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Is the Labor Chamber of the Cour de Cassation trying to increase the birth rate or to encourage the hiring of senior women??

The Labor Chamber of the *Cour de Cassation* (French Supreme Court) does surprise me over and over again. I had already been taken aback by its decision of October 16, 2013 (n° 12-15.638) in which it explained (i) that there was nothing irregular for an employee declared totally unfit to drive any vehicle to do car racing during his sick leave periods, and (ii) that this situation should not be seen as a disloyal behavior that could lead to the termination of employment!

I am now stunned by its decision of July 2, 2014 (n° 13-12.496) in which it held that an employee may seek the nullification of her dismissal insofar as she informs her employer that she is pregnant within the fifteen days following the notification of her dismissal, even though she got pregnant only after such notification!

Hence the title of this opinion piece…

The facts of this surreal case are as follows: an employee is terminated on personal grounds on October 15, 2009. By letter dated October 30, 2009, she sends to her employer a doctor's certificate issued on the same date attesting that she is pregnant. The certificate specifies that the employee got pregnant between October 16 and October 30. As such, the employer refuses to reinstate the employee on the ground that pregnancy was not established as of the notification of the dismissal.

The employer's decision appears quite logical and in line with previous decisions of the Labor Chamber of the

Cour de Cassation with respect to the date on which relevant facts must be assessed.

Indeed, the Labor Chamber of the *Cour de Cassation* always takes into account the date of the relevant events/facts. As such, with respect to dismissals, facts, including the complaints against the employee, the economic grounds put forth to justify a dismissal or the employer's redeployment obligation, as well as their scope of appraisal, must always be assessed as of the date on which the termination of employment is notified to the employee.

This appears to be simple common sense as the dismissal only becomes final and definitive upon its notification to the employee.

In addition, the French Labor Code has for a long time included provisions that protect pregnant employees and employees on maternity leave. These provisions are intended to address the risks faced by an employee whose boss could be upset at the prospect of having her go on maternity leave. This is clearly a legitimate protection. A pregnant woman should in no way lose her job because she is pregnant. Yet, on the other hand, does this mean that a pregnant woman should get a job just because she is pregnant?

The Labor Chamber of the *Cour de Cassation* did cross the line! In its decision of July 2, 2004 – which is completely devoid of common sense – it reverses the whole rationale!

Pregnancy becomes an aid, a reason, a right to employment!

The nullification of the dismissal means that the employer must reinstate the employee in her former position. If it fails to do so, it shall bear heavy financial consequences as it would be obliged to pay the employee for the whole period between her dismissal and the date of the decision!

In short, to save her job, a dismissed woman just has to get pregnant within fifteen days as from her dismissal! Some will find that this analysis is uncalled-for and unsavory. However, when it comes to saving one's job, it is quite conceivable that the relevant employee could take this decision!

The argumentation developed by the Labor Chamber of the *Cour de Cassation* to attempt to justify its position was as follows: French law does not condition the nullification of a dismissal upon a specific date of pregnancy and the Court of Appeals had added to the law a requirement that did not exist. Yet, the Labor Chamber of the *Cour de Cassation* has never been reluctant to impose new requirements and so, in some ways, to impose new legal obligations! In this respect, the evolution of case-law and then, as a result, the evolution of legal provisions applicable to part-time jobs is a key example. This argumentation is, therefore, baseless…

The Labor chamber of the *Cour de Cassation* has opened the door to new discriminations against women by distorting legal provisions that were intended to protect them.

Too much protection kills protection!

This type of approach could certainly boost the recruitment of senior women but is it really the solution?

Companies face an ever-increasing legal uncertainty and have to deal with the loss of the most elementary common sense to an excessive protection that is completely baseless (unless if we consider that companies are also responsible for boosting the French birth rate which remains in any event undeniably good!). This is bound to be detrimental not only to the employer-employee relationship, but also to the image of France, a country already well-known for its (too) highly protective labor legislation.