
# Employment & Labour Law 2025

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## General employment and labour market and litigation trends

### Parity and professional elections

The presence of women in professional elections is strengthening, according to a study conducted by the Dares,[1] the results of which were made public on October 24, 2024. The number of female candidates, as well as those elected in professional elections, has increased between the electoral cycles of 2013–2016 and 2017–2020. The proportion of women among elected representatives has risen to 45.3% compared to 41.2% at the end of the previous cycle. The increase in female representation among candidates and elected representatives is observed across all major private sector activities, but it is in the industrial sector that the increase in female representation among elected representatives is most significant. This trend is also observed in trade unions.

### Mental health and working conditions

A study conducted by the Dares and published on August 13, 2024, demonstrates that work intensity has a harmful effect on workers' mental health. In this report, researchers analyse the interactions between mental health and work organisations, focusing particularly on the impact of technological, organisational, and managerial innovations on employee well-being. According to the researchers, "work intensity has a harmful effect on workers' mental health (measured by the WHO-5 score), unlike work autonomy, which has a beneficial effect". Thus, workers facing both high work demands and low decision-making power have poorer mental health than workers with little work intensity and significant autonomy. Based on Karasek's (1979) model, the authors state that the effects of work intensity and autonomy on health depend on how intensity and autonomy are combined. Women are more likely than men to have poor mental health. In 2023, nearly 50% of female employees reported having poor mental health. According to a study published by Malakoff Humanis on September 21, 2023, this figure is 12 percentage points higher than that observed among male employees (who may also be less likely to admit it). This gap is attributed to differences in exposure to work intensity and, to a lesser extent, autonomy in task management. Social status also plays a role: individuals with education beyond high school are at a lower risk of depression, and managers or intermediate professions are less likely to report poor mental health compared to manual workers. However, age does not appear to significantly influence the occurrence of depressive episodes. The authors of the report are categorical: employees with automatable jobs are more prone to anxiety or depression than

others, partly, it seems, because of a greater fear of job loss and future disruptions in the professional field (and to a lesser extent, fear of greater work intensity). The study notes: "This is partly explained by the fact that they more frequently experience a feeling of job insecurity and fear having to change qualifications or profession in the next three years. They are also more exposed to intense work." Finally, teleworking is also likely to negatively impact employees' health. The researchers mention, in particular, sleep deterioration and energy loss. According to the Tracov1 survey (which described the impact of the health crisis on the working conditions of employed workers and the experiences of unemployed individuals), forced teleworking increases the likelihood of reporting poor mental health, whereas voluntary teleworking does not appear to affect employees' psychological well-being.

### Religious expression in the workplace

The 2024 Barometer on Religious Expression in the Workplace, developed under the aegis of the Institut Montaigne, released its latest findings on November 22, 2024.

They reveal that requests for leave and working hours adjustments for religious practice remain frequent in 2024, as noted by 27% of respondents, a stable figure compared to the previous year. While all religions are concerned, Islam ranks first in reported incidents, followed by Catholicism, Evangelical Christianity, and Judaism. In 23% of the recorded incidents, the intensity of religious manifestations is deemed high, making these situations particularly challenging to manage. This figure has remained stable after a significant increase since 2018 (when it was 19%).

Despite companies increasingly taking religious considerations into account, tensions remain. Thus, 15% of the situations involve negative behaviour towards women, such as refusing to work under their supervision, or treat them as equals to male colleagues. This percentage is on the rise. Situations of stigmatisation and discrimination are also increasing. They are observed by 30% of managerial staff. They particularly affect Muslim employees in the hiring process, while Jewish employees are experiencing growing stigmatisation in professional relationships. More than a quarter of practising employees consider leaving their company to escape stigmatising remarks or discrimination.

As religious manifestations increase within the workplace, companies must adapt. The strategies are varied: implementing charters; raising team awareness; and training managers, etc., but these initiatives remain insufficient. The Barometer urges companies to define clear inclusion policies and implement concrete measures that translate the principles into management processes and managerial decisions in order to enable both practising employees and managers to better position themselves and act with confidence and efficiency. Nonetheless, a majority of respondents (77%) believe that the principle of secularism should be applied in the private sector, just as it is in the public sector.

## Business protections and restrictive covenants

### Non-compete clause

In a decision dated January 24, 2024 (No. 22-20.926), the Employment Division of the French Supreme Court (*Cour de Cassation*) stated that "*the violation of the non-compete clause prevents the employee from claiming the benefit of the financial compensation associated with this clause, even after the cessation of its violation*". In this case, an employee hired as a technical sales executive on March 10, 2006, resigned on January 11, 2018. While the employment contract provided for a non-compete clause for a period of 24 months, he joined a competitor on February 5, 2018, for a period of six months. The former employer then sued the employee to enforce the non-compete clause and claim the payment of various sums in application of the clause. The employee requested the financial compensation for the non-compete clause for the period during which he had complied with it. The Court of Appeal dismissed the employer's claims and ordered the payment of the remaining non-compete compensation along with the related paid leave compensation. It

held that since the employee had violated the non-compete obligation only for six months, he was entitled to financial compensation for the remaining 18 months during which the non-compete obligation had been complied with. The former employer thus appealed to the *Cour de Cassation*, arguing that the Court of Appeal had violated Article 1104 of the Civil Code by allowing the employee to receive compensation for partial compliance with his non-compete obligation, whereas the non-compete clause specifically provided that "*any violation of the prohibition on competition would release the employer from the obligation to pay compensation*", so that the violation of the obligation caused the employee to permanently lose his right to financial compensation. He also reproached the Court of Appeal for having violated Article 1104 of the Civil Code by refusing the reimbursement to the employer of the non-compete compensation paid to the employee under his non-compete obligation, whereas the contract provided that "*any violation of the prohibition on competition would make the employee liable to [the employer] for the reimbursement of what he could have received in this respect*". The *Cour de Cassation* ruled on the basis of Articles L. 1121-1 of the Labor Code and former Article 1147 of the Civil Code, establishing on these grounds a general principle stating that "*the violation of a non-compete clause prevents the employee from claiming the financial compensation associated with this clause, even after ceasing the violation*".

A few months later, the court extended this solution. A technical sales representative, whose employment contract included a non-compete clause, resigned from his position after working for four years at a building air treatment and ventilation services company. Considering that the former employee had failed to comply with his non-compete obligation after the termination of his employment contract, the employer brought the case before the labour court in order to obtain recognition of this violation, reimbursement of the non-compete compensation, and damages for violation of the non-compete obligation. In the first instance, the labour court ordered the employee to reimburse the financial compensation and pay the contractual penalty provided for under the penalty clause of the contract. However, on appeal, the judges found that the non-compete clause excessively restricted the employee's freedom to work and declared it null and void and the employer's claim for damages for violation of the non-compete clause was dismissed. The employer then appealed to the *Cour de Cassation*, whose judges upheld the nullity of the non-compete clause. However, they disagreed with the judges of the Court of Appeal for dismissing the employer's request for compensation for the violation of the clause by the employee, "*when a non-compete clause is declared null, the employer who has paid financial compensation may request reimbursement if they can prove that the former employee violated the clause before its annulment*" (Cass. Soc., May 22, 2024, No. 22-17.036). This decision contains two important takeaways: reduction of an unlawful non-compete clause may only be requested by the employee; and the latter may not, despite the nullity, keep the financial compensation that he received for an obligation that he has not complied with.

After an unsuccessful attempt at conciliation, an employee who had resigned in February 2015 brought his case before the labour court in February 2018, seeking compensation for the damage caused by the alleged nullity of his non-compete clause. In a decision (Cass. Soc., October 2, 2024, No. 23-12.844), the *Cour de Cassation* provided several clarifications regarding the limitation periods applicable to disputes relating to non-compete clauses. The claim for damages for enforcing an unlawful non-compete clause upon an employee, which pertains to the performance of the employment contract, is subject to a two-year limitation period from the enforcement of the clause. Therefore, the employee must take legal action within two years of the beginning of the enforcement of the clause to seek damages for the harm caused by its illegality. The claim for payment of the financial compensation for the unpaid non-compete clause, on the other hand, is considered a salary compensation and is subject to a three-year limitation period from the due date of each monthly payment. The employee may thus claim the sums owed as financial compensation for an enforced but unpaid non-compete clause within three years of each monthly due date. The claim for damages for non-compliance with the non-compete clause and infringement of freedom of work is also compensatory in nature and is therefore subject to a two-year limitation period, starting from the date the employee is no longer bound by the non-compete obligation. An employee who

has complied with the clause but has not received the agreed compensation in return may claim damages in this respect within two years from the date the non-compete clause ceases to apply.

## Discrimination and retaliation protection

### Principle of equal treatment

By unilateral decision, a company established an exceptional purchasing power bonus for employees who had actually worked on-site during the period from March 12, the start of the public health emergency, to May 3, 2020, inclusive. Employees who had been teleworking during the health crisis contested the prorated calculation applied to the exceptional bonus. Considering they had not received the full amount of the bonus and invoking the principle of equal treatment, the teleworking employees brought a claim before the labour court, seeking payment of sums due as part of the exceptional purchasing power bonus. Their claims were rejected by the trial judges, leading the employees to file an appeal with the *Cour de Cassation*. They criticised in particular the contested judgments for considering that the reduction in the amount of the purchasing power bonus paid to teleworking employees did not infringe the principle of equal treatment. They contended that employees on sick leave, including those on leave for childcare and vulnerable people and on paid leave, having received the full bonus, were placed in an identical situation with regard to the disputed bonus. The *Cour de Cassation* dismissed the appeal (Cass. Soc., December 4, 2024, No. 23-13.829). It ruled that "*the employer's unilateral decision to grant an exceptional purchasing power bonus under Article 7 of Law No. 2019-1446 of December 24, 2019, to employees whose duties had to be performed on-site during the period from March 12 to May 3, 2020, but who were on paid leave, on sick leave, on leave for childcare, or because of their status as vulnerable individuals to the SARS-CoV-2 virus during the pandemic, while employees teleworking during this period received the bonus only in proportion to the number of days worked on-site, does not violate the principle of equal treatment set out in Article L. 1222-9 III, paragraph 1, of the Labor Code, in light of the legal requirements arising from Articles L. 1132-1 and L. 3141-24 of the same code*". Thus, the court confirmed that the employer may adjust the amount of the bonus according to working conditions related to the COVID-19 pandemic, pursuant to Article 7 of Law No. 2019-1446 of December 24, 2019, on social security financing for 2020.

### Moral harassment

The limitation period for dismissal based on moral harassment is not one year, as is generally the case, but five years. This applies both to the dismissal of an employee who was a victim of harassment and to that of an employee who reported the facts (Cass. soc., Oct. 9, 2024, No. 23-11.360 and Cass. soc., Sept. 4, 2024, No. 22-22.860). This predictable solution ensures consistency between the regimes governing discrimination and harassment. The *Cour de Cassation* noted that "*the employee's claim for the annulment of the dismissal was based on the report of alleged moral harassment*" to conclude that "*it was subject to the five-year limitation period provided for in Article 2224 of the Civil Code*". There is no doubt that the same solution will be the same with regard to sexual harassment, as paragraph 3 of Article L. 1471-1 of the Labor Code also exempts from the 12-month limitation period "*claims brought under (...) Article L. 1153-1 of the Labor Code*", which prohibits sexual harassment but without providing for the nullity of the termination decided for this reason, or for having reported such harassment.

## Protection against dismissal

### Dismissal and the personal/professional life boundary

The year 2024 was rich in case law on this subject.

An employee benefits from immunity regarding actions taken in their personal life: an event stemming from an employee's personal life may not, in principle, serve as grounds for dismissal. However, this

immunity could not be absolute, as certain behaviours can affect the company's operations or reputation to such an extent that continuing the employment relationship becomes impossible without causing harm to the company. Thus, an event linked to the employee's personal life cannot justify a dismissal unless it objectively disrupts the operation of the company, and, in such a case, the dismissal is based on a non-disciplinary personal reason. This solution perfectly combines protection of the employee's personal life and protection of the company's interests. Events taken in an employee's personal life benefit from disciplinary immunity because the employee's behaviour occurring in his personal life cannot be considered as misconduct, at least not in the sense of professional or disciplinary misconduct. Yet, the consequences of an employee's behaviour may sometimes justify dismissal, which, in these cases, would not be disciplinary. It is the company's interest that legitimises the termination and it is the negative consequence of the event on the company, not the event itself, that justifies the dismissal and serves as its rationale. After some confusing decisions unfortunately blurring disruption and misconduct, the landmark decision issued by the Mixed Division of the *Cour de Cassation* in 2007 reaffirmed the following distinction: the exercise of disciplinary power is excluded when the events are taken from personal life. A disciplinary sanction can only be considered if the employee has committed disciplinary misconduct, meaning an objective act attributable to the employee and constituting a violation of the obligations imposed on them within the scope of their work… But, precisely, in this regard, a first breach in the disciplinary immunity of the employee's "personal behaviour" would quickly be opened: a disciplinary dismissal can be decided if an act stemming from the employee's personal life constitutes a breach of an obligation arising from the employment contract (Cass. soc., May 3, 2011, No. 09-67.464). The end of disciplinary immunity for acts arising from an employee's personal life… Should this be welcomed? Yes, if we accept that certain behaviours, although occurring in a private or personal context, can be considered professional and disciplinary misconduct.

An illustration can be given by referring to case law on "intimate relationships" between employees of the same company. Let us take a moment to examine the most recent decision on the matter (Cass. soc., May 29, 2024, No. 22-16.218). An employee with both executive functions and human resources management functions was dismissed for having concealed from his employer an intimate relationship he had with another employee serving as both a union and staff representative. The court agreed with the trial judges for having held that the employee had breached his duty of loyalty by concealing this intimate relationship that was related to his professional duties and likely to affect their proper execution. There was a breach of the duty of loyalty, therefore a violation of a contractual obligation, and the relationship was deemed "likely to", so the existence of actual harm was irrelevant. However, caution is required in interpreting this decision: the relationship itself did not constitute a breach of the duty of loyalty, it was the act of concealing a relationship that was directly related to the employee's professional duties that amounted to a breach. While apparently flawless, this solution may still leave an unsettling impression. Although not explicitly mentioned, the concept of a conflict of interest is likely at the heart of the case. But wouldn't such a conflict of interest, if it exists, rather justify to rely on the notion of disruption more than that of misconduct? Of course, it would then be necessary to provide proof of the disruption, whereas misconduct exists without the need to demonstrate harm, but still… Does the position adopted not introduce an obligation to disclose matters of private life, matters of strict intimacy? And at what stage should an "obligation to disclose" be considered, anyway? From the beginning? When it becomes serious? At what point does it become serious? And what about friendships? Would the strength of some friendships not, in the same way, give rise to a risk of conflict of interest? And what would be the "permissible" reaction of the employer when an intimate relationship is disclosed? In short, the *Cour de Cassation* has rendered a decision that raises many issues, calling its relevance into question.

In 2024, the Employment Division of the *Cour de Cassation* further refined its case law on this issue by making a distinction between what falls under personal life and what pertains to the intimacy of private life. It is therefore essential to determine whether an act committed by an employee relates purely to

professional life, whether it strictly relates to personal life, whether it relates to personal life while having a connection to professional life, or finally whether it relates to the intimacy of private life, even if it occurs during working hours and in the workplace. Take, for example, the case of files stored on a professional USB drive. Although the *Cour de Cassation* has long held that a USB drive, once connected to a computer provided by the employer for the performance of the employment contract, is presumed to be used for professional purposes, so that the employer may access the files that are not identified as personal without the employee's presence (Cass. soc., Feb. 12, 2013, No. 11-28.649), it ruled on September 25, that if the USB drive is not connected to the professional computer, the employer's access to it in the employee's absence constitutes an invasion of privacy (Cass. soc., Sept. 25, 2024, No. 23-13.992), even if the USB drive had necessarily been connected at some point to the professional computer, since the employee had saved professional documents on it. Another example is messages sent by an employee via their professional email account. In a case leading to a *Cour de Cassation* decision rendered on March 6, 2024, an employee of the CPAM was dismissed for serious misconduct after sending messages with "manifestly racist and xenophobic content" to a group of people, including two other CPAM employees, using her professional email account. The connection to professional life seemed obvious. While reaffirming by way of introduction that an employee has the right to privacy, even during working hours and in the workplace, the *Cour de Cassation* ruled that the employer could not, to dismiss the employee, rely on the content of the disputed messages, as they fell within her personal life (Cass. soc., March 6, 2024, no. 22-11.016). However, on September 25, 2024, the Employment Division ruled that the fact for a senior executive to exchange vulgar and sexist remarks, accompanied by pornographic images, during working hours and in the workplace, using his professional email account on his professional computer, as part of a conversation involving three people, one of whom was his subordinate, while the other two were external to the company, did not fall under personal life but rather under the intimacy of the employee's private life (Cass. soc., Sept. 25, 2024, No. 23-11.860). Yet, the circumstances were similar to those of the March 6, 2024 decision (use of professional email accounts to send messages, some of which were directed at company employees). According to the *Cour de Cassation*, we should then consider that an employee, arrested on a public road in possession of cannabis consumed in his personal vehicle after working hours, commits an act falling within the intimacy of their private life. Indeed, the Constitutional Council has had the opportunity, on several occasions, to link vehicles to the sphere of private life (Cons. const. No. 2003-467 DC, March 13, 2003, and Cons. const. No. 2017-677 QPC, Dec. 1, 2017). However, the Employment Division surprisingly ruled in a third decision delivered on September 25, that this reason was "drawn from the employee's personal life", which "however did not fall under the intimacy of private life" (Cass. soc., September 25, 2024, No. 22-20.672). In these conditions, how can one expect to determine with certainty whether an act belongs to personal life or to the intimacy of private life?

In its decisions of September 25, 2024, and for the first time to our knowledge, the *Cour de Cassation* has drawn completely opposite consequences depending on whether the facts leading to dismissal are considered to affect the intimacy of private life or simply fall within the scope of the employee's personal life. Indeed, while the *Cour de Cassation* does not challenge the possibility of dismissal based on an act stemming from personal life if it is linked to professional life (when it constitutes a breach of an obligation arising from the employment contract, when the acts committed by the employee during their personal life are linked to their professional life, or when the behaviour relating to personal life objectively disrupts the company), an employer who fails to respect this framework will see the dismissal deprived of real and serious cause (Cass. soc., Sept. 25, 2024, No. 22-20.672). However, if the act in question falls within the intimacy of private life, the dismissal is automatically deemed null and void, the employer having infringed a fundamental freedom, which results in the nullity of the measure pursuant to Article L. 1235-3-1 of the Labor Code (Cass. soc., Sept. 25, 2024, No. 23-11.860). Thus, the classification of an act as either an infringement of personal life or of the intimacy of private life leads to radically different consequences with significant financial implications, as compensation for a dismissal ruled as lacking real and serious

cause is subject to a scale (Labor Code, Art. L. 1235-3), whereas no such limit applies to a dismissal deemed null (Labor Code, Art. L. 1235-3-1). Thus, employers now find themselves in a position where being able to accurately determine whether acts relate to personal life or to the intimacy of private life has become crucial. However, given the position taken by the *Cour de Cassation* in the decisions of September 25, classifying certain acts as part of the intimacy of private life when they really could have belonged to professional life, and when, just months earlier, it had ruled that such acts fell under personal life, we understand that employers now face complete legal uncertainty.

## Statutory employment protection rights

### Paid leave

Through a series of expected yet feared decisions rendered on September 13, 2023, the Employment Division of the *Cour de Cassation* aligned French paid leave law with European Union law and partially set aside two articles of the Labor Code, notably by bringing into play the direct effect of Article 31§2 of the Charter of Fundamental Rights of the European Union (Cass. soc., Sept. 13, 2023, Nos. 22-17.638, 22-17.340, and 22-10.529): employees absent due to illness or accident accrue paid leave entitlements (CP) during their period of absence, even if no work-related accident or occupational disease (ATMP) is involved; in cases of ATMP, the calculation of CP entitlements is no longer limited to the first year of work stoppage; and the limitation period on CP rights only begins when the employer has allowed the employee to exercise these rights within a reasonable timeframe. Consequently, the DADDUE[2] law of April 22, 2024, which includes provisions on the accrual of paid leave during work stoppage (Articles 37 *et seq*.), was adopted. These new legal provisions came into force on April 24, 2024 and apply to the ongoing paid leave accrual period, ending on May 31 for most companies, and required significant adjustments in HR practices, recalculations of paid leave, and payroll software updates.

*Regarding the number of CP days accrued in case of non-work-related work stoppages*

The law limits CP days accrual to four weeks (two working days per month, up to a maximum of 24 days) for work stoppages with a cause unrelated to work. However, if the applicable national collective agreement is more favourable, the latter's stipulations shall prevail, unless there is a company agreement to the contrary. These new rules apply retroactively to work stoppages dating back to December 1, 2009. As a result, a seventh paragraph has been added to Article L. 3141-5 of the Labor Code, listing the periods treated as actual working time for CP calculations, and Article L. 3141-5-1 has been created: "*By way of derogation from the first paragraph of Article L. 3141-3, the duration of leave to which an employee is entitled for the periods mentioned in paragraph 7 of Article L. 3141-5 is two working days per month, with a maximum allocation of twenty-four working days per reference period as defined in Article L. 3141-10*."

*Regarding the number of CP days accrued in case of work-related work stoppages*

The law maintains the five-week entitlement for employees on leave due to a work-related accident or occupational disease (ATMP), but now without limitation of duration, and paragraph 5 of Article L. 3141-5 of the Labor Code has consequently been revised.

*Regarding information due to employees*

Upon an employee's return from work stoppage, individual information shall be given to them as to their CP entitlements, precisely on their volume and the timeframe for their use, and this information must be provided within one month of the employee's return, as the case may be via the pay slip, pursuant to Article L. 3141-19-3 of the Labor Code.

*CP carryover and expiration*

Articles L. 3141-19-1 and L. 3141-19-2 of the Labor Code establish a 15-month carryover period and a progressive expiration mechanism for CP in case of long-term work stoppages to prevent unlimited CP benefit: beyond the carryover period, any accrued yet unused CP is permanently lost. Under Article L. 3141-21-1 of the Labor Code, a collective agreement may extend (but not reduce) this period. These provisions apply retroactively to work stoppages dating back to December 1, 2009.

*Limitation period*

The problem is only partially resolved in this respect… A two-year limitation period from the publication of the law is established, after which an employee still in the company's workforce may no longer claim back payment of CP related to previous situations. The additional leave accrued in application of the new provisions cannot, for each reference period, exceed the number of days entitling the employee to benefit from 24 working days of leave, after taking into account the days already accrued, for the same period, in application of the provisions in their wording prior to this law. What about an employee whose contract has already been terminated? The three-year limitation period should apply. Since they no longer claim CP days but instead demand financial compensation for paid leave, they fall under the three-year limitation period as set out in Article L. 3245-1 of the Labor Code, applicable to wage-related claims. This certainly applies to the time limit for claims… However, could an employer demand that the employee's claims be restricted to the three years preceding contract termination? This raises an issue of compatibility with the DADDUE law… And what about the starting point of the limitation period for employees still on the company's payroll? Of course, "Ignorance of the law is no excuse". But does an employee become aware of their rights the moment the law is published? The starting point of the limitation period should probably have been the date on which the employer provides the now-mandatory information to the employee… Ultimately, the initial stance taken by the CJEU, namely the refusal, when it comes to paid leave accrual, to distinguish between employees who actively work and those on leave, and which actually triggered all of this, remains puzzling…

### Fundamental freedoms

An employee of a senior care residence refused to get vaccinated during the COVID-19 pandemic. Since the mandatory vaccination requirement applied to all social and medico-social establishments hosting vulnerable individuals, the employer suspended her from her duties and stopped paying her salary. The employee contested this decision in court, arguing that her fundamental rights had been violated. After being dismissed in the first instance and on appeal, she took the case to the *Cour de Cassation*.

Referring to the Convention for the Protection of Human Rights and Fundamental Freedoms, the court considered that the mandatory vaccination requirement imposed by the legislator was legitimate and proportionate to the objective of protecting the health of the most vulnerable individuals in the context of a pandemic, that it was based not on opinions or beliefs but on objective medical data, and that consequently, the claimant's fundamental rights were not disproportionately violated (Cass. soc., Nov. 20, 2024, No. 23-17.886). This decision should put an end, at least before national courts, to the numerous ongoing legal disputes regarding the suspension of contracts for employees who refused vaccination during the pandemic when they were subject to the exceptional orders.

## Other recent developments in the field of employment and labour law

### Right to evidence

In a reversal of case law, the plenary assembly of the *Cour de Cassation* decided that, in a civil trial, the illegality or unfairness in obtaining or producing a means of evidence does not necessarily lead to its exclusion from the proceedings. The judge must, when requested, assess whether such evidence

undermines the fairness of the proceedings as a whole, by balancing the right to evidence against the conflicting rights involved, the right to evidence being able to justify the production of materials that infringe upon other rights, provided that their production is essential for exercising this right and that the infringement is strictly proportionate to the aim pursued (Plenary Assembly, December 22, 2023, No. 20-20.648 and No. 21-11.330). The Employment Division of the *Cour de Cassation* applied this case law solution to two cases in 2024. The first case illustrates the inadmissibility of a means of evidence, while the second illustrates its admissibility:

- Inadmissibility: An employee was hired as a sales manager. On May 26, 2017, he brought a case before the labour court, primarily seeking the termination of his employment contract, citing moral harassment by his employer in the context of his superior's dismissal. Declared unfit for his position on October 8, 2018, he was dismissed for unfitness and impossibility of redeployment by letter dated December 20, 2018. Before the Court of Appeal, he requested that his exhibit "QQQ", which contained the transcription of his interview with the members of the company's Health, Safety, and Working Conditions Committee (CHSCT) appointed to conduct an investigation into the existence of moral harassment by the employer, be declared admissible. He also sought judicial termination of his employment contract. Alternatively, he requested that his dismissal be declared null and void as being the result of moral harassment, or, at the very least, that it be recognised as lacking a real and serious cause. He also sought damages for a null and void dismissal, moral harassment, and the employer's breach of their safety obligation. In a decision dated January 17, 2024 (No. 22-17.474), the Employment Division of the *Cour de Cassation* stated that in a civil trial, the illegality or unfairness in obtaining or producing evidence does not necessarily lead to its exclusion from the proceedings. The judge must, when requested, assess whether such evidence undermines the fairness of the proceedings as a whole, by balancing the right to evidence against the conflicting rights involved, with the right to evidence justifying as the case may be the production of materials that infringe upon other rights, provided that their production is essential for exercising this right and that the infringement is strictly proportionate to the aim pursued. In this case, the Court of Appeal which, on the one hand, noted that the occupational physician and labour inspector had been involved in the investigation conducted by the CHSCT and that the CHSCT's findings, detailed in its report of June 2, 2017, had been made in the presence of the labour inspector and the occupational physician, and which, on the other hand, held, after having analysed the other evidence produced by the employee, that this evidence suggested the existence of moral harassment, thus showing that the production of the clandestine recording of the CHSCT members was not essential to support the employee's claims, thereby legally justified its decision.
- Admissibility: Evidence of an employee's misconduct obtained through an illegally installed video surveillance system is admissible if the viewing of the recordings was limited in time, in the context of inventory shrinkage, after initial investigations failed, and carried out solely by the company's manager. The *Cour of Cassation* ruled as such in a decision dated February 14, 2024 (No. 22-23.073), considering that the use of personal data from the video surveillance system was essential to the exercise of the employer's right to evidence and proportionate to the aim pursued. In this case, after noticing unjustified inventory shrinkage in his pharmacy, the employer installed a video surveillance system on the premises, consisting of five cameras. He first considered the hypothesis of theft by customers, but ruled out this possibility when viewing the video surveillance footage. The employer then decided to track the products at checkout and to cross-reference video footage showing the daily sales with the electronic sales logs records over approximately two weeks. Cross-checking the transactions recorded at a specific employee's register (*video vs. sales logs*) revealed 19 serious discrepancies. The employer then dismissed the employee for serious misconduct. The employee challenged her dismissal before the labour court, arguing that the video surveillance system used as evidence by the employer was inadmissible because it was unlawful. The labour court and the Court

of Appeal rejected her claims, upholding the dismissal for serious misconduct. She then appealed to the *Cour de Cassation*, which reaffirmed that under Article 6§1 of the European Convention on Human Rights and Article 9 of the Civil Procedure Code, "*in a civil trial, the illegality in obtaining or producing evidence does not necessarily lead to its exclusion*". The right to evidence may then justify the use of materials that infringe upon other rights, provided that their production is essential to exercise said right to evidence, and that the infringement remains strictly proportionate to the aim pursued.

## Guarantee of wage claims in case of employer insolvency

In an effort to narrow the scope of the AGS[3] coverage, the Employment Division of the *Cour de Cassation* has adopted an extremely restrictive interpretation of Article L. 3253-8(2) of the Labor Code. Under this provision, the AGS covers claims arising from the termination of employment contracts occurring after the opening of the proceedings, precisely during the observation period, within the month following the judgment establishing a safeguard, recovery, or transfer plan, within 15 days – or 21 days if an employment safeguard plan is implemented – following the judgment of liquidation and during the temporary continuation of activity authorised by the judgment of judicial liquidation, and within 15 days – or 21 days if an employment safeguard plan is implemented – following the end of said temporary continuation of activity. Strictly interpreting the notion of "claims arising from the termination of employment contracts", the *Cour de Cassation* ruled that the AGS coverage under Article L. 3253-8(2) of the Labor Code applies only in cases where the termination is initiated by the bodies governing the proceedings (Cass. soc., Dec. 20, 2017, No. 16-19.517; Cass. soc., Dec. 2, 2020, No. 18-22.470; Cass. soc., Oct. 14, 2009, No. 07-45.257; Cass. soc., Jan. 29, 2020, No. 18-24.607). A termination initiated by the employee would therefore prevent the AGS from covering severance payments. But, is this more than restrictive reading of the text, not rather and simply *contra legem*? Obviously, the *Cour de Cassation* has added a condition that is neither mentioned nor implied in the text. We are here in the presence of a relatively clear text, and we know how much this is not always the case. A clear text does not require interpretation. Reference is made to "claims arising from the termination of employment contracts" without any further clarification or exclusion. It is therefore difficult to see how the coverage of severance payments by the AGS can legitimately be limited only to cases where termination is notified by the judicial administrator or liquidator. Unless it is considered from a political or economic point of view, the *Cour de Cassation*'s legal stance is unconvincing: the text refers to guarantee periods but says nothing about who must initiate the termination of the employment contracts. And this stance is all the more perplexing given its total contradiction with that recognised by Article L. 3253-9 of the Labor Code. Under this text, the AGS covers "claims arising from the dismissal of employees benefiting from special protection relating to dismissal, provided that the administrator, employer, or liquidator, as the case may be, has expressed, during the periods mentioned in Article L. 3253-8(2), their intention to terminate the employment contract". However, the *Cour de Cassation* does not object to AGS coverage when a protected employee's contract has been judicially terminated (Cass. soc., Dec. 13, 2017, No. 16-21.773). Probably sharing the unease resulting from the interpretation of the Employment Division of the *Cour de Cassation*, the Aix-en-Provence Court of Appeal (CA Aix-en-Provence, Feb. 24, 2023, No. 21/15225) has decided to refer the matter to the Court of Justice of the European Union to determine whether this interpretation aligns with EU law, specifically with the so-called "insolvency" directive of 2008 (Directive 2008/94/EC of the European Parliament and of the Council of October 22, 2008, on the protection of employees in the event of employer insolvency, OJ L 283, Oct. 28, 2008, p. 36). The CJEU's ruling is unequivocal: the exclusion of AGS coverage for wage claims when a worker has acknowledged the termination of his employment contract due to sufficiently serious breaches by his employer preventing the continuation of said contract is contrary to EU law (CJEU, Feb. 22, 2024, Case C-125/23). Certainly, this solution shall apply to cases of judicial termination resulting from the employer's fault. Hence, the Employment Division of the *Cour de Cassation* could no longer maintain its previous stance and on January 8, 2025, it reversed its case law to bring it in line with EU law as interpreted by the CJEU, recognising AGS coverage, both in matters of judicial termination (No. 23-11.417) and in cases of constructive dismissal (No. 20-18.484).

## Endnotes

1 The Dares (*Direction de l'Animation de la Recherche, des Études et des Statistiques*) is a French governmental agency under the Ministry of Labor, conducting research, studies, and statistical analyses on employment, work, and professional training.

2 The DADDUE law (*Loi d'adaptation au droit de l'Union européenne*) was enacted to align national labour regulations with EU law, particularly regarding paid leave rights for employees on sick leave.

3 The AGS is a French wage guarantee fund.

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