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Judges' resistance to Macron's scale for the determination of damages

More than a year after the reform of French labor and employment law introduced by the Macron Ordinances dated September 22, 2017, the mandatory scale for the determination of damages in case of dismissal without real and serious cause continues to be a source of debate.

Four Labor Courts have recently found that this flagship measure of the Macron Ordinances is incompatible with international conventions.

The mandatory scale for the determination of damages in case of dismissal without real and serious cause introduced by Macron Ordinance n°2017-1387 is set forth in Article L. 1235-3 of the French Labor Code.

As explained in a previous article published in March 2018[1] that addressed *inter alia* the mandatory scale for the determination of damages, the judge is now required to apply this scale and to award damages, the minimum and maximum amounts of which are determined on the basis of the employee's seniority and the size of the company. The other criteria traditionally applied by judges to assess the scope of the harm suffered by the employee (e.g. age, family situation, difficulty in finding a new job, handicap) are not taken into account to set the minimum and maximum amounts of damages that may be awarded.

While the French Constitutional Council endorsed the scale in a decision dated March 21, 2018[2], the question of its compatibility with international conventions still remained unanswered.

It is in this context that the Labor Courts of Troyes, Amiens, Lyon and Grenoble have recently set aside the scale on the ground that it was not compatible with international conventions.

These Labor Courts mainly rely on two international conventions to justify their decision: Article 10 of Convention n°158 of the International Labour Organization ("ILO") and Article 24 of the European Social Charter.

Article 10 of ILO's Convention n°158 stipulates as follows: *"If the bodies referred to in Article 8 of this Convention find that termination is unjustified and if they are not empowered or do not find it practicable, in accordance with national law and practice, to declare the termination invalid and/or order or propose reinstatement of the worker, they shall be empowered to order payment of adequate compensation or such other relief as may be deemed appropriate."*

Similarly, Article 24 of the European Social Charter also recalls *that "With a view to ensuring the effective exercise of the right of workers to protection in cases of termination of employment, the Parties undertake to recognise (...) the right of workers whose employment is terminated without a valid reason to adequate compensation or other appropriate relief."*

Labor Courts consider that the application of the scale prevents them from awarding to employees adequate compensation as per the aforementioned international conventions.

Indeed, the Labor Court of Troyes handed down a very explicit decision asserting that the scale "*does not enable judges to assess the overall individual situations of the employees wrongfully dismissed and to award fair compensation for the loss suffered*". It even went one step further and stated that "*these scales do not act as a deterrent for employers wishing to dismiss employees without any real and serious cause. These scales offer a greater security to wrongdoers than to the victims and they are, as such, inequitable*"[3].

Just like the Labor Court of Troyes, the Labor Court of Amiens, in a case concerning an employee who was only entitled to a compensation equal to ½ month of salary as per the scale introduced by Article L. 1235-3 of the French Labor Code, found that "*this indemnity cannot be considered as appropriate and as a fair compensation for the dismissal without real and serious cause, as per Convention 158 of the ILO but also as per French law and related established case-law*"[4].

In another case, the Labor Court of Lyon implicitly set aside the scale by referring solely to Article 24 of the European Social Charter[5]. In addition, in a case where the scale was not applicable to the relevant employee as the dismissal dated back to 2014, the Labor Court of Lyon also issued a judgment that demonstrated "*the necessity of a full compensation of the losses suffered by the employee*", thereby running counter of the capping principle, here again on the basis of Article 24 of the European Social Charter and Article 10 of ILO's Convention n°158[6].

Even more recently, the Labor Court of Grenoble also ruled that the scale was incompatible with international conventions. It considered indeed that "*by reducing the indemnity for dismissals without real and serious cause and introducing too low ceilings, it is the penalty for the violation of the law that loses its deterrent effect vis-à-vis employers who can "budget" their wrongdoings*". Similarly, it explained that this scale "*also discourages employees from going to court to assert their rights as they can only expect a tiny compensation*" and that it can even "*serve as an incentive to carry out unjustified dismissals*"[7].

However, all of the Labor Courts in France do not have a unanimous position on this issue and it is difficult at this stage to know whether the appellate courts will hold the scale as incompatible with international

conventions. Indeed, other Labor Courts have argued otherwise and concluded that the scale was compatible with international conventions. As such, the Labor Court of Le Mans and the Labor Court of Caen have also relied on Article 10 of ILO's Convention n°158 to rule that the scale was compatible[8]. It is particularly interesting to observe that, contrary to all of the aforementioned decisions, the decision of the Labor Court of Caen was issued by a professional judge.

The reach of these decisions which, it should be recalled, are first instance judgments, is therefore uncertain at this stage and many legal writers announce the beginning of a "legal saga".

In any event, this is a strong message sent by Labor Courts which firmly refuse to have their discretion limited, as contemplated by the legislator.

Even though these are first instance judgments, the position adopted by many Labor Courts creates a great uncertainty as to the application of this scale and challenges one of its main objective, i.e. the possibility for employers to anticipate and to book the maximum amount of the indemnification that they may be ordered to pay. The future of the scale is thus uncertain and we eagerly await the decisions of the appellate courts and, of course, of the *Cour de Cassation* (French Supreme Court) as regards its compatibility with international conventions. Pending further clarification, employers should remain vigilant as to the application of the scale for the purpose of assessing the risk associated with potential dismissals without real and serious cause.

[1] Cf. article entitled *The Macron Ordinances also aim at reducing the number of employer-employee disputes brought to court*

[2] French Constitutional Council, March 21, 2018, n°2018-761 DC

[3] Labor Court of Troyes, December 13, 2018, RG F 18/00036

[4] Labor Court of Amiens, December 19, 2018, RG F 18/00040

[5] Labor Court of Lyon, December 21, 2018, RG F 18/01238

[6] Labor Court of Lyon, January 7, 2019, RG F 15/01398

[7] Labor Court of Grenoble, January 18, 2019, RG F 18/00989

[8] Labor Court of Le Mans, September 26, 2018, RG F 17/00538 and Labor Court of Caen, December 18, 2018, RG F 17/00193

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