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“Equal pay for equal work”…or too much of a good thing?

Case law has established the principle of “equal pay for equal work”, which seems logical and fair. However, in practice, it may be difficult to implement, specifically in small- and medium-sized companies. Further, equity can sometimes shift towards egalitarianism, which, in the end, could severely penalize employees, and therefore companies, should this become the norm.

Following two recent decisions rendered by the French Supreme Court on April 30, 2009 and July 1, 2009, case law evolved in a manner that may create a new basis for lawsuits against which companies may be helpless.

The general principle and its basis:

Articles L. 2261-22 and L. 2271-1 of the French Labor Code hint at the principle of equal pay for equal work. Specifically, Article L. 2261-22 relates to the conditions necessary to extend application of a collective bargaining agreement to all companies in a specified sector, and Article L. 2271-1 to the powers of the National Commission on Collective Negotiations. Since then, this principle has developed over the years, especially through case law.

The Order no. 92-43680 of October 29, 1996 rendered this principle a mandatory rule: *“the employer must ensure equality of remuneration between employees of either gender, as long as the concerned employees are placed in* ***identical situations****.”*

This rule has been reaffirmed and more detailed throughout the years: *“the employer must ensure equality of remuneration between employees as long as they are placed in identical situations; (…) the employer has the burden of proof in establishing that the disparate treatment is justified by* ***objective elements*** *free from any discrimination”* (Social Chamber of the French Supreme Court, June 20, 2001).

Consequently, employers’ decisions regarding salary cannot be discretionary and must be based on objective

and verifiable elements.

On April 30, 2009, the Social Chamber of the French Supreme Court reaffirmed this rule when deciding on a discretionary bonus issue: *"the employer cannot raise its discretionary power as an argument to escape its obligation to justify in an objective and **relevant** manner the difference in salary"* (Social Chamber of the French Supreme Court, April 30, 2009, no. 07-40527).

2. The scope of the principle:

Every element of remuneration is affected: base salary, variable salary, allowances, bonuses, benefits and other advantages, such as restaurant tickets[1] or paid absences[2].

Whatever the advantage given, the employer must always be able to justify his choices. He must have tangible proof that the reasons for attributing such advantages are based on relevant factors.

However, this principle only applies when there is "equal work". Article L. 3221-4 of the French Labor Code defines this notion of professional equality, specifically between men and women as follows: *"Any work that requires from employees, as a whole, comparable professional skills established by a title, diploma or professional experience, capabilities gained through experience, responsibilities and physical or stressful workload, is considered as equal."*

With regard to the general principle of equality, pursuant to case law, "equal work" corresponds to the same position with, in particular, identical duties, qualifications, levels of responsibility, workload and seniority.

Please note that having a diploma or degree can only be used as a criterion if such diploma or degree is useful for performing the duties assigned.

When there is a difference in remuneration or the advantages received, the employer can justify this disparity with **objective and verifiable** elements, such as experience gained at another job, the qualification of the employee, the level of productivity or responsibility, work that is particularly well done or the level of seniority (if there is no seniority bonus already granted).

3. The practical consequences for companies:

Companies must therefore be able to prove, with tangible evidence, that the reasons for granting any sort of remuneration or advantage to certain of their employees are based on **objective and relevant** criteria.

- **The objective criterion:** Any advantage given must be based on an objective criterion. Otherwise, other employees in identical situations may claim the same advantage. Consequently, companies must keep records of the tangible proof and must not use subjective or emotional factors in terms of an employee's involvement or behavior. From now on, everything must be measured and quantified otherwise all the employees will have the right to the same advantage. It is therefore necessary to

systematically have on file each employee's resume, and to keep records of any training the employee attended at the company's request or on his own initiative. Finally, in our opinion, it is especially important to systematize employee evaluations (which are often lacking in smaller companies) and ensure that the observations, comments, strong points and points to improve strictly correspond to the situation and expectations of the company. Not only must written records of these evaluations be kept, but it is now a priority to ensure consistency between these evaluations (also kept by the employee) and what such employee actually receives. These different tangible elements may suffice as proof justifying, for example, giving a higher bonus to one or more employees or a raise to only one employee.

- **The relevant criterion:** This criterion was recently introduced by case law in 2008 and is, without a doubt, the most uncertain in case of litigation. In fact, the judges will be responsible for controlling the relevance of the criterion, and they may not have the same vision as that of a company manager or owner. For example, on July 1, 2009, the French Supreme Court held that, in relation to a collective agreement, it is not relevant to distinguish between *cadres* (executives) and *non cadres* (non-executives) with regard to the right to additional paid vacation. The Court of Appeals of Paris had considered that granting *cadres* five extra days of paid vacation was justified by the specific constraints of their executive status, specifically their significant responsibilities. The French Supreme Court reversed, recalling that *"the difference of professional category in itself cannot justify disparate treatment in the granting of an advantage between employees placed in an identical situation."*

  In our opinion, given the French Supreme Court's position, the relevance of different treatment concerning any kind of advantage granted either by a unilateral decision or by virtue of a collective agreement will clearly be difficult to prove.

4. Future risks:

Think about the number of collective bargaining agreement provisions that set forth different rights solely on the basis of professional category. It is enough to fear a rise in litigation.

These collective bargaining agreement distinctions often address:

- The duration of the trial period: but as the Law dated June 25, 2008 itself differentiates between professional categories, it may be reasonable to believe that the judges will consider these differences relevant.
- The duration of the notice period: one can hope that the differences in duties will allow the distinction to remain, especially in the case of a dismissal, because is it relevant to grant only 2 months notice to an employee but an additional month to an executive to find work?
- Severance pay: several collective bargaining agreements grant indemnities to executives that are distinctly higher. What relevant basis are the union and employer signatories of these agreements going to put forth to justify this different indemnification for job loss?
- Death and disability coverage: in case of illness, salary can be maintained up to four times longer

depending on the professional category. How can this be relevantly justified?

- Finally, death and disability and insurance regimes: how can it be relevant to use professional category as a criterion to define the regime applicable to employees, notably the amount of death benefits or the level of coverage for medical expenses?

With this evolution in case law, companies are exposed to employment-related risks that are not negligible, even though they have been strictly complying with the collective bargaining agreement applicable to them. Now, compliance with the laws in force has become a source of risk, and with retroactive effect to boot!

The unions as well as companies must therefore immediately examine their collective bargaining agreement provisions, customs and unilateral commitments in force that use professional category as a criterion so that they may verify the relevancy thereof compared with the advantage in question and justify, as the case may be, the disparate treatment.

Otherwise, the consequences are two-fold: (i) a certain number of lawsuits will probably be filed by employees excluded from or with limited access to certain advantages and benefits, and (ii) any court judgment in favor of the employees may have a retroactive effect of five years, five years being the statute of limitations for any claims regarding remuneration.

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[1] A type of voucher book, generally given out every month, in which there are restaurant tickets corresponding to the number of days worked in that month and each with a Euro value, to pay for meals at restaurants; the employee pays a certain percentage that is withheld from his salary, and the majority is borne by the employer; it is generally offered when companies do not have subsidized cafeterias for employees.

[2] Generally, an employee who calls in sick will have his pay deducted for the days not worked, unless he has a certain level of seniority within the company and depending on the applicable collective bargaining agreement.