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In recent case law, employers' obligation de resultat with regards to work safety exposes companies to growing daily risks

This year was marked by several landmark decisions relating to employers' obligation to guarantee the safety of their employees. Companies are therefore more and more susceptible to being held liable in this regards, and the *Cour de cassation* (France's highest court) is stricter in its approach regarding the scope of the obligations imposed on companies.

It should first be noted that in respect of safety at work, companies have 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.

The *Cour de Cassation* has established the principle according to which "in an employment contract binding the employer to the employee, the employer has an *obligation de résultat* regarding notably the occupational diseases the employee may develop as a result of the products manufactured or used by the company; failure to comply with this obligation is considered an inexcusable fault as per Article L. 452-1 of the French Social Security Code, where an employer knew **or should have known of the danger** to which the employee was exposed and did not take the necessary measures to prevent said danger. " (*Cour de cassation*, Labor Chamber February 28, 2002)

If an employer fails to meet the above obligations, he may be held liable for inexcusable fault. A finding of inexcusable fault allows the employee victim of a work-related accident or an occupational disease to obtain additional indemnities for the damage caused. He/she has therefore an interest in having courts declare that his/her employer has committed an inexcusable fault.

We will note that since the February 2002 landmark cases, an employer's obligation to guarantee safety of

their employees is interpreted in an increasingly stricter manner and, as a result, companies are far more likely to being held liable in this respect.

1. Case decisions n°08-44.019 and 08-40.144 of February 3, 2010 – Workplace harassment and violence

These court decisions mark a new evolution in the *Cour de cassation's* strand of case-law. The *Cour de Cassation* ruled that an employer "*bound by his obligation to protect the health of his employees and thereby to guarantee their safety – which is an obligation de résultat – does not meet this obligation when one of his employees is victim of work place moral or sexual harassment, or work place physical or moral violence by one or more of its employees, even if the employer* ***has taken measures to prevent such actions from happening***."

The *Cour de Cassation* does not require that the existence of a fault on the part of the employer be established: the materialization of the risk is enough to hold the employer liable. In the above-referenced two cases, the employer, who is bound by an obligation to prevent moral or sexual harassment in the workplace (Article L.1152-4 of the French Labor Code), was held liable. The materialization of the risk is indeed necessarily due to the fact that preventive measures were either inexistent or insufficient.

2. Case decision n° 08-44.298 of February 17, 2010 – Stress at work

In this case, a secretary starts to complain about the deterioration of her work conditions, particularly during her annual evaluation meeting where she faints. Several months later, after having seen the postponement of a training she had requested and having been refused a company transfer, the employee is placed on sick leave due to traumatic neurosis, the change in her state of health being linked to the deterioration of her work conditions and to the reorganization of the company. A typical stress at work case. The employee was then declared to be unfit to fill any position at the company and subsequently dismissed as no redeployment placement was possible.

The employee invoked before the courts a failure by her employer to meet his obligation to guarantee safety in the workplace as per Article L.4121-1 of the French Labor Code which states that: "*an employer must* ***take the necessary measures*** *to ensure the safety and to protect the physical and mental health of its employees.*

These measures include:

1. *Steps to prevent occupational risks;*
2. *Provide information and training;*
3. *Put in place an adequate organization and the necessary means.*

The employer ensures that these measures are adapted so as to take into account a change in circumstances

and improve existing conditions."

The *Cour de Cassation* agreed with the argument put forth by the dismissed employee and ruled that "*the employer, bond by an* ***obligation de résultat*** *in terms of the health and safety of its employees in the workplace, must ensure that this obligation is effectively fulfilled*."

The employer, alerted on several occasions by the employee, did not take any specific measures to resolve the difficulties encountered by the employee; he therefore failed to meet his obligations.

3. Case decision n° 09-40.913 of October 5, 2010 – No pre-hiring medical examination

An employee was hired without having benefited from a pre-hiring medical examination as per Article L. 4624-10 of the French Labor Code.

He claimed and obtained damages as a result, even though he suffered no harm. The *Cour de cassation* reminded us that the employer must ensure the effective safety of its employees and as a result "*failure to meet this obligation necessarily resulted in a harm to the employee*."

4. Case decision n° 09-17.275 of November 18, 2010 – Inexcusable fault for tendinitis

An employee working in a hospital cafeteria develops tendinitis on her wrist as a result of repetitive tasks. The tendinitis is recognized as an occupational disease with a permanent rate of disability of 2%.

She files a lawsuit, so as to have the courts acknowledge that her employer committed an inexcusable fault, therefore entitling her to additional indemnities.

The employer denies being aware of whatever danger in the continuous handling of the tableware as he was neither made aware of the risk by the hospital's Health, Safety and Work Conditions Committee nor by the occupational doctor.

For the *Cour de Cassation*, the principles of prevention set forth in Articles R.4541-1 et seq. of the French Labor Code "*require an employer to take the necessary organizational measures or use adequate means to avoid resorting to manual tasks which carry risks to the workers due to their weight or unfavorable ergonomic conditions.*" These provisions apply to all manual labor carrying a risk, including therefore the tendinitis in the wrist developed by the employee. As a result, the employer could not deny that he was aware of the risk; and therefore his inexcusable fault was established.

5. Case decision n° 08-70.390 of November 30, 2010 – Availability of personal protection equipment

A temporary worker hired on March 29 as a welder was declared unfit for the job on June 17 by the occupational doctor, due to an increased monitoring. The employee was contaminated by chrome, although he did not suffer any injury or harm and this did not result in an occupational disease or a work-related injury. The protection mask required to be worn by all employees exposed to chrome was given to the temporary worker 10 days after his start date. This was sufficient evidence for the *Cour de cassation* to declare a failure by the employer to meet its obligation to prevent, and this regardless of the actual impact this had on the health of the employee.

6. Evolution of the obligation to prevent harsh work conditions

The obligations of employers were enlarged by Law n° 12010-1330 of November 9, 2010 regarding the retirement reforms by the introduction of new provisions regarding preventive measures not only in respect of safety matters, but also from now on with respect to harsh work conditions.

Article L. 4121-1 of the French Labor Code cited above was modified as follows: *"The employer **takes the necessary measures** to ensure the safety and protect the physical and mental health of workers. These measures include:*

> *1° Steps to prevent occupational risks and **harsh work conditions**;(…). «*

The Law creates as a result new obligations for companies. The upcoming decrees will provide the expected explanations regarding notably the follow-up sheet (which contains details regarding the possible exposure by the employee to harsh work conditions), the negotiation of an agreement or the implementation of a plan of action on the prevention of harsh work conditions in companies with more than 50 employees.

This leads us to believe that courts will be as demanding in terms of prevention of harsh work conditions as with safety at work.

Today the employer is held liable for the materialization of all risks, including those that could have been considered up until now as relatively benign or inherent to the job function (tendinitis). The employer will be held liable each time a failure to meet any of its obligations in this respect is established.

Health at work, which now includes harsh work conditions, is unquestionably an area which employers must integrate into their future plans of action. Small companies will certainly have more difficulties, given their reduced staff, to put in place preventive measures, specifically as regards harsh work conditions. We therefore fear a rise in legal actions.

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