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The new contours of employers' liability with respect to the health and safety of employees

Did you say *obligation de résultat* with respect to safety in the workplace? This is an extremely burdensome obligation that employers have towards their employees, an obligation that was enshrined by the so-called "asbestos" decisions rendered by the *Cour de Cassation* (French Supreme Court) that made this obligation an absolute one.

Since then, in labor disputes, it has become a common practice to claim that the employer has breached his obligation to ensure safety, in particular in order to support a request for the judicial termination of the employment contract, based on a too much stressful, oppressive or anxiety-provoking work organization or work climate.

This article provides insights into case-law developments since 2015: Indeed, while the *Cour de Cassation* does not lower its level of requirements when assessing employers' compliance with their obligation to ensure the safety of their employees, it still seems to offer a way out to those who implement within their company positive prevention measures with respect to health and safety.

Did you say *obligation de résultat* [1] with respect to safety in the workplace? This is an extremely burdensome obligation that employers have towards their employees, an obligation that was enshrined by the so-called "asbestos" decisions[2] rendered by the *Cour de Cassation* (French Supreme Court) that made this obligation

an absolute one.

This court-made doctrine is based on Articles L.4121-1 and L.4121-2 of the French Labor Code. The former sets forth general prevention measures while the latter lists 9 general prevention principles and led to the principle of employers' strict liability. It is, therefore, irrelevant that the company has taken prevention measures or even measures to stop a damage to the health or a risk to the safety of the employees since the employer is presumed liable from the sole fact that a damage has occurred[3].

Since then, in labor disputes, it has become a common practice to claim that the employer has breached his obligation to ensure safety, in particular in order to support a request for the judicial termination of the employment contract, based on a too much stressful, oppressive or anxiety-provoking work organization or work climate.

As such, in a decision dated October 6, 2010[4], the Labor Chamber of the *Cour de Cassation* held that a company had breached its obligation to ensure safety just because of the sense of insecurity felt by a front desk agent working in a coach station. The company was held liable even though it had implemented many actions in order to deal with the insecurity in the coach station during the two years that preceded the commencement of the legal action before the Labor Court. In that specific case, the employee had not even suffered any harm but the Court considered that the mere fact that the employee had been exposed to a risk that left her with a feeling of stress was constitutive of a breach by the company of its obligation to ensure safety….

This could only discourage any attempt to implement measures to prevent and protect the health and the safety of employees insofar as the company knows that, in the end, it will be held liable in any event!

Yet, since then, the *Cour de Cassation* seemed to step back a bit, as suggested notably by three decisions handed down by the Labor Chamber in 2015… to such an extent that French legal writers even wondered whether, with respect to safety at work, the well-known *obligation de résultat* was turning into a "reinforced" *obligation de moyen.* This would be a drastic shift since the fulfillment of an *obligation de moyen* is assessed on the basis of the company's capacities and resources. To escape liability, the company would then only have to bring evidence that it has implemented all means to try to preserve the safety of its employees, in the same vein as what exists with respect to the obligation to search for redeployment opportunities wherever an employee is dismissed on economic grounds or declared unfit for work.

So, do the decisions issued in 2015 by the Labor Chamber of the *Cour de Cassation* herald a progressive move of the *Cour de Cassation* towards a softer and more lenient position *vis-à-vis* businesses?

Well, not necessarily given the last decision rendered by the Labor Chamber of the *Cour de Cassation* on February 10, 2016[5] that strongly endorses the principle of employers' strict liability in case of breach of their obligation to ensure safety…

It rather seems that the *Cour de Cassation* wishes to shift towards a more pragmatic assessment of employers' compliance with their obligation to ensure safety, without, however, waiving its high level of requirements.

Positive alterations brought about by the line of decisions rendered in 2015

In 2015, three decisions tended to qualify the systematic recognition of employers' liability by French Labor Courts.

Concerning collective labor disputes, the Fnac[6] and Areva[7] decisions opened the way for a more concrete and less absolute assessment of the *obligation de résultat* to ensure safety.

In both cases, the issue at stake was to determine whether reorganization plans were likely – as claimed by the trade-unions who had brought the matter to court – to generate psychosocial risks for the relevant employees.

In both instances, the *Cour de Cassation* held that the pieces of evidence that had been produced were insufficient to establish the existence of any breach whatsoever by the employer of his obligation to protect the health and the safety of the employees of the company.

The *obligation de résultat* to ensure safety is thus fulfilled wherever the company can demonstrate that it has implemented all those actions aimed at preventing risks. In other words, the result is achieved through a sufficient risk prevention policy.

Concerning individual labor disputes, the Air France[8] decision dated November 25, 2015 gave employers a further breath of fresh air by providing them with a get out.

In that specific case, an Air France pilot who had witnessed the 9/11/2001 terrorist attacks considered that his employer had not implemented a sufficient psychological care program following these attacks. After he had resumed his duties without reporting any specific feeling of malaise or unease, he experienced a panic attack a few years later, in April 2006, while heading to his plane for a flight. He was then put on sick leave and remained on sick leave until his dismissal in 2011. He initiated proceedings before the Labor Court and sought damages, claiming that his employer had breached his obligation to ensure safety.

The *Cour de Cassation* held that "*Yet, an employer* ***who demonstrates that he has taken all the measures provided for under Articles L. 4121-1 and L. 4121-2 of the French Labor Code*** *does not fail to meet his legal obligation to take the measures necessary to ensure the safety and to protect the physical and mental health of the employees*".

Having noted that the employer had indeed taken into account the 9/11 attacks by providing for a medical monitoring program for the relevant aircraft crew until 2005, that the employee had been declared fit for work and had *de facto* performed his duties without any difficulty until April 2006, the *Cour de Cassation* ruled that the Court of Appeals had rightfully "***inferred the absence of any breach by the employer of his obligation de résultat to ensure safety***, [and] *legally grounded its decision*".

This finding underlines an obvious change in the way of addressing the obligation to ensure safety at work

since it is finally accepted that consideration should be given to the prevention/safety measures implemented by the company to prevent damage. As such, the employer is no longer presumed liable from the sole fact that a professional risk occurred and caused harm to the employees. And the defense strategy available to employers is no longer limited to proving that the breach, if any, was due to a force majeure event.

The *Cour de Cassation* adopted a pragmatic approach and provided companies with a line of defense: The existence of a breach of the obligation to ensure safety will only be established if the company has not implemented all the measures provided for under Articles L. 4121-1[9] and, primarily, Article L.4121-2[10] of the French Labor Code.

The performance of all the actions required under the aforementioned Articles L.4121-1 and L.4121-2 seems to henceforth serve as an indicator to be used by trial judges to assess whether the employer has breached his *obligation de résultat* to ensure safety.

However, the decision rendered by the *Cour de Cassation* on February 10, 2016 recalled that being pragmatic in the assessment of the employer's liability does not in any way mean less stringent requirements and less severity for companies who do not play by the rules…

The assessment of employers' compliance with their positive obligation to ensure the safety and to preserve the health of their employees remains, all in all, quite strict

While the employer has a number of obligations with respect to safety at work, employees also have some. Indeed, pursuant to Article L. 4122-1 of the French Labor Code "*It is each employee's responsibility, according to each one's training and possibilities, to take care of his safety and health as well as that of the other persons affected by his/her actions or omission at work*".

In the case adjudicated by the Labor Chamber of the *Cour de Cassation* on February 10, 2016[11], the question was to determine whether the principle of employers' liability could be mitigated by the risk-taking behavior of the employee.

In that case, an employee served as a consultant in Marseille and travelled only occasionally across the entire French territory. As from January 2008, following a call for tenders won by her company, the employee had her working time divided between Marseille and the *Ile-de-France* region (i.e. the Paris region) for a duration of two years (without any amendment being made to her employment contract). In June 2008, i.e. six months later, the employee alerted her supervisors on the consequences that her frequent travels and heavy workload had on her personal life and health. As from July 2009, she was put on successive sick leaves until she was declared unfit for any employment position that would require repeated travels across the French territory, and consequently, she was dismissed.

In the meantime, the employee had initiated proceedings before the Labor Court and sought the judicial

termination of her employment contract, claiming that such contract had been unilaterally amended and that her employer had breached his *obligation de résultat* to ensure safety.

As a defense, the company pointed out that the position as consultant held by the employee implied, by essence, frequent travels across France (according to the company, this was supported by the terms of the job description). As travels were part of the duties of the employee, the company considered that it was entitled to impose temporary mobility periods without this being considered as an amendment to the employment contract.

The Court of Appeals granted the employee's claims and ordered the judicial termination of the employment contract for unfair performance and breach by the employer of his *obligation de résultat* to ensure safety. However, it limited the amount of damages, considering that it was advisable to take into account "*the own behavior of the employee who has herself contributed to the harm she suffered by accepting a risk that at the same time she denounced, insofar as the acceptance of this risk resulted in a wage increase*".

The *Cour de Cassation* quashed the part of the decision that limited the amount of damages awarded to the employee. Relying on Article L. 4122-1 of the French Labor Code that imposes on employees obligations with respect to safety and health at work, it held that "*the obligations imposed on employees with respect to safety and health in the workplace do not affect the principle of employers' liability*".

To put it differently, the employer may not try to partly exonerate himself from the consequences associated with a breach of his *obligation de résultat* to ensure safety by invoking the behavior of the employee.

In the commented case, it seems that the employer had not taken any measures to preserve the health of the employee despites the numerous warnings made by her and the obvious deterioration of her health condition.

In this respect, this decision does not, strictly speaking, constitute a step backwards from the 2015 decisions since it is established that, to escape liability, the employer must be able to demonstrate the actions taken with the respect to the health/safety of the relevant employee.

On the other hand, this decision serves as a reminder that the level of requirements imposed by the *Cour de Cassation* is quite high. It is irrelevant that the employee has accepted the "risk situation" or, at least, is willing to accept it against a financial compensation. Insofar as the employer has not taken all the measures to avoid the risk denounced by the employee, the principle of employers' liability shall prevail.

In conclusion, the message that the *Cour de Cassation* is trying to convey to businesses through its latest rulings seems to be as follows: Any exposure of an employee to a health or safety risk shall entail the liability of the employer, regardless of the employee's share of responsibility in the risk-taking behavior, unless the employer is able to prove that he has implemented the measures required under Articles L.4121-1 and L.4121-2 of the French Labor Code.

In this respect, the question can be raised as to whether Articles L.4121-1 and L.4121-2 of the French Labor

Code set forth an exhaustive list of measures that the company should implement in order for its action to be considered as sufficient by the judge.

In any event, this "realignment" is welcome as it should mitigate employers' strong feeling that "*whatever we do with respect to safety at work, we will always be condemned…*" and thus, conversely, encourage them to put in place prevention measures, if only to be able to prove in case of a dispute that they have duly taken actions!

On the employee's side, it can be hoped that this subtle realignment will curb the trend of systematically claiming before the Labor Court the existence of a breach of the obligation to ensure safety, a trend that ultimately makes this notion lose its substance.

[1] In respect of health and safety at work, companies have under French law an ***obligation de résultat*** and not only an ***obligation de moyen***. With an ***obligation de résultat***, a party must fulfill a specific obligation or arrive at a specific result. With an ***obligation de moyen***, 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.

[2] Labor Chamber of the Cour de Cassation, April 11, 2002, n°00-16.535P

[3] Labor Chamber of the *Cour de Cassation*, June 21, 2006, n°05-43914; Labor Chamber of the *Cour de Cassation,* February 3, 2010, n°08-44019

[4] Labor Chamber of the *Cour de Cassation*, October 6, 2010, n° 08-45609

[5] Labor Chamber of the *Cour de Cassation*, February 10, 2016; n°14-24.350

[6] Labor Chamber of the *Cour de Cassation*, March 5, 2015, n°13-26.321

[7] Labor Chamber of the *Cour de Cassation*, October 22, 2015, n°14-20.173

[8] Labor Chamber of the *Cour de Cassation*, November 25, 2015, n°14-24.444

[9] "*The employer takes necessary measures to ensure the safety and 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 any change in circumstances

and improve existing conditions."

[10] *"The employer implements the measures set forth in Article L. 4121-1 on the basis of the following general prevent principles:*

1. *Avoiding risks;*
2. *Assessing the risks that cannot be avoided;*
3. *Combating risks at source;*
4. *Adapting work to man, especially for the design of workstations, the choice of work equipment and the choice of working and production methods, with a view, in particular, to alleviating monotonous work and work at a predetermined work-rate and reducing their effects on health;*
5. *Taking into account technological developments;*
6. *Replacing the dangerous by the non-dangerous or the less dangerous;*
7. *Developing an overall coherent prevention policy covering technology, work organization, working conditions, social relationships and the influence of factors relating to the working environment, including risks related to moral harassment, as defined in Article L. 1152-1;*
8. *Giving collective protective measures priority over individual protective measures;*
9. *Providing appropriate instructions to employees."*

[11] Labor Chamber of the *Cour de Cassation*, February 10, 2016 ; n°14-24.350