SOCIÉTÉ D'AVOCATS

Case law selection : first semester 2021

- **Amicable termination – Collective redundancy plan (Cass. soc., 6 January 2021, n°19-18.549)**

An employee and his employer concluded an amicable termination agreement.

Two months later, the employer presented a collective redundancy plan to the works council.

The employee filed a claim with the employment tribunal, arguing that the amicable termination agreement was vitiated because of a fraud, as the employer was aware of the imminent redundancy plan at the time the amicable termination agreement was signed.

The employee could then have benefited from higher severance pay.

The Court of Appeal agreed with the employee, and declared the individual amicable termination null and void, stating that the employer knew that the employee's position would cease to exist as part of the redundancy plan it was preparing.

The French Supreme Court confirmed this reasoning.

As this concealment was a key factor in obtaining the employee's consent to the amicable termination of his employment contract, the termination must be declared null and void.

This decision provides useful clarification regarding the relationship between amicable termination of employment and redundancy, as well as the impact of consent on the validity of an amicable termination.

- **Protected employees – Termination (Cass. soc., 3 March 2021, n°19-20.290)**

An employer verbally informed an employee of his suspension pending decision of dismissal.

The next day, at 10:13 a.m., the employee was designated as a union section representative by a trade union.

His employer sent a letter at 6:20 p.m. inviting him to an interview prior to his dismissal.

The employee was dismissed for serious misconduct two weeks later.

The employee contested his dismissal, arguing that the dismissal procedure for protected employees had not been followed by the employer.

The judges ruled in favor of the employee.

They held that as the appointment as a representative of the union section had been sent by fax, the employer was well aware of it when he initiated the dismissal procedure.

He was therefore required to follow the procedure for dismissal of protected employees.

The French Supreme Court approved this decision, stating that the suspension pending a decision on dismissal had no effect on the obligation to comply with the protection regime for protected employees.

This decision demonstrates that the French Supreme Court will take a strict view when it comes to complying with the protection regime for protected employees, and reminds employers of the need to prepare a dismissal procedure carefully in this type of situation.

- **Business transfer – Economic entity's identity (Cass. soc., 24 March 2021, n°19-12.208)**

An employee worked in a hardware store located in a shopping mall.

A supermarket in the same shopping mall decided to acquire this store.

The employment contracts were taken over by the supermarket pursuant to article L. 1224-1 of the Labor Code ("TUPE").

The employee refused the transfer of her employment contract.

The supermarket then dismissed her for serious misconduct, a dismissal that the employee contested.

The appeal judges and the French Supreme Court agreed with the employee, noting that the autonomous economic entity formed by the former hardware store had lost its identity at the time of the transfer.

Following the acquisition of the hardware store, the supermarket sold the stock and required the employees of the former hardware store to work interchangeably with the other employees of the supermarket, some of them being, for example, assigned to the meat section and not the hardware section.

The employment contracts were therefore not transferred, and the new employer was not entitled to dismiss the employees who refused to transfer.

This decision demonstrates the effect of dispersing the elements of the transferring business within the transferee's organization and consequently the importance of maintaining the identity of the autonomous economic entity after its acquisition, to secure an automatic transfer of employment contracts.

- **Paid holidays (Cass. soc., 5 May 2021, n°20-14.390)**

An employer inserted a clause in its employment contracts that forced its employees to take paid holidays outside the legal period and over periods shorter than 12 consecutive days.

This constituted a splitting of paid holidays, giving the employee the right to additional paid leave. However, in the clause the employees also waived in advance their right to this additional paid leave.

Several employees filed an action before the employment tribunal to obtain payment of damages for loss of their vacation entitlement.

The French Supreme Court approved the Court of Appeal's decision, which stated that the right to additional leave arises as a results of the splitting of paid holidays, irrespective of whether this is initiated by the employer or the employee.

Consequently, a clause in the employment contract could not be a valid waiver, as the splitting had not yet taken place and the right for additional leave entitlements had not yet arisen.

Thus, the waiver of additional days of leave for splitting is only possible if it is agreed with the employee once additional leave has been accrued, or where the waiver is provided for by collective agreement.

- **Confidentiality – Trade union's communication (Tribunal Judiciaire de Paris, 1st June 2021, n°21/54080)**

Within the framework of compulsory annual negotiations, an employer provided union representatives with certain information.

At the end of the negotiation, one of the union representatives distributed a leaflet in digital format to the company's employees, which included a table containing the minimum, average, median and maximum salaries per classification within the company.

The employer, considered that the distribution of this leaflet violated the union representatives' duty of confidentiality, and brought an action before a Paris court to stop the distribution of this information on any medium.

The court rejected the employer's request.

It made a distinction between information obtained during the operation of the works council, which are protected by the duty of confidentiality, and information obtained outside the operation of the works council, which are not.

In this case, the trade union representative was given this table during a meeting which was part of mandatory annual negotiations, and t outside the operation of the works council.

The table was therefore not covered by the duty of confidentiality.

The court also made two clarifications that may come as a surprise.

The employer argued that the dissemination of the information should be controlled by restricting the choice of medium for disseminating this sensitive information.

It argued that communication on a digital medium would allow the salary table to be easily communicated to persons outside the company, and that this would facilitate the infringement of the company's interests.

The court rejected this argument, stating that the employer did not demonstrate how a digital medium would facilitate communication to outsiders.

The Court also held that the company had failed to demonstrate how the distribution of this document could harm its interests.