French Employment Law Newsletter – February 2022

Gwenaelle Artur
Avocat Associée

César Solis
Avocat

Several employment law decisions caught our attention this month. They relate to the protection of the employee who denounces deontological wrongdoings **(1)**, the staff representatives consultation when a company employs less than 50 employees in case of dismissal of a protected employee **(2),** the impossibility for the employer to challenge teleworking implemented informally for years **(3),** as well as the determination of the increase of remuneration of rest days in a rest day scheme (« forfait jours ») **(4).**

1. The extension of protection against dismissal for employees denouncing deontological wrongdoings in good faith (*Cass. Soc. January 19, 2022, n°20-10.057*).

French Law provides for the protection of whistleblowers from discriminatory dismissals. In principle, this protection applies in cases relating to the whistleblowing of facts likely to constitute a misdemeanor or a crime. In this decision from January 19, 2022, the Court of Cassation (the highest court in the French judiciary) extends the benefit of this protection to cases of denunciation of facts potentially constituting breaches of ethical obligations.

Thus, the dismissal of an employee that reported or testified in good faith facts likely to characterize breaches of ethical obligations, is considered null and void. Such a dismissal would violate the employee's freedom of expression.

2. Dismissal of a protected employee: the consultation of the staff representative's body (*CSE*) is optional if the company employs less than 50 employees (*Conseil d'Etat, December 29, 2021, n° 453069*).

Further to Article L. 2421-3 of the French Labour Code, the dismissal of protected employees must be preceded by prior consultation of the staff representative's body (*Comité social et économique*, or "*CSE*").

However, as the CSE's responsibilities are different depending on the size of the company's workforce, the French Labour Code provides for two separate sections depending on the

size of the workforce: one for companies with 11 to 49 employees, and the other for companies carrying at least 50 employees. The rules applying to the CSE are therefore likely to be different according to the size of the company.

Thus, the French Highest Administrative Court (« *Conseil d'Etat* ») has interpreted these provisions in the sense that "*in the case of companies between 11 and 49 employees, the CSE does not have to be consulted on the project of dismissal of an elected member of the staff representation of the CSE, holder or substitute, or of a trade union representative of the CSE, or of a proximity representative of the CSE*".

However, the *Conseil d'Etat* specifies that the consultation of the CSE remains mandatory where "*such consultation has been provided for by a collective agreement concluded pursuant to Article L. 2312-4 of the Labour Code*".

3. Telework: the employer cannot challenge telework that has been practiced informally for years (*CA Orléans, soc. December 7, 2021, nº 19/01258*).

In the absence of a collective agreement or charter relating to teleworking, asking an employee to comeback on site two days a week after several years (more than 5 years) of total telework constitutes a modification of the employment contract. Thus, the employer cannot impose it on the employee unilaterally.

This decision is in line with the well-established case law of the Court of Cassation, which recognizes that if it has been agreed (contractually or otherwise) that at least part of the employee's work can be carried out at home, the questioning of this organization is similar to a modification of the employment contract, that requires the employee's agreement.

It is recalled that Article L1222-9 of the French Labour Code provides that Telework is set up within the framework of a collective agreement or, failing that, within the framework of a charter drawn up by the employer after consulting the staff representatives; failing this, the parties may "formalise their agreement by any means". In this regard, it is recommended that companies formalize in writing the conditions of teleworking, and in particular the return to on-site work, to avoid any potential dispute with teleworking employees.

4. Without a written agreement on the resting day scheme (« forfait jours »), the judge determines the amount of the remuneration increase (Cass. Soc. January 26, 2022, n°20-13.266).

Employees under a working time duration set in days (so called « forfait jours ») may give up on resting days in exchange of an increase of remuneration for the days exceeding the agreed scheme, and as long as there is a written agreement between the employer and the employee.

Where there is no written agreement, in case of litigation, it will be up to the judge to

determine the amount of the increase. In this respect, the judge may set such remuneration increase beyond the minimum rate of 10% provided for by the French Labor Code (Article L. 3121-59 of the French Labour Code). Where necessary, it is therefore essential to ensure that the employee waives his days in writing.

Gwenaëlle Artur	César Solis
gartur@steeringlegal.com	csolis@steeringlegal.com
+33 6 20 50 31 55	+33 1 45 05 16 65