failure to implement Directive 2003/88/EC of 4 November 2003, and in view of the case law of the Court of Justice of the European Union on the horizontal direct effect of the Charter of Fundamental Rights (...), it is proposed to modify this text of internal law*". Because the legislator failed to hear this call, the Cour de cassation takes the lead and modifies its case law, relying on the case law of the Court of Justice of the European Union. Without adding anything to or modifying anything in the text, which it obviously cannot do, the Cour de cassation uses the notion of autonomy and assesses the employee's degree of dependence on the employer in order to determine whether the travel time falls within the scope of Article L. 3121-4 of the Labor Code, laying down the principle of excluding travel time from actual working time, or falls within the scope of Article L. 3121-1 of the same Code, which establishes the definition of effective working time. As long as the travel time of an itinerant employee between his home and the sites of the first and last customers meets the definition of effective working time, as set by Article L. 3121-1 of the Labor Code, they do not fall within the scope of Article L. 3121-4 of the Labor Code.

Unemployment

Law No. 2022-1598 of 21 December 2022 on emergency measures relating to the functioning of the labour market with a view to full employment authorises the Government to modulate the conditions of compensation under unemployment insurance. Since 1 February 2023, jobseekers registered with Pôle emploi in mainland France have their maximum duration of compensation reduced by 25%. This measure, justified by a favourable situation due to an unemployment rate established at 7.3%, must apply until the end of the year, unless the labour market were to deteriorate. However, the overseas departments are not concerned due to a particular economic context, nor certain specific statuses: deep-sea fishermen; and temporary entertainment workers, dockers and expatriates. Employees dismissed for economic reasons benefitting from a professional securing contract are not affected either. Beyond the question of the modulation of the duration of the compensation, the Government wishes to reform the conditions of previous activity for the opening or reloading of rights. Employers' organisations and trade unions will soon be instructed to examine the matter.

Resignation

Law No. 2022-1598 of 21 December 2022 on emergency measures relating to the

functioning of the labour market with a view to full employment creates Article L. 1237-1-1 of the Labor Code, which establishes a presumption of resignation for the employee who voluntarily abandons his position and does not return to work after having been given formal notice to justify his absence and return to his position, by registered letter or letter delivered in person with receipt, within the time limit set by the employer. The employee who disputes the termination of his employment contract may refer the case to the labour court, the case being brought directly before the ruling panel which has a one-month period to rule on the nature of the termination and its associated consequences.

Alternative dispute resolution method

Is the agreement instituting a mandatory preliminary mediation binding on the trial judge if the parties invoke it and must it therefore lead to the inadmissibility of a well-founded request without the mediation procedure having been implemented? This is a fundamental question on the articulation of alternative dispute resolution methods, in this case mediation, and the public order jurisdiction of the labour court to settle any dispute between an employer and an employee. The employment division of the Cour de cassation was instructed to give an opinion on this question. It states as a reminder that under the terms of Article L. 1411-1 of the Labor Code, the labour court settles by way of conciliation any disputes that may arise under any employment contract subject to the provisions of this code between employers, or their representatives, and the employees they employ. It states as a reminder that it adjudicates disputes when conciliation has not been successful. It follows, for the Cour de cassation, that because of the existence in employment law matters of a preliminary and mandatory conciliation procedure, a clause of the employment contract which institutes a procedure of preliminary mediation in the event of a dispute occurring on the occasion of this contract does not prevent the parties from directly referring their case to the labour court.[23]

Employment contract/collective agreement articulation

There is a well-known rule: if a stipulation of the employment contract is more favourable than a conventional provision, it shall prevail. This results from Article L. 2254-1 of the Labor Code which provides that "*when an employer is bound by the clauses of a convention or an agreement, these clauses apply to the employment contracts concluded with him, except for more favorable stipulations*". The entire content of the articulation between the employment contract and the labour agreement is contained in this text. The conventional norm has an automatic, imperative and immediate effect. However, the employment contract may include more favourable clauses. In this case, the contractual norm hinders the application of the conventional norm, which is being put on hold. Any possibility of combination is excluded: the contractual stipulation prevails; or it is the only one applicable. The condition for the contractual norm to prevail is clear: the contractual standard must be the most favourable. Consequently, in the presence of such competing provisions, it is necessary to compare the advantages resulting from the provisions in question and the comparison is made between provisions having the same object or the same cause. The Cour de cassation has just stated all this as a reminder and affirmed that "*in the event of competition between the contractual stipulations and the conventional provisions, the advantages having the same object or the same cause cannot, unless otherwise stipulated, be combined, the more favorable among them can alone be granted*".[24] In this case, an employee is claiming the combination of a production bonus of a contractual nature and an attendance bonus established by collective agreement. The employer is opposed to it, considering that they have the same object and the same cause: to encourage and reward the effective presence of the employee at their position. The Court of Appeal disagrees. It notes that the production bonus is a fixed daily bonus based on the presence of the employee

at their position, that it concerns all employees with more than one year's seniority and that its amount depends on the level and grade as well as on the annual bonus, which may vary according to the value of the employee to be assessed by the operation manager according to certain criteria. It considers that it does not have the same purpose as the attendance bonus, based on the presence of the employee at their position. It is clear here that the Court of Appeal is keen to point out that the attendance bonus is based on the mere presence of the employee at their post. It therefore distinguishes bonuses with regard to their conditions of granting, to conclude that they do not have the same purpose. Unfortunately, there is, here, confusion between the purpose of a bonus and the condition for granting this bonus which could not escape censorship from the Cour de cassation. The latter therefore criticises the Court of Appeal, very logically, for having accepted insufficient grounds to characterise that the production and attendance bonuses do not have the same purpose. Both the production bonus and the attendance bonus are intended to enhance the employee's presence in their position. It was pointless to look further to find an object similarity, and wrong to rely on the criteria for granting each of the bonuses to rule on the question of the similarity or, on the contrary, the difference in their object. However, the criteria for granting each bonus will be closely analysed to identify and retain the most favourable bonus. Finally, it should be noted that the principle of non-combination can be set aside. Indeed, the Cour de cassation makes sure to affirm that benefits having the same object or the same cause cannot be combined "*unless otherwise stipulated*". Undoubtedly, combination may be exceptionally possible between advantages having the same object or the same cause, by virtue of an express clause providing for it.

Challenging a clause of a collective agreement

By three decisions of 2 March 2022,[25] the employment division of the Cour de cassation draws the contours of the exception of illegality of a clause of a collective agreement. First, it affirms that a works council can invoke the exception of illegality of a collective agreement when it is a question for it of defending a specific right resulting from the prerogatives recognised by law and which is violated by the clause. Next, the Cour de cassation recognises that a non-signatory union can raise the illegality of a collective agreement by way of exception if the agreement deprives a union of its own rights resulting from the union prerogatives recognised by law. Finally, it affirms that the recognition of the illegality of a clause of a collective convention or agreement makes it unenforceable against the person who raised the exception, it does not render it null and void. Thus, the Cour de cassation recognises that the social and economic committee and the unions that have not signed a collective agreement have the right to challenge, by way of exception, the legality of its clauses. By rendering the illegal stipulations of a collective agreement unenforceable, and because it may be raised without delay, the exception of illegality appears as a formidable means of contesting an agreement. However, there remained an unaddressed question, that of knowing whether the signatory of a collective agreement may also raise the exception of illegality. The Cour de cassation answered in the negative in a decision of 19 October 2022,[26] on the grounds that the signatory unions are entitled to bring an action for nullity.

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Endnotes

1. Cass. soc., 1 June 2022, No. 20-19.957.
2. DDD, framework decision 2022-139, 31 August 2022.

3. Cass. Soc., 6 Apr. 2022, No. 19-25.244 and No. 19-25.994.
4. Cass. Soc., 29 June 2022, No. 20-19.711.
5. CE, 20 June 2022, No. 437767.
6. Cass. Soc., 11 May 2022, No. 21-15.490 and No. 21-15.247.
7. D. No. 2022-1434 of 15 Nov. 2022, Official Journal 16 Nov.
8. D. No. 2022-679, No. 2022-681 and No. 2002-696 of 26 Apr. 2022, Official Journal 27 Apr.
9. L. No. 2022-401 of 21 March 2022 law to improve the protection of whistleblowers, Official Journal 22 March.
10. D. No. 2022-1284, JO 4 Oct.
11. Cass. soc., 1 June 2022, No. 20-22.058.
12. Cass. soc., 29 June 2022, No. 21-11.437.
13. Cass. soc., 6 July 2022, No. 21-13.631.
14. Cass. soc., 31 March 2001, No. 19-25.233.
15. Constitutional Council QPC (preliminary question of constitutionality), 19 Nov. 2021, No. 2021-947.
16. Cass. soc., 15 June 2022, No. 21-60.107.
17. Cass. soc., 29 June 2022, No. 21-11.935.
18. Cass. soc., 8 June 2022, No. 20-22.500.
19. Cass. soc., 21 Sept. 2022, No. 21-10.718.
20. Dir. 2003/88/CE of 4 November 2003, concerning certain aspects of working time adjustment; CJEU 10 sept. 2015, case C-266/14, *Tyco*; CJEU 9 March 2021, case C-344/19, *Radiotelevizija Slovenija*.
21. Cass. soc., 23 Nov. 2022, No. 20-21.924.
22. Cass. soc., 14 Nov. 2012, No. 11-18.571; Cass. soc., 24 Sept. 2014, No. 12-29.209; Cass. soc., 30 May 2018, No. 16-20.634.
23. Cass. soc., 14 June 2022, No. 22-70.004, opinion.
24. Cass. soc., 11 May 2022, No. 21-11.240.
25. Cass. soc., 2 March 2022, No. 20-16.002, No. 20-18.442 and No. 20-20.077.
26. Cass. Soc., 19 Oct. 2022, No. 21-15.270.

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