

Variable remuneration: Don't forget at the beginning of each year to set objectives that are ... realistic!

In a ruling dated December 15, 2021, the *Cour de Cassation* (French Supreme Court) upheld the decision of a Court of Appeals that had ordered an employer to pay back pay for variable remuneration, the objectives of which were neither realistic nor revised every year.

Variable remuneration, whenever provided for in the employment contract, is a component of the salary that makes it possible to determine compliance with the minimum salary provided for by law or the applicable collective bargaining agreement^[1].

The payment of this variable remuneration is in principle conditional upon the achievement of annual objectives by the employee.

Over the years, French courts have established various rules applicable to variable remuneration based on the achievement of objectives.

On the one hand, the objectives to be achieved may be set unilaterally by the employer, or defined in the employee's employment contract. In case of disagreement between the employer and the employee on the achievement of the relevant objectives, the judge will investigate the reasons for the non-achievement, and will consider in particular whether the set objectives were reasonable and compatible with the market^[2].

On the other hand, the objectives to be achieved must be communicated to the employee at the beginning of the year^[3] wherever the employer determines them unilaterally. If the objectives are set forth in the employment contract, the employer must ensure that an amendment to such contract is signed with the employee at the beginning of each year in order to determine the annual objectives to be achieved.

The Labor Chamber of the *Cour de Cassation* has already ruled that the late communication of the objectives entails the full payment of the variable remuneration^[4].

The ruling handed down by the Labor Chamber on December 15, 2021^[5] recalled the conditions for the payment of variable remuneration based on the achievement of objectives and imposes on the employer the obligation to provide evidence that these conditions have been met.

Indeed, in that special case, the *Cour de Cassation* upheld the findings of the appellate judges who had ordered an employer to a back pay on the variable remuneration of an employee, the objectives of which were not realistic and had not been re-determined from year to year.

In so doing, it recalled the need for the employer to define reasonable and market-compatible objectives. **It also ruled out the possibility of a tacit renewal of the objectives over the years.**

The employer's failure to set annual objectives and to communicate them to the employee has the serious consequence of requiring the employer to pay the entire bonus, irrespective of whether or not the employee has achieved the previously set objectives.

Moreover, as the variable remuneration had been determined contractually in the case at hand, the *Cour de Cassation*, in application of the French Civil Code, pointed out that **it was up to the employer to provide in court the elements likely to determine that the objectives were achievable**, without however reversing the burden of proof. The employer may therefore be required to justify that the objectives it has predefined are realistic in order to extinguish its obligation to pay the variable remuneration to the employee.

Finally, the *Cour de Cassation* confirmed that an employer who has failed to meet its obligation to revise the objectives over several years commits a breach justifying the acknowledgment of the termination of the contract by the employee, thereby producing the effects of a dismissal without real and serious cause, and entailing the payment of the related indemnities. As a reminder, if the employer communicates the objectives to the employee too belatedly, this may entail the same consequences

For information purposes, the mere non-achievement of objectives by the employee cannot in itself justify the dismissal of an employee for poor results. It is necessary to bring up other elements to characterize a poor professional performance at the origin of the poor results.

^[1] Labor Chamber of the *Cour de Cassation*, June 4, 2002, No. 00-41.140

^[2] Labor Chamber of the *Cour de Cassation*, March 30, 1999, No. 97-41.028

^[3] Labor Chamber of the *Cour de Cassation*, March 2, 2011, No. 08-44.977

^[4] Labor Chamber of the *Cour de Cassation*, November 25, 2020, No. 19-17.246

^[5] Labor Chamber of the *Cour de Cassation*, December 15, 2021, No. 19-20.978



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