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Executives/non-executives: the cour de cassation's decision is being followed and exposes companies to very high financial risks

The decision rendered on July 1, 2009 (no. 07-42675) by the Labor Chamber of the *Cour de cassation* (French Supreme Court) was addressed in our July-August 2009 e-newsletter, in which we expressed our concern about the possible direction of the principle of equal treatment between employees.

According to this decision, *"the sole difference of professional category in itself cannot justify disparate treatment in the granting of an advantage between employees placed in an identical situation, as any disparity must be based on objective reasons whose actual reality and relevance must be verified by the judge."*

This decision concerned a provision in a company agreement that granted executives longer paid vacations. The *Cour* held that this benefit was due to the non-executive as the company failed to show any relevant justification for its limitation to executives.

This begs the question: what would be the impact on the numerous provisions of the collective bargaining agreements which, following in the footsteps of the historical National Collective Bargaining Agreement for Executives dated March 14, 1947 – the social foundation of French society, grant specific benefits according to professional category?

The distinction between executive status and non-executive status is a French particularity. Although it has progressively become blurred in terms of consequences for the employees, notably regarding the mandatory retirement regime, French lawmakers have seen to it that companies are able to absorb these consequences in terms of cost and personnel management by very slowly aligning the regimes in place.

By challenging this status distinction with regard to benefits granted to employees, the *Cour de cassation* has shattered this foundation without concerning itself with the consequences for the companies that are, today, exposed to significant financial risks and find themselves in situations of serious legal uncertainty even though

all they are doing is strictly complying with the terms of the collective bargaining agreements, duly negotiated between the unions and employers.

Unfortunately, our concerns are being confirmed, and we can only fear the worst for the coming months due to the decision rendered by the Montpellier Court of Appeals dated November 4, 2009.

1. Decision of the 4th Labor Chamber of the Montpellier Court of Appeals dated November 4, 2009:

An employee was dismissed for economic reasons, which she contested. Under these circumstances, she claimed notably an additional severance pay and an additional notice period indemnification, arguing that the terms of the collective bargaining agreement applied to her were those for non-executives. She did not contest her non-executive status. Rather, she purely and simply asked the alignment of her status with that of the executives, whose collective bargaining agreement, quite naturally, sets forth a notice period of 3 months and a higher severance pay. To justify her claims, the employee argued the principle of equality had been violated… This was to be expected.

The Court of Appeals used the reasoning put forth by the *Cour de cassation* and held:

"The sole difference of professional category in itself cannot justify disparate treatment in the granting of an advantage between employees placed in an identical situation, as any disparity must be based on objective reasons. (…) Yet, it must indeed be acknowledged that none of the provisions of the collective bargaining agreement in question, negotiated between the unions and employers, objectively justified the difference made between one category and another in the granting of benefits in the case of a dismissal. Further, the circumstance that executives occupy more qualified positions with higher responsibilities, as argued by the employer, does not in itself objectively justify a longer notice period or a more advantageous severance pay calculation. The fact that the executive would take longer to find a job or that the employer would need more time to find a replacement constitutes ***a purely subjective appreciation*** *that is not based in any way on specific data concerning the job market. The employer's second argument that the severance pay is aimed at indemnifying a loss of salary and that the difference is justified by the fact that the executive who no longer has a job suffers a greater damage also* ***lacks any relevance****."*

In other words, no objective or relevant reason justifies the disparate treatment between executives and non-executives with regard to the length of the notice period or the calculation of the severance pay.

This conclusion can only make companies, and more particularly those that managed or are in the process of managing economic dismissals due to the economic crisis, shudder with fear.

A certain number of non-executives can easily obtain additional notice period indemnities and more than substantially higher severance pay. One month, even two months, of notice period indemnity could very easily

be obtained by any non-executive who could also, depending on the collective bargaining agreement, double or triple the severance pay he had received.

Please find below a few significant examples:

Collective Bargaining Agreement for Metallurgy:

For a 51 year old non-executive with 10 years' seniority, per the collective bargaining agreement, the notice period is 2 months and the severance pay is equal to 2 months' salary. Now, he could claim:

- 4 months' notice period (as executives over the age of 50 receive a notice period of 6 months); and
- 1.84 months' salary as additional severance pay;

i.e. a total of 5.84 months' salary.

Collective Bargaining Agreement for the Chemical and Building Industries:

On the same bases, a laborer (non-executive) in one of these sectors of activity could obtain 1 additional month for the notice period and 1 additional month in severance pay.

Consequently, a dramatic rise in litigation on the issue is to be expected.

2. The probable subsequent consequences:

As the French courts held irrelevant the arguments raised to justify granting additional paid vacation, and then those for a longer notice period and a higher severance pay, how is it possible to hope that disparate treatment regarding an employee's health will be deemed relevant? On what basis can an employer justify full salary coverage for a longer period of time in case of illness? And death benefits that are 5 times higher for executives, can this be objectively justified?

In addition to the notice period and severance pay, it appears that companies are now exposed to higher financial risks regarding death and disability coverage. If the company has taken out insurance policies with different terms, conditions and coverage based on professional category, and an employee passes away after an illness, his beneficiaries could claim several years of salary from the company on the basis of equal treatment of guarantees and coverage.

3. What can companies do in light of these new risks?

The decision of the Montpellier Court of Appeal will probably be appealed before the *Cour de cassation,* which will then have another opportunity to rule on the matter, but this time concerning provisions in the national collective bargaining agreements.

In the meantime, and to say the least, companies will be in an uncomfortable situation because they manage

on a daily basis the social consequences of the distinction between executives and non-executives as it exists within our French social culture.

So how can companies protect themselves today?

In our opinion, the distinction between these two professional categories will disappear, particularly regarding certain benefits tied to an objective personal situation: illness, disability, death. Many companies have already taken this route and have one death and disability regime and/or one complementary health insurance regime applicable identically to all professional categories. We believe this approach to now be a priority for companies with different policies for different categories. The financial risks are indeed particularly high: several years of salary as a death benefit or years, even over ten years, in disability benefits.

Concerning other collective bargaining agreement provisions, and more specifically the length of the notice period and the severance pay, we will have to wait for the solution adopted by the *Cour de cassation* and then the negotiations between union and employers that will need to adapt the collective branch agreements pursuant to the new requirements set forth by case law. Until then, in our opinion, it is necessary to make contingency provisions to cover the risk.