SOULIER BUNCH

Published on 9 February 2024

Olivia Heilpern, Member of the Lyon Bar
oheilpern@soulierbunch.com
Tel.: +33 (0)4 72 82 20 80

Read this post online

Latest news in French labor and employment

In recent weeks, the *Cour de Cassation* (French Supreme Court) has issued a number of rulings providing useful clarification on issues that are important to companies and their corporate officers.

These rulings concern *inter alia* the criminal liability of employers in the context of their obligation to ensure the safety of their employees, a reversal of case law pertaining to the right of evidence in civil matters, the absolute protection of an employee on maternity leave against dismissal, and the compensation due to an employee using his/her home for professional purposes.

Employers' criminal liability and safety at work

Entering into a contract with a third party does not release the employer from its obligation to ensure the safety of its employees.

In a ruling handed down on November 16, 2023[1] in case related to a fatal accident, the *Cour de Cassation* considered that the employer had committed an inexcusable fault and held that it could be not be released from its obligation to ensure the safety of its employees by entering into a contract providing that such safety would be ensured by a third party.

In the matter at hand, the successors in interest of an employee who died in a helicopter accident during the filming of a TV show brought an action before the social security court and asked such court to acknowledge

that the employer had committed an inexcusable fault.

In defense, the employer argued that it had delegated safety management to a specialized third-party company.

It should be recalled that an employee who has suffered a work-related accident can obtain additional compensation if it is established that the employer has committed an inexcusable fault. Such inexcusable fault is established wherever the employer, in breach of its obligation to ensure the safety of its employees, was aware, or should have been aware, of the danger to which the employee was exposed, and failed to take the necessary measures to protect him/her[2].

The *Cour de Cassation* held that delegating safety to a specialized third-party company did not release the employer from its obligation. It underlined that third-party companies remain under the supervision, direction and control of the employer.

It should be noted that, in another case, the *Cour de Cassation* had previously ruled that when the responsibility for a worksite has been entrusted to an employee/agent of an external company, such employee/agent can be considered as acting as a substitute for the employer whose employee has suffered a work-related accident, meaning that he/she can be held liable for having committed an inexcusable fault[3]. In that case, a liability action can thus be directed against the third-party company.

Right to evidence: A reversal of case law

The civil judge can now consider pieces of evidence unfairly obtained.

In two rulings issued on December 22, 2023[4], the Plenary Assembly of the *Cour de Cassation* reversed its case law by holding that from now on, in a civil trial, unfairness in the collection or production of evidence does not necessarily result in the dismissal of such evidence. The *Cour de Cassation*'s reference to Article 6, § 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms[5] show a desire to align with EU case law.

In the first case, a sales employee had been dismissed for serious misconduct, notably because of his repeated refusal to provide his employer with information relating to the follow-up of his sales activities, refusal that he had expressed during meetings with his employer. The employer proved the materiality of these facts by means of transcripts of audio recordings made during these meetings without the employee's knowledge. The employee argued that this evidence was unfair and, therefore, inadmissible, in accordance with the *Cour de Cassation*'s established case law in civil matters.

In the second case, an employee had been dismissed for serious misconduct because of comments made in a private conversation via Facebook messenger. These comments had been discovered by the temporary employee who replaced him during his leave. This temporary employee, while using the employee's computer, accessed to the latter's Facebook account which had remained open.

The rulings of the Plenary Assembly on December 22, 2023 clearly confirm that, whatever the reason why the evidence may be found unlawful, it cannot automatically be held inadmissible by the judge ruling on the merits. They also confirm the principle established by the *Cour de Cassation*, according to which the application of the rules governing the right to evidence presupposes that this right be invoked by a party[6].

However, while the civil judge is henceforth authorized to no longer automatically dismiss unfair evidence, he/she must ensure that the production of such evidence does not adversely affect the fairness of the proceedings.

It is, therefore, up to the judge, when faced with unfair evidence, to ensure that the production of such evidence is essential to the exercise of the right to evidence by the party who produces it, and that the breach of the traditional rules of evidence is strictly proportionate to the objective pursued.

Maternity and protection against dismissal

During her maternity leave, as well as during the paid vacation leave taken immediately thereafter, the employee benefits from a so-called "absolute" protection against termination of her employment contract. This means that no dismissal, on any ground whatsoever, may take place during the period of suspension of the employment contract[7] .

According to the *Cour de cassation*, pursuant to these provisions, interpreted in the light of Article 10 of Directive 92/85 of October 19, 1992[8], an employer is prohibited not only from giving notice of dismissal, on any ground whatsoever, during the protection period referred to in Article L 1225-4 of the French Labor Code, but also from taking any preparatory measures for such a dismissal[9].

In a ruling issued on November 29, 2023[10], the *Cour de Cassation* recalled that no preparatory measures for dismissal may be taken during the period of absolute protection of an employee on maternity leave.

As such, the employer may not send the relevant employee a notice to attend a pre-dismissal meeting before the end of this period.

Sending such a notice during the period of absolute protection is sufficient to render any subsequent dismissal null and void.

Home occupation allowance

In a ruling handed down on November 15, 2023[11], the *Cour de cassation* recalled that the use by an employee of his/her home for professional purposes constitutes an interference in his/her private life, and that the employee is entitled to claim compensation in this respect if no business premises are actually made available to him/her.

In the *Cour de Cassation*'s view, the burden of proving the provision of business premises to determine whether an allowance should be awarded for use of the home for professional purposes lies on the employer,

not on the employee.

If no such business premises are made available, it is up to the judge to assess the amount of the home occupation allowance due to the employee.

---

[1] 2nd Civil Chamber of the *Cour de Cassation*, November 16, 2023, No. 21-20.740

[2] 2nd Civil Chamber of the *Cour de Cassation*, October 8, 2020, No. 18-25.021

[3] Labor Chamber of the *Cour de Cassation*, November 14, 1991, No. 90-14.065

[4] Plenary Assembly of the *Cour de Cassation*, December 22, 2023, No. 20-20.648 and No. 21-11.330

[5] https://www.echr.coe.int/documents/d/echr/Convention_ENG

[6] Labor Chamber of the *Cour de Cassation*, March 8, 2023, No. 20-21.848 FS-B

[7] Article L. 1225-4, § 1 and § 2 of the French Labor Code

[8] Council Directive 92/85/EEC of October 19, 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding

[9] Labor Chamber of the *Cour de Cassation*, February 1, 2017, No. 15-26.250 F-D : FRS 5/17 inf. 3 p. 6

[10] Labor Chamber of the *Cour de Cassation*, November 29, 2023, No. 22-15.794

[11] Labor Chamber of the *Cour de Cassation*, November 5, 2023, No. 21-26.021