THE

Labour and Employment Disputes Review

Third Edition

Editor
Nicholas Robertson

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The Labour and Employment Disputes Review

Third Edition

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Nicholas Robertson

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PREFACE

It is commonplace for the senior management of a business to describe their employees as the best assets that the business has. Equally, in troubled times, it not unusual to find employers voicing concern that employees may vote with their feet and leave the organisation (irrespective of any legal claims they may have) to work for competitors.

However, the truth of the matter is that, in many jurisdictions, fine words about the rights of employees are mixed with an increasingly uncertain future for employees. One frequently hears comments about the future impact of technology on many types of jobs. This technology will know no boundaries and the only safe prediction is, I think, that the jobs most affected will include some surprises. Already we see significant friction between the attempts by businesses to organise employees into a low-cost, allegedly lower-skilled and fully flexible workforce and the conflicting desires of employees and, in many countries, legislators to have stable employment relationships underpinned by statutory and contractual rights. The battles that Uber and other 'disrupters' are facing are symptomatic of that tension.

In the United Kingdom, of course, we have now seen Brexit, finally, become a reality, although the detail of what this will mean for employers and employees remains frustratingly vague.

A similar phenomenon is at play in relation to the #MeToo movement, and its impact on workplace behaviours and relationships. The desire for those in the workplace to inhabit an environment free of unlawful discrimination has undoubtedly made progress, giving voice to employees who might previously have felt, for legal, cultural or commercial reasons, that they had no option but to accept inappropriate behaviour. The corollary of this strengthening of employees' rights is that it makes the workforce less insecure.

Indeed, in the United Kingdom, the extended debate about the degree to which it is ever permissible for employers to use non-disclosure agreements to resolve matters privately is an indication of how far the debate has moved. A time-travelling employment lawyer from 10 years ago (if such an individual existed) would be astonished at the pace of change.

In these circumstances, a book such as *The Labour and Employment Disputes Review* offers an opportunity not only to look at the bigger themes, but also to measure some of the changes taking place, year on year, as the world of work continues to evolve.

Nicholas Robertson
Mayer Brown International LLP
London
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Chapter 5

FRANCE

Julien Boucaud-Maître and Jean Gérard[1]

I INTRODUCTION

In France, as in many Western countries, the salaried employee, who is economically weak, is regarded as being legally favoured in any employment relationship. French labour law therefore decisively favours the employee rather than the employer. In the litigation area, examples abound of legislators showing such favour. Thus, in the event that a dismissal is challenged, the employee is given the benefit of the doubt. In other words, if the judge has not been able to decide in the light of the elements submitted by the parties and despite, if necessary, the initiation of investigative measures, the judge must consider the dismissal to be devoid of actual and serious cause and subsequently grant damages to the employee.

Similarly, when an employee alleges a prohibited discrimination, either in the termination or even the performance of the employment contract, the burden of proof is clearly reversed. The same applies to allegations of moral or sexual harassment. It is up to the employer to show that the decision he or she made was not influenced by a discriminatory ground. If the employer cannot prove this, the alleged discrimination will be upheld against him or her. This mechanism is particularly unfavourable towards companies since, as we shall see, damages paid for discrimination must be awarded in full, in all cases.

In France, however, it has always been considered that the determination of the standards that govern employment relationships should be left to the social partners. Labour law (and, more generally, social law) is therefore widely composed of rules that derive from collective agreements negotiated by employers' groups on the one hand and employee unions on the other. In this context, the role of the state should be limited, through government action, to giving the social partners the impetus – and sometimes the injunction – to negotiate. In addition, the state should, through the action of the legislature, limit its role to determining the general principles that are binding in all cases, and that the social partners cannot exclude, while ensuring the effectiveness of collective agreements – again through appropriate legislation.

II PROCEDURE

The principles discussed in Section I explain why the resolution of individual labour disputes between an employer and an employee falls, in the first instance, not to state courts but professional and specialised ones, namely the labour courts. These are presided over by an equal representation of non-professional judges who are appointed by trade union

1 Julien Boucaud-Maître and Jean Gérard are partners at Chassany Watrelot & Associés.

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organisations of employers and the trade unions of employees. The labour courts are divided into professional sections: industry, trade and trading services, agriculture and miscellaneous activities. There is also an inter-professional section – the management section – before which all disputes between members of management and their employer, whatever the nature of the activity, are brought.

Wherever possible, conciliation is the preferred resolution. The procedure therefore begins, in the vast majority of cases, with an attempt at conciliation. This is entrusted to the conciliation board of the court, which is composed of two judges: an employer and an employee.

For a long time, the role of the conciliation board was limited to seeking an agreement between the parties to put an end to the dispute, in whole or in part, at a conciliation hearing. Since 2016, the conciliation board has been renamed the conciliation and orientation board. Its role has been extended beyond an attempt at conciliation to include preparation of the case and its orientation before the judgment board. The conciliation and orientation board thus plays the part of an examining magistrate, and is comparable, in many respects, to the role of a pretrial judge in procedures before the judicial tribunals (formerly regional courts).

Thus the board may order, even *ex officio*, all appropriate means of inquiry. From this perspective, it can, at the outset of a conciliation hearing, order the disclosure of a particular piece of evidence, organise a consultation measure or even seek specialist knowledge, authorise an inquiry, order the personal appearance of the parties or visit the place of work, inter alia. Where the existence of the obligation is not seriously challengeable, the board may order payment by the employer to the employee of a provision on the wages and damages relating to the termination of the employment contract. Similarly, the board may order delivery of the documents relating to the termination of the employment contract (such as the certificate of work or certification for the unemployment agency).

As part of its examination of a case, the conciliation and orientation board should ensure there is an exchange of arguments and evidence between the parties. In this regard, the procedure before the labour courts, which was purely oral until 2016, has since undergone an important evolution, which increases very significantly the quantum of writing. Henceforth, a labour court must be seised of a signed and dated written petition, which must state the legal and factual grounds supporting a claim. This petition must also set out the documents on which the claim is grounded and must be filed with the labour court registry in as many copies as there are parties to the proceedings plus one, with a copy of the documents. For the remainder of the proceedings, if the parties have decided to be assisted or represented by lawyers, those lawyers, if they decide to use written documents to develop their argument, must now do so in the form of legal submissions.

When it appears to the conciliation and orientation board that the case has reached a state in which it can be judged, the parties are referred to the judgment board, which will hear the pleadings. Composed of four judges specialising in labour law – two employers and two employees – the board then deliberates before rendering its decision. Note that the parties are not present during the judgment board's deliberations. In approximately 20 per cent of cases, these four persons do not succeed in adopting a decision by a majority of the votes cast, with ballots equally divided for and against the claimant. In these cases, a professional judge is called upon to assume the role of 'tiebreaker'. She or he hears the pleadings again, if possible in the presence of the initial four judges who specialise in labour law, and the decision is then adopted in this tiebreaker setting with five members. If she or

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he is not assisted by the judges with specialised experience in labour law and who originally heard the pleadings, the professional judge rules on the matter alone, after having heard the opinion of the attending judges.

Judgments rendered by a labour court may be appealed before a court of appeal. Again, for a long time, these proceedings were oral, even at the appeal stage, but there has been a move towards a written, more formal procedure. As of 2016, all stages of the procedure are in writing, including hearings at courts of appeal. The parties must be represented either by a lawyer or by a union representative. All the rules applicable to civil case procedures before a court of appeal – which are sometimes very stringent – now apply to labour law procedures. In turn, decisions rendered by courts of appeal can be appealed before France's supreme court, the Court of Cassation.

In the courts of the highest degree (courts of appeal, the Court of Cassation), the specificities of labour law dispute disappear: these courts are presided over by professional judges who adjudicate on labour law disputes according to the same procedures and in the same way that they rule on all other types of litigation (family law, civil liability law, commercial law, etc.).

Other types of conflict resulting from the application of employment laws and more generally social laws fall within the jurisdiction of common law courts. These include collective disputes between either groups of employees and an employer or a group of employers. One should also mention disputes related to the application of collective bargaining agreements, between employee trade unions and an employer or between different employee trade unions or even between employee trade unions and employer trade unions. Disputes related to the operation of employee representative bodies are also included. Finally, one should not disregard the significant weight of disputes relating to professional elections and the appointment of union representatives, as well as social security litigation subject to specific procedures brought before common law first instance courts.

More specifically, with respect to this type of conflict, the year 2019 witnessed the finalisation of an important structural reform, resulting in fundamental changes to the judicial organisation in France (other than labour courts). Established in 1958, the regional courts, which ruled on the most important disputes, and the district courts, hearing the other disputes, were wound up on 31 December 2019. As from 1 January 2020, there is in place a new and single first instance court: the judicial tribunal. Each regional court has been replaced, at its current seat, by a judicial tribunal and each district court by a district division. The judges working at the former regional and district courts were assigned to the new courts and now pursue their former duties under the new court system.

Furthermore, the judicial tribunal is divided into specialised departments. A social department deals with disputes related to employment law. The judges whose duties are more specifically related to social law in a broad sense (employment, social security and social welfare law) are assigned to this department. The new organisation will thus highlight the specialisations of the professional judges. By planning ahead, some courts had already implemented a social department to which those judges specifically ruling on employment and social security law issues were assigned. These specialised judges also assume the role of tiebreaker before the labour courts. The 1 January 2020 reform is therefore a form of acknowledgment of these practices.

Finally, the substantial role played by administrative courts in employment relationships must be mentioned, namely administrative courts, administrative courts of appeal and the highest administrative court, the Council of State. In a nutshell, they are called to rule on two

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different types of disputes. They traditionally hear the claims lodged against decisions taken by the labour inspectorate with respect to employees benefiting from special protection, mainly those holding a union mandate or an elective office, the dismissal or even certain modifications to the employment contract of whom must be authorised by the administration prior to their implementation. If unlawful, the authorisation or refusal may be referred to the administrative judge.

In addition, all disputes resulting from collective redundancies when the procedure targets more than 10 employees over a period of 30 days also fall within the jurisdiction of the administrative courts. For these procedures, to limit the number of redundancies, an employment safeguarding plan must be certified or approved by the labour administration. All claims arising in the framework of these procedures must be brought before the administrative courts.

III TYPES OF EMPLOYMENT DISPUTES

The vast majority of cases that come before the labour courts arise from the termination of an employment contract or, more specifically, a dismissal. The proportion of cases relating to dismissal on personal grounds fluctuated between 66 per cent and 76 per cent between 2004 and 2013. During the same period, dismissals grounded on economic reasons represented only 3 per cent of cases.

Since 1973, a dismissal must be justified by an 'actual and serious' cause (Article L.1232-1 of the Labour Code). Therefore, when an employee is dismissed for a reason that is neither actual nor serious, he or she is entitled to damages. Article L.1232-1 of the Labour Code has been in effect for more than 45 years now and – in its current codification – has given rise to very abundant case law which, given the French legislature's bias towards elaborate rules that are increasingly favourable to employees, has resulted in the courts increasingly allowing the appeals of interested parties. Thus, according to the official statistics of the Ministry of Justice for 2017 (the last full year for which statistics are available), the labour courts have been seised of 126,693 new cases (including emergency procedures).

The remainder of cases relate to other forms of dismissal (including collective or individual redundancy or dismissal invalidity) or termination of employment contracts (such as abusive resignation and formal record of termination). We should also mention disputes arising from the performance of the employment contract (amount of salary, application of the relevant clause of a collective agreement, disputes relating to paid leave or other types of leave, or to fixed-term and temporary employment contracts).

IV YEAR IN REVIEW

During the past 12 months, labour law disputes have been affected by the continued challenge presented by the 'Macron Scale'. By way of a reminder, the Macron Scale introduced a ceiling for the amount of damages awarded by judges in the event of dismissals devoid of actual and serious cause. Article 2 of Ordinance No. 2017-1387 dated 22 September 2017 significantly amended the wording of Article L.1235-3 of the Labour Code. This text provides that the judge, when a dismissal has no actual and serious cause, may propose (but not impose) reinstatement of the employee concerned. However, the new wording of the Article adds: 'If

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either of the parties refuses this reinstatement, the judge grants the employee damages paid by the employer the amount of which ranges between the minimum and maximum amounts set in the tables here below.'

The first of these two tables applies to employees dismissed by a company that normally has 11 or more employees. It provides for minimum and maximum damages payments that vary according to the employee's length of service. The maximum amount ranges from two months' salary for an employee with one year of service to 20 months' salary for an employee who has been with the same company for more than 30 years. The minimum amount ranges from one month's salary to three months' salary. The second table applies to all other companies.

In comparison with the law that applied previously, this double limitation constitutes a major change. Formerly, an employee with more than two years of service at a company with 11 or more employees automatically received a minimum indemnity equivalent to the salary paid during the previous six months; there was no maximum amount. In all other cases, the employee received compensation for proven damage and there was no maximum amount.

Over the years, the old system has increasingly been subject to criticism. In particular, the old legislation was criticised for fostering unpredictability in labour and employment disputes. Since there was no maximum level of compensation, each labour court and, more importantly, each court of appeal could freely determine the amount of damages granted to an employee dismissed without any actual or serious cause, and in a completely different way from the labour court or another court of appeal. In addition, there were objections to the payment of six-month minimum damages as a lump sum, as could happen in certain cases. In fact, some critics said these damages payments could be disproportionate to the amount of harm suffered, especially if the employee found work immediately after being dismissed without any actual or serious cause and, as a result, suffered no economic loss.

The former legislation (unchanged since 1973) was also said to be at fault for having generated a veritable explosion of labour court disputes. Ministry of Justice statistics show 200,000 new cases coming before the labour courts each year. Worse still, the appeal rate (around 60 per cent) had destabilised the operation of the courts, some of which were no longer able to judge cases within a reasonable amount of time, in line with France's international commitments. In this context, the current government, appointed by President Emmanuel Macron after his election, modified Article L.1235-3 of the Labour Code, which is why the progressive limitation of the damages granted by judges to employees is commonly referred to as the Macron Scale.

The capping of damages applies to all disputes relating to dismissals notified after the Ordinance that created it entered into force, which is 23 September 2017 in Paris and the day after that in all other French regions. As a result, all labour court cases that arose during 2019 further to a dismissal are affected by the limitations of the Macron Scale. However, these limitations only affect dismissals found to be without actual or serious cause. There is no ceiling for damages granted when the dismissal is void because of the violation of a fundamental freedom, an act of moral or sexual harassment, when the dismissal is deemed discriminatory or when it follows to legal action. In the same way, no limitation can affect compensation for the harm suffered as the result of an infringement of professional equality between men and women, the denunciation of a crime or offence, the exercise of a mandate by a protected employee or protection allowed to certain employees. In these latter cases, compensation for the harm suffered must be full.

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The Macron Scale has also been heavily criticised. Even before the enactment of Ordinance No. 2017-1387, the employee and employer members of the labour courts expressed their concern at what they considered genuine interference by the legislature in the traditionally consensual operation of the labour courts, whose impartiality and objectivity, they say, are necessarily guaranteed by the composition of the court being based on an equal representation of judges. They pointed out that this equality created balance and had resulted, since 1973 and contrary to what could have been said, in the homogenisation of the awarded damages from one labour court to another and even from one court of appeal to another.

Subsequent to President Macron's commitment, once the Ordinance was ratified by Parliament, the anti-Macron Scale 'judicial saga' started. Indeed, the law of ratification was referred to the Constitutional Court right after its adoption. (Note that this Court – the highest constitutional authority in France – can be seised by the President, members of Parliament or senators after the passing of a law but before its enactment.) Parts of the text found to be inconsistent with the Constitution were deleted and only those that were declared compliant or were not challenged were published in the Official Journal and acquired the force of law.

In their referral, members of Parliament raised three questions. First, they said the capping of damages would be contrary to the constitutional principles of the 'guarantee of rights' according to which, in their view, the low ceilings of compensation provided would be insufficiently dissuasive and would thus allow an employer to wrongly dismiss an employee. Second, the limitation would also be contrary to the principle of full compensation for the damage suffered. Finally, according to members of Parliament, by limiting the indemnity solely on the basis of length of service, the legislature would disregard the principle of equality before the law.

In its Ruling No. 2018-761 of 21 March 2018 (published in the Official Journal dated 31 March 2018), the Constitutional Court dismissed these grievances. First, the Court considered that, for reasons of general interest, the legislature may adjust the conditions under which liability may be incurred and thereby make exclusions or limitations to the right to damages, provided that these do not result in disproportionate harm to the victim of a wrongful act.

By setting a mandatory reference for the damages awarded by the judge in the event of dismissal without actual and serious cause, the legislature, according to the Constitutional Court, intended to reinforce the foreseeability of the consequences attached to the termination of an employment contract and thus pursued an objective of general interest.

Moreover, the derogation from the liability under common law resulting from the maximum amounts provided does not constitute a disproportionate restriction of the general interest objective pursued. Indeed, on the one hand, these amounts were determined in line with the preparatory work, depending on the average compensation granted by the courts and, on the other hand, certain types of dismissals are not subject to any limitation (void dismissal, violation of a fundamental freedom, harassment, etc.).

As regards equality, this has not been breached. In fact, the legislature may, without disregarding the principle of equality, adjust the maximum compensation due to an employee when he or she retains, for this adjustment, the criteria relating to the harm suffered. This is precisely the case for the criterion of length of service with the company. In addition, the legislature was not required to set a scale taking into account all the criteria that determine the harm suffered by a dismissed employee, as the principle of equality does not require the legislature to treat persons in different situations any differently.

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Compliance with the Constitution was therefore unambiguously upheld by the Constitutional Court. On this point, the debate is definitively closed. It is therefore no longer possible to argue before a labour court, a court of appeal, or even the Court of Cassation, that capping resulting from the Macron Scale is unconstitutional. On 25 September 2019, the Reims Court of Appeal issued a ruling aligned with this position. Noting that the constitutionality review had been carried out once and for all by the Constitutional Court, it dismissed a claim lodged by an employee who asserted that the Macron Scale was contrary to the Declaration of the Rights of Man and Citizen of 26 August 1789, which forms an integral part of the preamble of the Constitution of 4 October 1958.

Faced with this first obstacle, opponents of the Macron Scale have raised their grievance on other grounds – compliance of the revised Article L.1235-3 of the Labour Code with the international conventions that bind France. The Constitutional Court has no jurisdiction over control of this compliance, whereas the judicial and, more rarely, the administrative courts are competent to exercise this control. Convention No. 158 of the International Labour Organization and Article 24 of the European Social Charter have thus been invoked before these latter courts.

It should be recalled that Article 10 of Convention No. 158 provides that where a judge of a signatory state is led to conclude that a dismissal is wrongful, he or she must be entitled, in the absence of reinstatement or nullification of the dismissal, to award an employee adequate damages or any other form of compensation considered appropriate. By the mere fact that it is capped by the Macron Scale, the compensation would no longer be adequate or appropriate. Consequently, as early as December 2018, the labour courts of Troyes and Amiens granted employees a greater amount of compensation than that afforded by the Scale, to provide the employee, from the courts' point of view, with appropriate damages for the harm suffered in the cases at bar.

Article 24 of the European Social Charter states, more simply, that 'all workers are entitled to protection in case of dismissal'. For the Labour Court of Troyes, which explicitly referred to this text in its decision, the Macron Scale would again deprive the dismissed employee of protection.

In the year 2019, several labour courts followed suit. Conversely, during the same year, other labour courts confirmed the Scale's compliance with France's international commitments. In short, the first instance labour courts gave the unfortunate impression that law was not uniformly applied in France.

Faced with this judicial confusion, the Court of Cassation, the highest court in the French judicial order, was called upon by the Louviers and Toulouse labour courts to issue an opinion on the compliance of new Article L.1235-3 of the Labour Code with these two international conventions. It issued two decisions on 17 July 2019 (opinions Nos. 15012 and 15013) stating very clearly that the Macron Scale is not contrary to Convention No. 158. As for Article 24 of the European Social Charter, the solution is even simpler for the Court of Cassation: it has no direct effect in internal law and consequently, cannot be invoked in the framework of disputes between private parties. However, in both its opinions, the Court of Cassation made sure to specify that it had refrained from analysing any facts falling within the jurisdiction of the lower courts. It underlined that its control remained 'hypothetical'.

In this context, two courts of appeal in turn issued much anticipated decisions. First, the Reims Court of Appeal, in the aforementioned order dated 25 September 2019, ruled that the Scale is not per se contrary to France's international commitments. Thereafter, Division 6-8 of the Paris Court of Appeal also decided that the Scale complies both with

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Convention No. 158 and Article 24 of the European Social Charter. However, for both appellate jurisdictions, this compliance in principle does not prohibit judges to whom the challenge of an employee's dismissal has been referred from effectively verifying that the damages that may be granted to the claimant, despite their limitation by the Scale, really provide him or her with fair compensation in light of the case's specifics.

When reading the orders, one has the feeling that the judge's rationale is twofold. He first determines the extent of the prejudice suffered by the employee and calculates the amount of the damages that accurately compensate the prejudice. He then compares this amount with the Scale. If indeed the amount of the damages falls between the Scale's minimum and maximum amounts, the Scale can be applied. But if the damages are greater than the maximum amount, the Scale would ultimately be disregarded.

This method has the advantage of complying with the Court of Cassation's opinion, which deems that the Scale complies with both international conventions, while granting the employee the benefit of compensation determined according to the prejudice suffered. However, one can only note that in practice, the position adopted by the courts of appeal would mean that the Scale would be both enforceable and unenforceable, depending on the case's specifics.

It goes without saying that a decision (and not merely an opinion) from the Court of Cassation is very much expected. There is currently a lot of confusion on the matter. The highest French court must assume its regulatory role and put an end to remaining qualms.

V OUTLOOK AND CONCLUSIONS

The question that should be raised at the beginning of 2020 is that concerning the continuance of the transformation of labour law disputes, both from a quantitative and a qualitative point of view. First, with regard to quantity, the fall in the number of incoming cases occurred well before the Macron Scale was implemented and even before the reforms to the labour law procedure that took effect on 1 September 2016. The peak was reached in 2009 when the number of new cases rose to the unparalleled level of 228,578 cases. The number has fallen steadily since: to 184,343 cases in 2015, 149,806 in 2016 and, as already stated, 126,693 in 2017. It is clear that the reform only accompanied an underlying trend that was already downward, and certainly did not trigger the decline or even accelerate it.

On the other hand, it is certain that the nature of the cases of which the French labour courts are now seised has evolved significantly. Litigation may certainly remain overwhelmingly made up of disputes over individual dismissals, but it will gradually occupy the territory of discrimination in all its forms. Indeed, one should note that when it is discriminatory, a dismissal is void and, when deemed void, a dismissal entitles the claimant to compensation without limit. The ongoing debates on the enforceability or unenforceability of the Macron Scale shall thus be definitely avoided.

However, this type of case is much more burdensome than cases based solely on challenging the actual and serious cause. In itself, despite the benefits to the employee in terms of the burden of proof, when the discrimination falls within the scope of a legal prohibition, it must be carefully alleged, and the elements that make it likely and presume its existence must be collected carefully. Conversely, an employer must be very specific when challenging allegations made by an employee, as it does so without being able to take shelter behind its power of control.

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In this respect, litigants could make judicious use of the new powers of investigation and guidance now granted to the conciliation and orientation boards. Likewise, they will have to ensure, in a precise written and legally based argument, the development of all the legal means necessary to convince the judge. In a nutshell, the work done by their lawyers will become more and more important.

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Appendix 1

ABOUT THE AUTHORS

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Chassany Watrelot & Associés

Julien Boucaud-Maître joined Chassany Watrelot & Associés in 2003 and has been a partner since 2009. He has a postgraduate degree in tax and business law, a corporate lawyer degree and a master's in international law (University of Kingston, United Kingdom).

Julien Boucaud-Maître advises and assists French and international companies on all issues relating to social law and, notably, on mergers and acquisitions, restructurings and 'management packages'. His expertise is also much sought after in the framework of employment collective relations.

JEAN GÉRARD

Chassany Watrelot & Associés

Jean Gérard began his legal practice as a judge. In 1987, he became an attorney at Gérard Vernet and then at Aguerra, both law firms in Lyon. Jean Gérard joined Chassany Watrelot & Associés in 1992 as a partner and now manages the litigation department.

Jean Gérard assists and represents French and international companies before all French courts having jurisdiction in social law, be they civil, criminal, administrative or specialised. His expertise is much sought after in the framework of emergency procedures.

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