Case Law - May 2021

This month, several decisions relating to employees' working conditions (1,2) and termination (3,4,5) caught our attention.

1. Status of a delivery platform worker: a still uncertain dispute

Paris Court of Appeal, Pole 6, Chamber n°4, April 7, 2021, no. 18/02846

While the Cour de Cassation has now ruled twice in favour of granting the *"employee"* status to platform workers in the *Take Eat Easy*[1] and *Uber*[2], rulings (vs. *"independent"* contractor status), nothing seems to be set in stone yet.

In a decision from April 7, 2021[3], the Paris Court of Appeal rejected the misclassification claim from a Deliveroo worker, on the grounds that the *"subordination link"* between the plaintiff and the platform was not established.

As a reminder, for the existence of an employment contract to be recognised between a worker and a given company, one way is to demonstrate a link of subordination which is characterised by **the power to give instructions, to control their execution and to penalize their breaches[4].**

The higher Court, Cour de Cassation, has not yet had the opportunity to rule on the stratus of the Deliveroo platform's delivery workers. While it seems possible that it will adopt a similar analysis to the one used in the *Take Eat Easy* and *Uber* rulings, and conclude that there exists a subordinate relationship between the worker and the platform, in particular in view of the existence of a geolocation system, one cannot be sure of the final outcome.

Pending the Cour de cassation's ruling on this case, the Paris Court of Appeal's decision is not final. To be continued...

2. Pending the Cour de cassation's ruling on this case, the Paris Court of Appeal's decision is not final

Cass. soc. April 14, 2021, No. 19-24.079 (No. 479 FS-P)

Since the «Micropole» case law[5], a company may include **a neutrality clause** in the company's internal rules **prohibiting the visible wearing of any political, philosophical or religious sign at the workplace**. However, this clause is only valid if it is *"general and undifferentiated"* and is only applied to employees who are in contact with customers.

In the case at hand, no neutrality clause had been provided for within the company. After being dismissed, an employee challenged her termination, arguing that she had been victim of discrimination, having decided to wear an Islamic headscarf at work. She was ultimately dismissed after her employer asked her to remove it, which she refused to do.

The Cour de Cassation, agrees with the Court of Appeal's analysis and considers that, in the absence of a neutrality clause, the prohibition imposed on the employee to wear an Islamic headscarf characterized the existence of a discrimination directly based

1 Take Eat Easy ruling, Cass. soc. November 28, 2018, n°17-20.079.

2 Uber ruling, Cass. soc. March 4, 2020, no. 19-13-316.

3 CA. Paris, Pôle 6, Ch. 4, April 7, 2021, No. 18/02846.

4 Société Générale decision, Cass. soc. November 13, 1996, No. 94-13.187.

5 CJEU, March 14, 2017, Micropole Univers, C-188/15

on the employee's religious beliefs. The image that the company wishes to project to its clientele is not considered a "necessary and determining requirement" that could motivate the prohibition for employees to wear a religious sign at the workplace.

Cet arrêt permet aussi de rappeler que l'image que souhaite renvoyer l'entreprise n'est pas une exigence professionnelle nécessaire et déterminante. A cet égard, les juges de la Cour de cassation précisent que la jurisprudence de la Cour de justice de l'Union Européenne « *renvoie à une exigence objectivement dictée par la nature ou les conditions d'exercice de l'activité professionnelle en cause.* ***Elle ne saurait, en revanche, couvrir des considérations subjectives, telles que la volonté de l'employeur de tenir compte des souhaits particuliers du client.***»[6]

3. The compensation scale implementation: towards a case-by-case assessment?

Paris Court of Appeal, Pole 6, Chamber 11, March 16, 2021, No. 19/08721

LThe application of the compensation scale in the event of dismissal without real and serious cause (also known in France as the Macron scale) is subject to discussions between different French Courts of Appeal, particularly with regards to the compliance of French law with European standards.

Although the Cour de Cassation considers the compensation scale to be "consistent" with the provisions of international law (Article 10 of ILO Convention 158[7]), which provides for an *"adequate and appropriate"* compensation in case of unjustified dismissal, some French Courts of Appeal choose to not apply the compensation scale.

A case-by-case analysis seems to be emerging: in a decision from March 16, 2021, the Paris Court of Appeal, reiterates an analysis already made by the Reims Court of Appeal[7] and then repeated by several others Courts[8], and ruled that Article L. 1235-3 of the Labour Code, relating to the compensation scale, **had to be set aside, as it did not allow the right to *"adequate and appropriate"* compensation (laid down in Article 10 of ILO Convention 158[9]) to be observed.**

The **Paris Court of Appeal reached the same conclusion by making an in concreto assessment of the situation at hand**. Without deciding whether it is consistent with international law, the Paris Court of Appeal, stresses that the compensation scale would only have ensured compensation for half of the damage suffered by the employee in this particular case, and therefore it ruled out its application.

This case-by-case assessment could lead to the exclusion of the scale **to compensate for a *"particular"* situation**[10] where the dismissal of the employee would cause him/her significant loss taking into account factors such as age, the possibility of finding a new job or the loss of significant income for example.

4. The Cour de Cassation and the balance of faults of the employer and the employee: the end of the Kerviel case

Cass. soc. March 17, 2021, no. 19-12.586

6 Opinion n° 15012, July 17, 2019 (Request for opinion n°R 19-70.010) ECLI:FR: CCASS:2019:AV15012.

7 CA Reims, September 25, 2019, n° 19/00003.

8 For example, see CA Chambéry, November 14, 2019, n° 18/02184 or CA Caen, December 12, 2019, n° 18/02368.

9 International Labour Organization.

10 Paris Court of Appeal, Pole 6, Chamber 11, 16 March 2021, No. 19/08721.

The outcome of the high-profiled Kerviel case was an opportunity for the French Cour de cassation to deepen its case law on *"serious misconduct"*, and in particular where the employee's fault was allowed or facilitated by the employer's behaviour[11].

The Cour de Cassation considers that if the *"serious deficiencies"* of the internal control system of the company (in this case a bank) made possible the employee's fraud and its financial consequences, they did not make the employee's misconduct lose its *"seriousness"*. Thus, the employee's dismissal for serious misconduct was grounded.

Regardless of the employer's fault, or its share of responsibility in the employee's wrongdoing, if the employee's fault makes it *"impossible for him to remain in the company"*, the employee may be dismissed for serious misconduct.

The media coverage of the *"Kerviel"* case and the seriousness of the facts of which the employee was accused of, must be put in perspective when assessing the impact of this decision, making it more of an isolated case rather than a landmark decision.

5. Gifts from customers accepted by employees: a dismissal may be grounded for serious misconduct

Cass. soc. March 31, 2021, No. 19-23.144 F-D

In a decision from March 31, 2021, the Cour de Cassation ruled that the acceptance of a substantial gift by a manager may constitute a breach of his obligations arising from the employee's contract of employment, in particular with regards to the *Code of good conduct* in force within the company.

The Court of Appeal's decision, which, despite applying well-established case law[12], held that *"facts relating to the personal life of employees may only constitute a fault in employment relations if the employer demonstrates that they are the cause of a disturbance in the company and that it is neither argued nor demonstrated by the company that the private exchanges between the employee and the client overlap on the employee's working time"*, is overturned by the Cour de cassation.

Thus, particular attention must be given to gifts accepted by employees as **the acceptance of gifts from customers may not be considered a *"private matter"* but a breach of obligations arising from the employment contract which could ground a dismissal for serious misconduct**.

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11 For example, see Cass. soc. 29 April 2009 n° 07-42.294 F-D: RJS 7/09 n° 619.

12 For example, see Cass. soc., 26 Sept. 2001, No. 99-43.636; Cass. soc., 29 Jan. 2008, No. 05-43.745; Cass. soc., 23 June 2009, No. 07-45.256, No. 1437 FS - P + B.