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The anxiety-related damage: a new risk for businesses?

The anxiety-related damage was first recognized by the Cour de Cassation (French Supreme Court) in May 2010 and has already evolved since then. Insofar as an increasing number of claims are filed against companies with respect to safety in the workplace, this article examines the possible extension of this concept to other situations than asbestos.

And this appears to be even more relevant since any employee exposed to particular risks “which may have lasting, identifiable and irreversible effects on health” is monitored by means of an exposure sheet, copy of which is remitted to him/her when he/she leaves the company, develops an occupational disease or is placed on sick leave for a certain period of time (Article L.4121-3-1 of the French Labor Code).

Will the anxiety-related damage be reserved only for pre-retired asbestos workers or will this compensable damage spread like an

epidemic, it being recalled that there were 11.5 million hypnotics/anxiolytics users in France in 2012?

1. Background of the anxiety-related damage that must be compensated by companies

Article 41 of the Law of December 23, 1998 created the *Allocation de Cessation Anticipée d'Activité des Travailleurs de l'Amiante* (Allowance for Early Cessation of Occupational Activity of Asbestos Workers, hereinafter the "ACAATA") for the employees and former employees of establishments that manufacture materials containing asbestos, are engaged in asbestos fireproofing and heat insulation activities, or naval construction and repair works, subject to a number of conditions, the main of which being the resignation of the relevant employees at the age of 50 or over.

The establishments targeted by the Law are set forth in a list drawn up by the Ministers of Labor, Social Security and Budget.

It should be noted that some establishments were included in that list even though only 6% to 12% of the workforce was involved in asbestos-related activities. As such, even if 80% of the workforce was not exposed to asbestos, 100 % of the employees of such establishments are eligible to the above-described ACAATA scheme.

In a decision dated May 11, 2010 (decision n° 09-42.241), the Labor Chamber of the *Cour de Cassation* held that the employees **"found themselves in a situation of permanent concern with regard to the risk of developing at any time an asbestos-related disease and were required to undergo regular medical controls and examinations that are likely to reactivate their anguish"**.

Therefore, the anxiety-related damage was admitted "as such", and acknowledged to be compensable, irrespective of whether an asbestos-related disease has developed or not.

On the other hand, the Labor Chamber refused to acknowledge the existence of an economic damage resulting from the loss of revenue suffered by the employees who had elected to benefit from the ACCATA scheme.

On December 4, 2012, the Labor Chamber of the *Cour de Cassation* softened its position and considered that the employee in question **"found herself, because of the employer, in a situation of permanent concern with regard to the risk of developing at any time an asbestos-related disease, irrespective of whether she undergoes regular medical controls or not"** (decision n° 11-26.294).

As such, anxiety does not need to be established... Its existence is automatically *de facto* acknowledged!

On September 25, 2013, the Labor Chamber of the *Cour de Cassation* dismissed a claim for indemnification of an additional damage related to **"the disruption in living conditions"** and specified that **"the compensation granted for the anxiety-related damage redresses all the psychological risks, included those related to the disruption in living conditions, resulting from the risk of developing at any time an asbestos-related disease"**

(decision n° 12.12883).

The *Cour de Cassation* also recalled that the Labor Courts have jurisdiction to grant compensation for anxiety-related damage insofar as the claims brought by the employees are based on an alleged breach by the employer of its obligation to ensure safety in the workplace. Consequently, employee who declared that they were suffering from a disease as a result of the exposure to asbestos and claimed compensation before the Social Security Tribunal, are entitled to seek compensation for the anxiety-related damage, such compensation being intended to cover the period before the appearance of the disease (decision n° 12-20.157).

In 2014, the Labor Chamber of the *Cour de Cassation* was requested to rule on the statute of limitations issue. It considered that *“the anxiety-related damage, that does not result from the mere exposure to a risk created by asbestos, covers all the psychological disorders brought about by the fact that the employees become aware of such risk”* and specified that the damage *“occurs on the date on which the employees became aware of the ministerial decree”* that sets forth the list of establishments falling within the scope of Article 41 of the Law of December 23, 1998 (decision n° 13-21.254 of December 17, 2014).

Since 2008, the applicable statute of limitations is five years (as opposed to thirty years previously).

2. Compensation granted

The compensation granted to former employees of the establishments included in the list of establishments eligible to the ACAATA scheme varies significantly from one Court of Appeals to another.

On average, the Court of Appeals of Nancy has granted 10,000 euros to 150 former employees of one of the above-mentioned establishments.

The Labor Court of Saint-Brieuc awarded 2.2 million euros to 275 employees of another establishment, i.e. 8,000 euros per employee.

The Court of Appeals of Paris is the most generous court: it awards between 13,000 euros and 17,000 euros per employee.

3. Possible future evolution of the anxiety-related damage

It is necessary to recall the terms of the decision rendered by the Labor Chamber of the *Cour de Cassation* on October 6, 2010 (decision n° 08-45.609): the employer of a front desk agent working in a coach station was convicted for breach of its obligation to ensure safety simply because of the sense of insecurity felt by the agent, despite all the measures that had been implemented (video-surveillance, prevention measures taken in cooperation with public authorities, alarm systems, etc.).

The obligation to ensure safety is indeed a so-called *obligation de résultat* under French law, including with respect to mental health.

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As such, a mere sense of insecurity felt by an employee can be sufficient to warrant the conviction of the employer...

Concerning specifically the anxiety-related damage resulting from the *“permanent concern with regards to the risk of developing at any time a disease”*, we can legitimately believe that an employee exposed to harmful substances, including carcinogens, mutagens and substances toxic for reproduction, precisely informed of the risks incurred in the performance of his/her duties, both during the term of his/her employment contract or upon retirement through the mandatory delivery of the exposure sheet, can certainly become anxious about the possible consequences of such exposure – which can have consequences as serious as those related to exposure to asbestos.

Why would his/her anxiety to develop a cancer or to have difficulties – or even to be unable – to have children not be taken account, just like the anxiety felt by the asbestos workers who have retired from work early??

Those who defend employees are perfectly aware of this fact: more than 900 claims have already been brought in the Lorraine Region to obtain compensation for an anxiety-related damage concerning the risks incurred by working in iron mines and another 800 claims have been brought by employees who used to work in coal mines... For these defenders, *“all those who are anxious as a result of a fault committed by a third party must be recognized as suffering from an anxiety-related damage. The basic reasoning behind this is the breach of the obligation to ensure safety. It applies to toxic products, chromium vapors or other risks. Those who have been exposed to potent carcinogens must be indemnified according to the same principle”*.

With this approach, there is every good reason for fearing a steep rise in litigation concerning the anxiety-related damage.

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