Read this post online

Health, Safety and Working Conditions Committee: latest legal and case-law developments

The Health, Safety and Working Conditions Committee ("HSWCC"), a social partner whose sphere of competence was originally limited, has gradually become a key player and is now involved in many stages of the daily life of businesses.

The increasing involvement of this Committee is quite logical given the growing concerns and obligations related to health in the workplace, whatever the industry concerned and the size of the company.

It should firstly be recalled that under French law and in respect of health in the workplace, the employer is bound by a so-called *obligation de résultat*[1] and must therefore protect the mental and physical heath of its employees (Article L. 4121-1 of the French Labor Code). French courts have rendered numerous decisions on this subject. They have notably been asked to rule on the HSWCC's role in consultation processes that concerned a matter that may have had an impact on the health of the employee and on the assistance provided by a mandated expert, a source of difficulty in companies because of the significant costs that such assistance may entail.

You will find below a brief overview of recent developments in this respect.

1. The extensive interpretation of the concepts of "*alteration of working conditions*" and "*technological change*"

A judgment handed down on August 5, 2013 by the Court of Appeals of Versailles (n° 13/05861) confirms the trend that French courts make an extensive interpretation of the obligations imposed under Article L.4612-8 of the French Labor Code.

Such Article stipulates that the HSWCC must be consulted "*before every decision regarding important modifications affecting the health, safety or working conditions of the employees*".

In this particular matter, the company SFR RIVE DEFENSE consulted its Works Council ("WC") and Central

Work Council ("CWC") in relation to the deployment of the 4G technology that was supposed to become the centerpiece of its sales strategy. SFR RIVE DEFENSE considered that this evolution had no impact on the working conditions of the employees and therefore merely informed (as opposed to consulted) the HSWCC. The deployment of the 4G technology was implemented by 7 project managers who had received a specific training during two days.

The HSWCC requested the launch of a full consultation process and the elaboration of an adaptation plan. And it finally obtained what it asked for. The Court of Appeals of Versailles held that a project of such a strategic importance unavoidably had an impact on the working conditions of the employees. This clearly shows that what is obvious to some, is not so obvious to others! The judge assumed that while the 4G concerned only a few project managers, "in its last phase, *[it] would have a significant impact of other business functions, such as sales*".

As such, anything that is strategic for the company would necessarily fall within the sphere of competence of the HSWCC, not only within that of the WC.

It is now obvious that consulting the HSWCC prior to consulting the WC on any issue relation to the activities of and changes within the company is inevitable. This has been recently recalled by the *Cour de Cassation* (French Supreme Court) on several occasions (Labor Chamber of the *Cour de Cassation*, July 4, 2012, n°11-19.678 and July 10, 2013, n°12-17.196). The Court of Appeals of Versailles has extended this obligation to a case where the change in question had no immediate impact on the working conditions and employment positions.

It is true that any change is likely to raise questions and thus concerns among employees… which can be a source of stress and, therefore, may affect their working conditions. This is sufficient to justify the launch of a consultation process with the HSWCC.

The other issue raised in this case concerned the preparation of an adaptation plan, i.e. a plan that is supposed to be discussed in the framework of a consultation with the HSWCC insofar as an employer contemplates implementing significant and rapid technological changes (Articles L.4612-10 and L.2323-14 of the French Labor Code). In this particular case, SFR RIVE DEFENSE considered that the 4G technology was merely an evolution of existing technologies (i.e. 2G and 3G technologies) – which excluded the idea of "technological change" referred to in the French Labor Code – and claimed that such technology was an evolution intended to serve clients and in no event a new tool made available to employees who would keep their usual working methods and have the same working assignments.

These arguments, even though obviously fully relevant, remained ineffective! The Court of Appeals of Versailles considered that the introduction of the 4G technology was an important project that impacted the personnel and that its implementation was a rapid process. As such, the deployment of the 4G technology had to be addressed in an adaptation plan!

2. Articulation between the powers and responsibilities of the WC and that of the HSWCC

In many cases, the powers and responsibilities of these two bodies are now complementary and inextricably linked.

Because the opinion issued by the HSWCC is necessary for the WC to examine the issue at stake, the company must consult the HSWCC before the WC – or at least at the same time, so that the WC can have the opinion of the HSWCC to examine the issue and express its own opinion thereon.

The Law on securing employment of June 14, 2013 has amended Article **L.2323-3** of the French Labor Code that now reads as follows: "*In the absence of any legal provisions to the contrary, an agreement between the employer and the Works Council, or as the case may be, with the Central Works Council, adopted by majority vote of the elected sitting members of such Council, or in the absence of such agreement, a Decree of the Council of state shall fix the timeframe within which the Works Council must issue opinions in the framework of the consultation processes provided for under Articles L.2281-12, L.2323-72 and L.3121-11* [of the French Labor Code]. *This timeframe, which may not be less than 15 days, must enable the Works Council to usefully exercise its powers and duties, depending on the nature and importance of the issues at stake, and, as the case may be, depending on the information and consultation of the Safety, Hygiene and Working conditions Committee(s)*."

In addition, Decree 2013-552 of June 26, 2013 has amended Article R.4614-3 of the French Labor Code to include therein a specific timeframe of three days when the HSWCC is convened in relation to a contemplated reorganization and workforce downsizing.

3. HSWCCs Coordination Body

Created by the Law on securing employment, this coordination body, set up on an optional and temporary basis, is intended to organize the use of a single expert when the HSWCC of several sites are impacted by a contemplated project.

Only the employer can decide to set up this coordination body. The employer is the prime beneficiary of this new possibility since it will avoid the costs incurred by the appointment of an expert by the HSWCC of each site impacted by the project.

This HSWCCs Coordination Body is set up on a temporary basis and comprises the employer, one to three representatives (depending on the number of involved HSWCCs) of the HSWCC of each site impacted by the contemplated project and third parties (occupational physicians, labor inspector, etc.).

The representatives of the HSWCCs Coordination Body are appointed by and among the employees sitting in each relevant HSWCC for the duration of their term of office.

This appointment must be made during the first meeting that follows the election of the HSWCC representatives and the order or priority of the three representatives must be specified. For HSWCCs that are already in place as of July 1, 2013, the appointment must be made during the first meeting of the HSWCC held after such date.

The appointed representatives do not benefit from an additional credit of hours to fulfill their duties as members of the HSWCCs Coordination Body. However, Article L.4614-3 of the French Labor Code has been modified and now stipulates that the membership to the HSWCCs Coordination Body is a legitimate ground for exceeding the number of credited hours.

The HSWCCs Coordination Body can – but does not have to – issue its own opinion on the contemplated project. It must decide so during its first meeting (Article R.4616-8 of the French Labor Code). If it decides to issue an opinion, such opinion shall be transmitted, together with the expert's report, to each relevant HSWCC that will then issue their own opinion as the HSWCCs Coordination Body does not take over the duties and functions of the HSWCC of each site impacted by the project.

The Law on securing employment has also regulated the timeframes for the completion of the consultation process, the issuance of the expert's report and the issuance by the various involved councils and/or committee(s) of their opinions. Undoubtedly, businesses will have a hard time dealing with these multiple timeframes applicable to the various parties involved. This will especially be true in case of reorganizations and workforce downsizings.

---

[1] In respect of health and safety at work, companies have under French law an ***obligation de résultat*** and not only an ***obligation de moyens***. With an ***obligation de résultat***, a party must fulfill a specific obligation or arrive at a specific result. With an ***obligation de moyens***, the party must simply implement or use, to his/her best efforts, all necessary means in order to fulfill a specific obligation or achieve a specific result. In other words, concerning safety and health at work, the employer will be presumed liable from the sole fact that a professional risk occurred and caused harm to its employees.

advice. The addressee is solely liable for any use of the information contained herein.