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The Macron Ordinances also aim at reducing the number of employer-employee disputes brought to court

The interests of companies undoubtedly lie at the heart of the reform of the French Labor Code introduced by the so-called Macron Ordinances of September 22, 2017. Driven by the concept of "flexicurity", the objective of the Government was to give more freedom and security to both companies and employees.

In this context, how to offer companies a more secure framework whereas French labor law is internationally known for its complexity, its rigidity and its large corpus of rules? One of the solutions adopted by the Government is to help better assess a risk so feared by French and foreign businesses: The litigation risk.

During the presentation of the five so-called "Macron" Ordinances on August 30, 2017, Minister of Labor Muriel Pénicaud declared that "*the objective of the reform of the French Labor Code is to give more freedom and security to both companies and employees*". This statement encapsulates the spirit of the reform: The French Labor Code must no longer only protect the interests of employees but it must also protect the interests of companies. The reform is not just part of the trend initiated during the past legislature with the LSE Law of June 14, 2013, the El Khomri Law of August 8, 2016, the Macron Law of August 6, 2017 and the Rebsamen Law of August 17, 2017. It actually amplifies it substantially.

Companies' interests lie at the heart of the reform. This idea is promoted through the concept of "*flexicurity*". Drawing on the Danish model, "*flexicurity*" is about giving more freedoms to companies while offering employees greater security. Very concretely speaking, this approach means that dismissals should be facilitated (more flexibility for companies) in return for a more efficient vocational training and lifelong learning scheme and a more protective unemployment insurance system (more security for employees).

The Macron Ordinances of September 22, 2017 primarily address the "flexibility" part, the "security" for the employees being supposed to be dealt with subsequently in the reform agenda. The concept of "flexibility" is not, however, alien to that of security. On the contrary, both concepts are closely connected, the one being the catalyst for the other. This stands out clearly in Macron Ordinance n°2017-1387 appropriately named "*the predictability and securing of work relationships*". But what does the concept of "*securing*", as driver of business flexibility, imply?

Based on the Macron Ordinances, "*securing*" clearly implies a limitation of the powers of the judge and, consequently, a diversion of employee-employer disputes away from courts. Indeed, bringing a dispute before the judge means that the parties are deprived of any decision-making power and implies that the outcome is necessarily uncertain. As such, it is *per se* a risk and must be recorded in companies' accounts as a contingent liability.

While the existence of an economic risk is an assumption indisputably admitted in the business world, a litigation risk is viewed with great concern and can be analyzed as an hindrance to economic growth and, as such, contrary to the interests of companies. In this context, "*securing*" means providing greater predictability to businesses and reducing their exposure to litigation risks. As a result, according to this approach, the litigation risk becomes a financial constraint and must, like any other types of risk, be better apprehended by businesses.

The Macron Ordinances address this risk by promoting diversion from courts, i.e. reducing the judge's intervention in the labor relationships within companies.

This diversion from courts is apparent at a number of levels. Firstly upstream, by limiting the role of the judge and reducing the judge's possibility to assess the consequences of the termination of employment contracts.

The role of the judge is to settle disputes between the parties and to examine their respective claims. The "*securing*" mechanism implemented by the Macron Ordinances implies the limitation of the judge's power to award damages, by reducing the scope of dismissals without real and serious cause (A), and by limiting the consequences for companies should a dismissal be found without real and serious cause (B).

A. Reducing the scope of dismissals without real and serious cause

Since the Law of July 13, 1973, the employer must specify in the dismissal letter the reasons justifying such dismissal. According to a case-law of the Labor Chamber of the *Cour de Cassation* (French Supreme Court) established since the so-called "Rogié" decision of November 29, 1990, the vagueness of the grounds put forth to justify a dismissal is deemed as an absence of grounds, and the dismissal must, therefore, be considered without real and serious cause. As such, providing vague reasons to justify a dismissal means that the employer will be ordered to pay damages for lack of real and serious cause.

Macron Ordinance n°2017-1387 introduced a new rule that creates a shift. Article L. 1235-2 of the French Labor Code stipulates that the employer is now allowed to specify, at its own initiative or at the request of the dismissed employee and within strict timelines fixed by Decree (cf. below), the grounds set forth in the

dismissal letter after such letter has been notified. It also adds that if the employee has not asked the employer to further specify the grounds for dismissal, the fact that such grounds are not sufficiently substantiated no longer constitutes a substantive irregularity but a procedural irregularity which is sanctioned by "*an indemnity that may not exceed one month's salary*".

In other words, it is up now to the employee to expressly request that the grounds put forth in the dismissal letter be further specified so that an insufficient statement of grounds may be ultimately relied upon to consider that the dismissal is without real and serious cause. As per the terms of Decree n°2017-1702 of December 15, 2017, the employee has 15 days as from the notification of the dismissal letter to make such a request. The employer then has 15 days from receipt of this request to respond. The employee must thus act quickly if he/she wants to keep the possibility to have the judge ultimately hold that his/her dismissal is without serious and real cause as a result of an insufficient statement of grounds.

If the above is not completed and if only an indemnity not exceeding one month's salary can be awarded, the question remains as to what damage will the employee claim in support of his/her request[1]. It is hard to imagine how the employee could blame the employer for not having further specified the grounds put forth to justify the dismissal whereas he/she had the opportunity to ask it do so in due course. However, in response to this new rule, trial judges may decide to make a flexible application of the case-law trend according to which non-compliance by the employer with one of its obligations does not automatically entitle the employee to compensation.

In addition, the question arises as to how these new rules will articulate with the starting point of the new one-year statute of limitations period. It could be argued that this new statute of limitations should start running from the date of notification of the dismissal letter, duly supplemented by the employer, which would correspond to the date on which the employee actually becomes aware of the entirety of the grounds put forth by the employer to justify the dismissal. There is no doubt that the legal counsels of the employees will promptly take up this issue.

Macron Ordinance n°2017-1387 introduced in the French Labor Code another new rule intended to overturn a rather well-established case-law. Before the reform, applicable case-law suggested that breaches of dismissal rules provided for by applicable collective bargaining agreements in addition to the rules set forth by law ought to result in the dismissal being considered as deprived of real and serious cause. Since the reform, such breaches must be regarded merely as procedural irregularities that can only be sanctioned by an indemnity that may not exceed one month's salary. This Ordinance thus puts a final end to an established case-law which held that the dismissal procedure provided for by applicable collective bargaining agreement was a substantive safeguard, and now places on the employee the burden to prove that it has actually suffered a harm.

In this context, the judge will have no choice: The compensation ceiling for breach of any such rules is one month salary. Under this limitation, the judge will assess the amount of damages to be awarded to the employee, provided that the latter is able to demonstrate that he/she has actually suffered a harm as a result of such breach.

B. Limiting the consequences of dismissals without real and serious cause

Highly publicized, 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.

Pursuant to this Article, the judge must 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.

In determining the damages to be awarded to the employee, the judge is even invited to take into consideration the dismissal indemnities paid in excess of the minimum mandatory amount set forth by law in connection with the termination of the employment contract. It is doubtful that the judges, already bound to apply a pre-determined scale that allows little leeway, will be inclined to follow this recommendation.

As such, "*securing*" is designed to substantially limit the judge's discretionary power in assessing the compensation that ought to be paid to the employee in reparation for the harm he/she has suffered. The intention of the Government was clear: This provision was supposed to enable an alignment of the decisions of French Labor Courts as the amounts of damages awarded so far could easily range from single to triple. Overall, the amounts provided for in the new scale are, according to legal authors and law practitioners, divided by two compared to what was so far applied by French Labor Court judges.

At first sight, the mission of making French labor law more secure for businesses is accomplished: The employer can anticipate and record a contingent liability that corresponds to the maximum amount of damages that it may be ordered to pay. On the other hand, some will say that this necessarily has perverse effects, among which the fact that labor disputes are dealt with from a financial perspective only and that employers are no longer actually accountable for their actions as they can make up for their fault/breach by paying damages that are pre-determined independently of the harm actually suffered by the employee. As such, it can be feared that the employer-employee relationship will be mainly examined in light of these considerations, including throughout the performance the employment contract.

It remains to be seen whether this sliding scale of damages – which set minimum amounts that vary depending on whether the company has more or less than 11 employees – will be endorsed by the Constitutional Council when the latter will be asked to review the legality of the contemplated scheme.

However, Article L. 1235-3-1 of the French Labor Code stipulates that these rules shall not apply to dismissals considered null and void, in particular as a result of a violation of a fundamental freedom, moral or sexual harassment and discrimination, dismissals subsequent to a legal action brought by employee for breach of professional gender equality rules or also dismissals of or a so-called protected employee for an action made during the exercise of his/her mandate as employee representative. The nullity of the dismissal excludes the

application of the scale of damages, which means that the plea of nullity will certainly be primarily relied upon by employees' legal counsels. We can expect that labor disputes based on these new rules will increase in the coming years. For examples, this will imply arguing that the facts that led to the dismissal relate to one of the categories that entail the nullity of such dismissal, such as moral harassment, or trying to extend the concept of fundamental freedom in order to create new categories that could entail nullity. It is not unreasonable to believe that the judges, because of the reduction of their discretionary power, will be receptive to these new types of arguments.

If that were to happen, the employee would then be able again to use the threat of a lengthy and costly lawsuit, as was previously the case before the reform. This would be antithetical to the spirit the Macron Ordinances.

With employees fearing that the damages to which they may be entitled will be capped as per the new rules, and employers fearing that employees will systematic claim that their dismissal is null and void, a ripple effect of the reform could be to further prompt employers and employees to sit around the table to find a mutually acceptable arrangement.

[1] Labor Chamber of the *Cour de Cassation*, September 13, 2017, n°16-13.578