THE LABOUR AND EMPLOYMENT DISPUTES REVIEW

Fifth Edition

Editor
Carson Burnham

THE LAWREVIEWS

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This article was first published in October 2022
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Published in the United Kingdom
by Law Business Research Ltd
Holborn Gate, 330 High Holborn, London, WC1V 7QT, UK

www.TheLawReviews.co.uk

ISBN 978-1-80449-093-8

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

ANJIE LAW FIRM

ARENDT & MEDERNACH

CHASSANY WATRELOT & ASSOCIÉS

DEACONS

ENSAFRICA

JIPYONG LLC

MORI HAMADA & MATSUMOTO

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OGLETREE, DEAKINS, NASH, SMOAK & STEWART, PC

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VAN OLMEN & WYNANT

CONTENTS

PREFACE

It is my honour and great pleasure to have been selected as editor of this year's *Labour and Employment Disputes Review*. Our distinguished contributors continue to show us a variety of perspectives as we consider how best to advise our clients seeking a global approach to employment concerns.

While the pandemic continues to influence all aspects of the employment relationship, we are seeing structural changes beyond any that could have been predicted in a pre-pandemic era. Employers are learning to accept the reality that employee expectations for flexible work arrangements have changed, and accommodating these expectations has become critical to maintaining employee engagement and retention. We also notice a shift in the power structure of the relationship, where employers no longer have a settled expectation regarding the willingness of employees to devote their full lives to work. With the advent of 'soft quitting' and employees' persistent intentions to work remotely from the location of their choosing, employers are having thoroughly to rethink their long-established methods of attracting and retaining top talent.

These shifts in the workplace are reflected in the increase in employment disputes noted throughout this Review, and particularly disputes in the arenas of bullying and moral harassment, whistle-blowing, and the right to disconnect from work that have been particularly noted throughout these chapters.

We also see trends resulting from employers' attempts to adjust to shifts in employee expectations. On the one hand, employment disputes arising from remote working relationships have increased, such as those concerning whether and to what extent an employer must pay for employees' expenses incurred to facilitate the employee's ability to work. On the other hand, we note a marked increase in employers' attempts to circumvent the strict requirements of the employment relationship altogether, such as by engaging independent contractors and leased workers or by using fixed-term contracts to limit exposure to employee-favourable legislation or collective bargaining agreement terms designed to protect employees' right to continued employment on favourable terms.

As trends in employment disputes continue to influence adjustments in legislation to accommodate new realities in the working relationship, we look forward with interest to continued developments in the years to come.

Carson Burnham
Ogletree, Deakins, Nash, Smoak & Stewart, PC
Boston
September 2022

Chapter 5

FRANCE

Benoît Dubessay[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, they 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 they made was not based on 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 and employment law is, therefore, widely composed of rules that derive from collective bargaining 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

These principles explain why the resolution of individual employment disputes between an employer and an employee are brought before specialised courts (namely labour courts) in the first instance, and not under usual state courts. These courts are presided over by an equal representation of non-professional judges who are appointed by trade union organisations of

1 Benoît Dubessay is a partner at Chassany Watrelot & Associés.

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 non-professional 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. However, since 2016, it is also in charge of the 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.

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 (the Pôle emploi)).

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, increases the written side of the procedure. Henceforth, a labour court must be seised of a signed and dated written petition, which must state the legal and factual grounds supporting the 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 non-professional judges specialising in labour law – two employers and two employees – the board then deliberates before rendering its decision. The parties are not present during the judgment board's deliberations. In approximately 20 per cent of cases, these four judges 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'. They hear the pleadings again, if possible in the presence of the initial four judges, and the decision is then adopted in this tie-breaker setting with five members. In the absence of 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 before 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 as those pertaining to family law, civil liability law, commercial law, etc.

Other types of conflict resulting from the application of employment and labour laws fall within the jurisdiction of common law courts (the judicial court has replaced the regional court since 1 January 2020). These include 'collective' disputes between employee trade unions or staff representative bodies (social and economic committees) and employers or groups of employers. Among these disputes, one can mention those related to the application of collective bargaining agreements. One should also 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 the judicial court.

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 different types of disputes. These jurisdictions 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.

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. A total of 80 per cent of the claims brought before labour courts aim to challenge the grounds for dismissal, most often based on personal matters.

The remainder of cases relate to the performance of the employment contract (e.g., moral harassment, discrimination, amount of salary, application of a collective agreement or working time).

IV YEAR IN REVIEW

In late 2020, labour and employment litigation in France was marked by two decisions delivered by the social chamber of the Court of Cassation, which favour the employer's right to evidence.

Until 2020, any evidence produced by an employer that violated the privacy of the employee was declared inadmissible. This included evidence obtained through undeclared data collection systems.

In the first decision, dated 30 September 2020, the Court of Cassation overruled its previous position by deciding that the right to evidence could justify the production of elements infringing on an employee's private life provided that production is:

a essential for the exercise of the law of evidence (i.e, the employer only had those elements to establish the breach the employee was accused of); and

b proportionate to the aim pursued. In this case, the employer's aim was to defend the confidentiality of its business.[2]

In the second decision, dated 25 November 2020, the Court of Cassation was even more innovative, ruling that:

> *henceforth, the illegality of a means of evidence does not necessarily entail its rejection in the proceedings, as the judge must assess whether the use of this evidence has undermined the fairness of the procedure as a whole, by balancing the right to respect for the employee's personal life and the right to evidence, which may justify the production of elements that infringe on an employee's personal life, provided that such production is essential for the exercise of this right and that the infringement is strictly proportionate to the aim pursued.*[3]

On 10 November 2021, the Court of Cassation confirmed its position by recalling that an employer could rely on images obtained with the help of illicit CCTV as long as their production was essential to the exercise of the right to evidence and that the infringement of the employee's private life was proportionate to the aim pursued.

With these rulings, the social chamber of the Court of Cassation has thus set out a general principle of the right to evidence in labour law, which makes it possible to rebalance the rights of employers and those of employees who, for their part, have always been authorised to produce in court all the elements they had knowledge of during their duties, (i.e., almost anything they wanted, including documents taken from the company).

Finally, 2022 has been already marked by the decision of the Court of Cassation that settled the question of whether the Macron scale of damages for unfair dismissal (the Macron scale) complies with France's international commitments (see below).

With respect to dismissals notified since 23 September 2017, the Macron scale introduced a cap for the amount of damages awarded by judges in the event of dismissals without actual and serious cause. Pursuant to Article L.1235-3 of the Labour Code, to the extent a dismissal is not notified for an actual and serious cause, the judge grants the

2 Cass. Soc. 30 September 2020, No. 19-12.058.

3 Cass. Soc. 30 November 2020, No. 17-19.523.

employee damages paid by the employer, the amount of which is set according to minimum and maximum damages payments that vary according to the employee's seniority and the number of employees at the company.

The purpose of this scheme is to address criticisms as to the 'unpredictability' of the amount of damages granted by the courts for a dismissal without actual and serious cause. As no such maximum damages amount had been set prior to Ordinance No. 2017-1387 dated 22 September 2017, each judge 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 one labour court to another or a court of appeal to another.

Further to its publication, the Macron scale set out in Article L.1235-3 of the Labour Code was heavily criticised, on the grounds that it would be contrary to Article 10 of Convention No. 158 of the International Labour Organization and Article 24 of the European Social Charter. This debate was settled by the highest French courts, which all confirmed the scale's compliance with these texts:

a In its Ordinance No. 415.243 dated 7 December 2017, the Council of State ruled that the capping of damages for dismissals is not contrary to Article 24 of the European Social Charter and Article 10 of Convention No. 158.[4]

b In its Decision No. 2018-761 DC dated 21 March 2018, the Constitutional Court approved this scheme without reservation.[5]

c In Opinion No. 19-70.010 issued by its plenary assembly on 17 July 2019, the Court of Cassation considered (1) that the provisions of Article 24 of the revised European Social Charter did not have a direct effect on national law in the framework of a dispute between private individuals; and (2) that the provisions of Article L.1235-3 of the Labour Code that set a scale applicable to the determination by the judge of the amount of damages for dismissal without actual and serious cause are compatible with the provisions of Article 10 of Convention No. 158.[6]

However, despite these decisions, several courts of appeal considered that the judge could *in concreto* control the Macron scale and, if necessary, set it aside if it did not provide the employee with fair compensation in relation to their real prejudice.

On 31 March 2022, the Court of Cassation was asked to examine the conformity of the Macron scale with France's international commitments on protection against dismissal. In its long-awaited decision, dated 11 May 2022, the Court put an end to the judicial debate that has lasted almost five years by confirming that the Macron scale is not contrary to Article 10 of Convention No. 158 of the International Labour Organization. Therefore, French labour courts cannot reject or set aside, even on a case-by-case basis, the application of the Macron scale. Moreover, French labour law will not have to be reviewed for conformity with Article 24 of the European Social Charter, which does not have direct effect.

4 CE, Réf. Ord., 7 December 2017, No. 415.243.

5 Cons. Constit, decision No. 2018-761 DC of 21 March 2018.

6 Cass. Avis, A.P, 17 July 2019, No. 19-70.010.

V OUTLOOK AND CONCLUSIONS

The year 2022 will determine whether the quantitative and qualitative transformation of labour litigation will continue. First, regarding quantity, the fall in the number of incoming cases occurred well before the Macron scale was implemented and before the reforms to the labour law procedure, which took effect on 1 September 2016. The peak was reached in 2009 when the number of new cases rose to an unparalleled 228,578. The number has fallen steadily in recent years, to 118,573 in 2019 and 102,696 in 2020. It is clear that the reforms followed an underlying trend that was already downward, and the reforms did not trigger the decline or even accelerate it.

The nature of the cases of which the French labour courts are now seised has evolved significantly. Litigation may still be overwhelmingly made up of disputes over individual dismissals, but it will increasingly occupy the territory of discrimination in all its forms. Indeed, when it is discriminatory, a dismissal is void and, when deemed void, a dismissal entitles the claimant to compensation without limit.

However, these types of cases are 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 protected by its power of control. It will have to ensure, in a precise written and legally based argument, the development of all the legal means necessary to convince the judge.

Appendix 1

ABOUT THE AUTHORS

BENOÎT DUBESSAY

Chassany Watrelot & Associés

Benoît Dubessay joined Chassany Watrelot & Associés in 2009 as an associate. He has been a partner since 2017.

His practice is mainly dedicated to employment litigation. He is in charge of sensitive matters relating to restructuring operations, union rights, collective bargaining, and respect of individual rights and freedoms in the workplace.

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ISBN 978-1-80449-093-8