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Evolution of disability-related case law: when the absence of dismissal entitles employees to damages without having to prove that they suffered a damage…

In a judgment dated October 6, 2010 (n°09-13.149), the Labor Chamber of *the Cour de Cassation* (French Supreme Court) held that "*during the suspension of the employment contract, the employer has no obligation to have the employee's unfitness for work certified and a declaration of* unfitness for work*, even for all types of jobs, should not necessarily result in the dismissal of the relevant employee*". This particular case concerned an insurer that sued a company for not having dismissed employees declared as Class 2 disabled persons, which led this insurer to pay disability benefits higher than what it would have had to pay had the relevant employees been dismissed.

On January 25, 2011, i.e. less than four months later, the same Labor Chamber of the *Cour de Cassation* held that "*insofar as the employee informs the employer that it has been declared as a Class 2 disabled person and does not express his/her intention not to resume work, it is up to the employer to schedule a medical examination for work resumption that will put an end to the suspension of the employee's employment contract*". Du to a delay in the organization of the medical examination for work resumption requested by the employee (a one year delay in this case), the company was ordered to pay to the employee damages corresponding to one year's salary even though the employee received Class 2 disability benefits from the Social Security and supplemental benefits from the complementary insurance institution!

This case-law evolution will undoubtedly create a new source of litigation for companies. Yet, it could also be used against the employees ignoring the precise consequences on their employment agreement of the terms they use when notifying their employer that they have been declared disabled …

The concept of disability (*invalidité*) under French law

Before going back in more details on the aforementioned decisions of the *Cour de Cassation*, it is useful to recall the precise meaning of certain French law concepts.

Disability is established when an insured person durably suffered a **two-third reduction of his/her working or earnings capacity**. The state of disability is assessed by the *Caisse primaire d'assurance maladie* (local sickness insurance fund) on the basis of the insured person's global remaining working capacity, general

health condition, age, physical and mental abilities, skills and professional training (Article L.341-3 of the French Social Security Code (hereinafter "FSSC")).

Specifically, the global capacity to make an income through an occupational activity is assessed by the *Médecin-Conseil* (medical officer) of the French Social Security. This officer is not a *Médecin du Travail* (occupational health physician) who is competent and responsible for assessing the specific suitability of a person to a particular employment position, profession or company. The *Médecin-Conseil* is competent and responsible for assessing an insured person's global working or earnings capacity, whether this person is a salaried employee or a self-employed.

Well, at least, this is what we could expect…

Disabled persons are classified into three categories set forth in Article L.341-4 of the FSSC:

1. *disabled persons able to carry out a paid activity;*
2. ***disabled persons totally unable to carry out any activity whatsoever;***
3. *disabled persons who, totally unable to carry out any activity whatsoever, need assistance from a third party to perform everyday tasks."*

In addition, it is important to recall the provisions of Article L.341-9 of the FSSS: "***Benefits are always granted on a temporary basis***". As such, a Class 2 disabled person whose health condition has improved over the years can be "downgraded" and re-classified as a Class 1 disabled person. Article L.341-11 stipulates: "*Benefits can be adjusted according to the evolution of the relevant person's state of disability*".

The downgrading from one category to another results in a sudden loss of income: disability benefits paid under the social security general regime falls from 50% to 30% of the relevant person's average annual salary (up to the ceiling fixed by the Social Security). It should be noted that complementary health and disability insurance contracts offered by complementary insurance institutions do not always cover Class 1 disability. When they do, the benefits paid under the complementary insurance scheme fall in the same proportion as for the Social Security benefits. As such, the income of an employee can easily fall from 80% of his gross salary to (i) 30% of his gross salary if his salary is below the ceiling fixed by the Social Security, or to (ii) 30% of the ceiling fixed by the Social Security if his salary is above said ceiling.

Disability is, therefore, a precarious condition that depends both on the evolution of the employee's health condition over the years and on the assessment of the *Médecin-Conseil* (medical officer) of the French Social Security.

Disability is never in itself a ground for dismissal. It must be formally distinguished from unfitness for work.

Unfitness (*Inaptitude*)

The *Médecin du Travail* (occupational health physician) is the only competent person to certify that an

employee is unfit for his/her employment position. Unfitness can only be established after two medical examinations, carried out with an interval of at least two weeks, unless there is an immediate danger.

Pursuant to Article R.4624-21 of the French Labor Code (hereinafter the "FLC"), an employee is mandatorily entitled to a **medical examination for work resumption** after:

- a maternity leave;
- a sick leave due to an occupational disease;
- a leave of at least eight days due to an occupational accident;
- a leave of at least twenty one days due to a non-occupational disease or accident;
- repeated leaves due to health problems.

This medical examination must take place upon work resumption or within a maximum of eight days thereafter (Article R.4624-22 of the FLC).

Please note that the employer, bound by an *obligation de résultat*[1] towards its employees in respect of safety at work, is responsible for taking the initiative to schedule the medical examination for work resumption. Any failure on the employer's part in this respect shall be heavily sanctioned since **non-compliance and/or delay in the performance of this obligation necessarily causes an harm to the employee** (Labor Chamber of the *Cour de Cassation*, December 13, 2006) and any refusal to organize this medical examination for work resumption is considered as a dismissal (Labor Chamber of the *Cour de Cassation*, October 28, 2009).

Companies must, therefore, remain particularly vigilant on compliance with this obligation. This is all the more true as only the medical examination for work resumption puts an end to the suspension of the employment contract. Consequently, when an employee is on leave due to an occupational disease or accident, any dismissal, for any grounds whatsoever, carried out without a prior medical examination for work resumption is likely to be considered null and void.

French rules governing unfitness for work are numerous and full of nuances and can, therefore, easily mislead companies that are not sufficiently familiar therewith.

It is, for example, necessary to make a distinction between a total and a partial unfitness, between a temporary and a permanent unfitness, between a medical examination for work resumption upon return to work and a medical examination for work resumption prior to returning to work, between a standard unfitness and a qualified unfitness (i.e. unfitness for work subject to certain reservations) etc. Any error is sanctioned.

And any error can be very costly for companies. For instance, companies must pay a careful attention to the fact that the unfitness is due to an occupational or non-occupational cause. Non-compliance with the procedure to be followed in respect of unfitness due to an occupational disease or accident will cost no less than one year's salary! This could also extend for example to a company that fails to timely organize the election of staff representatives as staff representatives must mandatorily be consulted on any redeployment process initiated by the company.

Among the unfitness-related legal constraints imposed on companies, the requirements set by an established-case law in respect of redeployment are often virtually insurmountable, notably for small companies.

Indeed, in a small company with no staff representative, how can the business manager, who is the sole decision-maker, prove that he/she has effectively explored all available redeployment opportunities? If the matter is brought to court, the business manager must produce factual evidence of the researches he/she has made. In practice, he/she must not rush things after receipt of a notice of unfitness because a hasty dismissal could be used as evidence that the required redeployment researches have not been properly conducted. On the other hand, he/she should not wait too long before dismissing the employee because Article L.1226-4 of the FLC stipulates that the employer must resume the payment of the salary if the relevant employee is neither redeployed nor dismissed within one month from receipt of the second notice of unfitness.

In addition, the employer must not forget to thoroughly verify whether the *Médecin du Travail* (occupational health physician) has duly followed each procedural step: the slightest mistake in the number of required medical examinations or in the compulsory statements to appear on notices of unfitness, or the absence of recommendations in respect of the employee's redeployment shall be attributable to the employer that will be held entirely liable therefore

The conclusions to be drawn from recent case-law evolutions in respect of employees' disability

In practice, when one of their employees is declared as a Class 2 disabled person, companies often initiate a dismissal procedure for unfitness for work. As such, they follow the requirements of the decision rendered by the *Cour de Cassation* on January 25, 2011 (n°09-42766) and convene the relevant employee to a medical examination by the *Médecin du Travail* (occupational health physician) as soon as they are informed that the employee has been declared disabled.

Managing an employee whose employment contract can be suspended for several years may indeed be quite complex.

Yet, a certain number of companies keep the relevant employee on the payroll, taking into account the precarious situation generated by a declaration of disability, the social benefits possibly granted to employees being on the firm's payroll (complementary insurance at a better price, access to the benefits/advantages offered by the Works Council in the same conditions as for active employees, better compensation under complementary insurance schemes, etc.).

Companies also often take into account the age of the relevant employee: if the employee is near to retirement, they tend to wait for the date on which the employee will be entitled to a full rate pension, which shall automatically happen once the Social Security acknowledges that all requirements for a full rate pension are met.

The company shall then pay to the relevant employee a voluntary retirement indemnity, just like it would do for any other active employees. Most of the collective bargaining agreements provide for a voluntary retirement indemnity that is much lower than the dismissal indemnity as the company is not held liable for the termination of the employment contract and for the employee's departure from the company. Legal provisions themselves make a significant distinction between voluntary retirement and dismissal: a retiring employee with a seniority of 10 years is entitled to a voluntary retirement indemnity corresponding to ½ month's salary compared to a dismissal indemnity of 2 months' salary. The differential between the two types of indemnity rises as the employee's seniority increases.

Therefore, when an employee with high seniority declared as a Class 2 disabled is close to retirement, it is in the company's financial best interests to keep the employee and wait until he reaches the required retirement age to pay him the corresponding voluntary retirement indemnity.

The relevant employee does not suffer any harm from not being dismissed as long as he/she receives the benefits from the Social Security and complementary insurance schemes. This is all the more true since Article L.5411-5 of the French Labor Code stipulates that: "*disabled persons mentioned in 2° and 3° of Article L.341-4 of the French Social Security code who receive due to their condition social benefits because of a total work disability, may not be registered on the list of job seekers for the whole duration of the disability period.*" A quite logical and perfectly clear provision.

Yet, despite this provision, the *Cour de Cassation*, in its decision n°03-11467 of February 22, 2005, held that "*the grant of Class 2 disability benefits does not necessarily means that the recipient of such benefits is unfit for work, as defined in Article L.351-1 [L.5124-1] of the French Labor Code*" (said Article lists the requirements – including the suitability for work – to be eligible to unemployment benefits).

This was the first time that a decision creates a situation in which a disabled employee unable to carry out an activity could theoretically be fit for work. This also applies to Class 3 disabled persons…

This decision resulted in the publication of the following regulatory provision (that we could call "a piece of anthology" of French labor regulations), extracted from Circular n°2009-10 of April 22, 2009 issued by the UNEDIC (French unemployment benefit fund):

"*Class 2 or Class 3 disabled persons who receive Class 2 or Class 3 disability benefits due to their total work disability,* ***may not, in principle, be registered on the list of jobseekers*** *for the whole duration of the disability period. (Article L. 5411-5 of the FLC).*

Yet, the grant of Class 2 or Class 3 disability benefits by a social security body does not ***necessarily*** *mean that the recipient of such benefits is unfit for work, as defined in Article L. 5421-1 of the FLC****. The registration as jobseeker is, therefore, possible.***"

As such, companies will henceforth less frequently refrain from dismissing employees declared as Class 2 disabled persons. Indeed, as mentioned earlier in this article, the *Cour de Cassation* held that insofar as "*the employee informs the employer that it has been declared as a Class 2 disabled person and* ***does not express***

***his/her intention not to resume work**, it is up to the employer to schedule a medical examination for work resumption that will put an end to the suspension of the employee's employment contract".*

Consequently, if **the employee** declared as a Class 2 disabled person expressly informs his/her employer that he/she **does not want to resume work … the company will be entitled to keep him on the payroll! On the other hand, if this employee only informs his/her employer that he/she has been declared as a Class 2 disabled person, the company will have the obligation to dismiss him/her!**

How can we imagine that a *Médecin du Travail* (occupational health physician) will consider that an employee declared as a Class 2 disabled person – i.e. "*totally unable to carry out any professional activity whatsoever*" – is fit to perform a specific job! Currently, in such a case, total unfitness to perform work automatically extends to all employment positions within the relevant company and *de facto* results in the impossibility to redeploy the relevant employee to another employment position. Yet, the company will still be compelled to do everything possible to redeploy an employee officially declared as unable to perform any job whatsoever!

But who is to say that the next case law evolution will not allow an employee declared as a Class 2 disabled person, considered as fit for work by the *Médecin du Travail* (occupational health physician) and redeployed to another employment position to claim damages against the company: indeed, such employee could ultimately claim that the redeployment ordered by his/her employer deprived him/her from a well-deserved break granted by the Social Security and from the benefits to which he/she was entitled?

A grotesque situation? Absolutely!

Unless we consider that the *Médecin-Conseil* (medical officer of the Social Security) is neither competent nor authorized to assess the state of disability as per Article L.341-3 of the FSSC that expressly states that the *Médecin-Conseil* takes into account the skills and professional training of the relevant employees. This is what we can infer from court decisions…

If this was not the case, the *Cour de Cassation* should not impose the obligation to conduct senseless redeployment searches and ultimately a dismissal, unless we should considerer that the obligation to search for redeployment opportunities – due compliance therewith being often difficult to prove – and the dismissal are in fact merely a means for well-informed employees to obtain a compensation simply because of the termination of their employment contract,

- even if their disability has nothing to do with the performance of the professional duties, and as such nothing to do with the company itself,
- even if the company is itself required to terminate the employment contract.

The resulting obligation to dismiss imposed on companies is somewhat perplexing at a time when emphasis is put on the reduction of job precariousness! Let us point out that the suspension of the employment contract during the Class 2 disability period is certainly more secure than a dismissal! If the relevant employee is "downgraded" to Class 1 disability, he/she will be able to be reinstated within the company in the conditions set forth by the *Médecin du Travail* (occupational health physician) and will continue to benefit from the

protection linked to his/her unfitness for specific types of job: his/her working capacity will be reduced and his/her reinstatement will probably require an accommodation of the workplace or a redeployment to another employment position, which the company will be able to perform more easily than for a Class 2 disabled person (unless if the *Médecin-Conseil* (medical officer of the Social Security) is incompetent and the Social Security overgenerous in the grant of disability benefits!). In addition, should the redeployment to another position turn out to be impossible, the relevant employee could still be dismissed since he/she would have retained his/her "right" to be dismissed! The relevant employee may at most – and depending on the applicable collective bargaining agreement – gain a few years of seniority!

We can only forecast an increase in disability-related litigation since employees are frequently declared as Class 2 disabled persons. In addition, the number of employees declared as Class 2 disabled persons will undoubtedly increase with the raising of the minimum legal retirement age to 62.

This will have a significant cost impact on companies as they will be required to pay dismissal indemnities.

Uncertainties and risks associated with a dismissal for unfitness for work will also increase as a result of the evolution of case law in the past few years.

Small companies – that do not have in-house legal expertise and whose financial standing precludes the assistance of external legal advisors to manage such dismissals -will, again, be the most severely penalized.

Lastly, employees are highly recommended to seek advice before notifying their employer of their classification as disabled persons because their disability benefits and potential rights/entitlements during the disability period will depend on the terms of such notification.

A legislative action would be more than welcomed to ensure transparency and guarantee a minimum level of legal certainty to both employees and companies.

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[1] In respect of 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. However, 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 at work, the employer will be presumed liable from the sole fact that a professional risk occurred and caused harm to his employees.

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