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Additional requirement concerning the employer's redeployment obligation when an employee is declared unfit for work: This obligation must be fulfilled with loyalty!

In a decision dated January 26, 2022, the *Cour de Cassation* (French Supreme Court) clarified that the presumption introduced by Article L. 1226-12 of the French Labor Code only applies if the redeployment position offered to an employee declared unfit for work is as comparable as possible to the position previously held by that employee, thereby imposing a duty of loyalty on the employer.

An employee who is the victim of a work-related accident or an occupational disease may be declared unfit for work by the occupational physician who will recommend that the employee be reassigned to a position suited to his/her new condition.

The employer will then be obliged, following the opinion of the staff representatives, to offer the employee available positions that are more similar to the recommendations made by the occupational physician, in order to satisfy its redeployment obligation. In the absence of an available position, the employer has the option of dismissing the unfit employee who cannot be redeployed to another position. In that case, the latter will of course receive dismissal indemnities. Since the so-called El Khomri Law of 2016, the dismissal will be justified even if the employer has offered only one redeployment position that has been refused by the employee whereas it was previously required to offer to said employee several redeployment positions.

In this respect, Article L. 1226-10 of the French Labor Code stipulates as follows:

“When an employee who has been the victim of a work-related accident or an occupational disease is declared unfit by the occupational physician, pursuant to Article L. 4624-4, to return to the employment position her/she previously held, the employer shall offer him/her another job consistent with his/her abilities, within the company or, as the case may be, the companies of the group to which it belongs, located on the national territory and of which the organization, activities or place of operation ensure the permutation of all or part of the personnel staff.

This offer shall take into account, after the opinion of the Economic and Social Committee, the written conclusions of the occupational physician and the guidance that he/she gives on the employee’s ability to perform one of the tasks existing within the company. The occupational physician also provides guidance on the employee’s aptitude to benefit from training to prepare him/her for a suitable position.

The proposed position shall be as comparable as possible to the position previously held, if necessary, by implementing measures such as transfers, adjustments, adaptations or transformations of existing positions or reorganization of working hours.”

Article L. 1226-12 of the French Labor Code further specifies that “the redeployment obligation is deemed to be fulfilled when the employer has offered a position, under the conditions provided for in Article L. 1226-10, taking into account the opinion and guidance of the occupational physician.”

Yet, the *Cour de Cassation* added to these provisions that “*the presumption introduced by this text only applies if the employer has offered the employee, **with loyalty**, and taking into account the recommendations and guidance of the occupational physician, another position consistent with his/her abilities*”^[1]. It thereby reiterated the reasoning of the Court of Appeals which had held that “*as the employer has not fulfilled with loyalty the redeployment obligation imposed on it by law, the dismissal is devoid of any real and serious cause*”^[2].

In the matter at hand, after 25 years of service with the same employer, a public works equipment operator was declared unfit for work by the occupational physician, who recommended that he be repositioned as an operator of less vibrating equipment, or re-assigned to administrative positions.

The employer offered an administrative job to this employee whereas a position as equipment operator adapted to the employee’s physical condition was available. As such it was held that the employer did not fulfill its redeployment obligation with loyalty.

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As a reminder, the El Khomri Law relieves the employer from its redeployment obligation in the marginal case where, according to the opinion of the occupational physician, *“keeping the employee in a job would be seriously detrimental to his/her health or the employee’s health condition is an obstacle to any redeployment within the group”*^[3].

^[1] Labor Chamber of the *Cour de Cassation*, January 26, 2022, No. 20-20.369

^[2] Court of Appeals of Besançon, January 24, 2020, No. 19/00755

^[3] Article L. 1226-12 of the French Labor Code

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