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The Cour de Cassation approves Macron's scale for the determination of damages

A new episode in the legal saga on Macron's scale: the Cour de Cassation (French Supreme Court) recently issued an eagerly awaited opinion on the compatibility of Macron's mandatory scale for the determination of damages in case of dismissal without real and serious cause with European and international standards.

It should first be reminded that the judge is now required to apply the mandatory scale for the determination of damages in case of dismissal without real and serious cause, as introduced by Ordinance n°2017-1387 and set forth in Article L. 1235-3 of the French Labor Code, and to award damages, the minimum and maximum amounts of which are determined on the basis of the employee's seniority and the size of the company.

Many Labor Courts have opposed this scale, arguing that it was incompatible with international conventions. Specifically, they consider that the application of this scale does not allow them to provide employees with an adequate compensation in accordance with Article 10 of Convention No. 158 of the International Labor Organization ("ILO") and Article 24 of the European Social Charter.

In response to this wave of opposition, the Ministry of Justice sent a circular dated 26 February 2019 to Public Prosecutors at the Courts of Appeals, in which it recalled that the scale had been validated by the *Conseil d'Etat* (Council of State) and the *Conseil Constitutionnel* (Constitutional Council)..

It is now the *Cour de Cassation* that has been asked to examine this issue. On July 19, 2019, it handed down two opinions^[1] following two applications filed by the Labor Courts of Toulouse and Louvriers with respect to the compatibility of this scale with European and international standards.

In both opinions, the *Cour de Cassation* first acknowledged that the applications were admissible and then

expressed its view on the merits. In particular, it considered Article 6, § 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms and then Article 24 of the European Social Charter to finally give its opinion on the compatibility of such scale with Article 10 of Convention No. 158 of the ILO.

The *Cour de Cassation* considered first of all that the provisions of Article L. 1235-3 of the French Labor Code do not constitute a procedural obstacle to access to justice, and that they, therefore, do not fall within the scope of the aforementioned Article 6, § 1.

With regard to Article 24 of the European Social Charter, the *Cour de Cassation* also considered that the provisions of this Article of the Charter are not directly applicable in domestic law in a dispute between individuals.

The *Cour de Cassation* then ruled on Article 10 of ILO's Convention No. 158, which it considered to be directly applicable in domestic law, and which stipulates that *"If the bodies referred to in Article 8 of this Convention find that termination is unjustified and if they are not empowered or do not find it practicable, in accordance with national law and practice, to declare the termination invalid and/or order or propose reinstatement of the worker, they shall be empowered to order payment of adequate compensation or such other relief as may be deemed appropriate."*

The *Cour de Cassation* held that *"the term 'adequate' must be understood as reserving a margin of discretion for Member States"*.

It recalled that under French law, *"if the dismissal is devoid of any real and serious cause, the judge may propose that the employee be reinstated in the company. When reinstatement is refused by either party, the judge shall grant the employee an indemnity to be paid by the employer, to be comprised between maximum and minimum amounts. The scale provided for in Article L. 1235-3 of the French Labor Code shall be disregarded if the dismissal is held null and void, as per the provisions set forth in Article L. 1235-3-1 of the same Code"*.

The *Cour de Cassation* therefore concluded that the scale was compatible with the provisions of Article 10 of ILO's Convention No. 158.

However, the "saga" on the Macron scale does not seem to stop there since the Labor Court of Grenoble^[2] handed down a judgment on July 22, 2019 in which it set aside the opinion delivered only a few days before by the *Cour de Cassation*. Indeed, after stating that said opinion did not constitute a decision on the merits, the Labor Court of Grenoble awarded to the employee an indemnity higher than that provided for under the scale. It is also important to note that this judgment was rendered by a professional judge.

The opinions of the *Cour de Cassation* therefore do not seem to put an end to the debate and French Labor Courts could continue to refuse to apply the scale. We are still therefore looking forward to the decisions of Courts of Appeals, but above all for a ruling of the *Cour de Cassation* that would close the debate.

^[1] Opinions n°15012 and 15013 of the *Cour de Cassation* dated July 17, 2019

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[2] Labor Court of Grenoble, July 22, 2019, n°18/00267

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