SUMMARY

2016/12 ‘Independent contractors’ working in a subordinate relationship may in reality be employees (FR)

<p>An ‘independent contractor’ working for a company in a subordinate relationship should be considered as a de facto employee. In such a situation, the company and its legal representatives can be held liable for ‘concealed work’ and be subject to criminal penalties.</p>

Summary

An ‘independent contractor’ working for a company in a subordinate relationship should be considered as a de facto employee. In such a situation, the company and its legal representatives can be held liable for ‘concealed work’ and be subject to criminal penalties.

Facts

The appellants in this case were a telemarketing company, its Director Ms X and its Manager Mr Y.

In 2011, the Labour Inspection (Inspection du travail) conducted an investigation at the company’s premises. It concluded that several individuals who were performing work there (the ‘workers’) held contracts as independent contractors (auto-entrepreneurs) whereas in reality, in the opinion of the Labour Inspection, they were employees. In fact, the individuals in question had originally been hired as employees but, at a later date, changed their status while continuing to perform their duties as ‘independent contractors’. X and Y were then prosecuted for travail dissimulé (i.e. concealed work). The tribunal correctionnel found them guilty and sentenced them to fines of € 15,000 each.

They appealed to the Court of Appeal in Amiens, basing their argument on Article L8221-6 of

the Labour Code, as it read at the time, which provided that a worker registered with the Commercial Register as an independent contractor is presumed not to be an employee, but that this presumption may be rebutted if it is demonstrated that the worker performs his work “in conditions that place him in a position of permanent legal subordination vis-à-vis the party for whom he works”. ‘Concealed work’ shall be taken to exist if, and only if, the party for whom the work is performed (the principal) has intentionally failed to fulfil the legal formalities required when hiring and paying staff. At least one of the accused made no effort to deny that the failure to fulfil those formalities was intentional.

The appeal was without success. In a judgment dated 2 July 2014, the Court of Appeal upheld the conviction, reasoning as follows.

the workers carried out the same activities as they did when they were still employed;

their terms and conditions were determined unilaterally by the company;

they worked for no other company;

the company helped them to complete the paperwork required to register themselves as independent contractors;

they performed the same work as was being done by the company’s own employees;

they were not able to determine their working hours;

the company treated them as ‘independent contractors’ in order to avoid having to pay social insurance contributions.

Based on these circumstances, the Court of Appeal held that whatever the parties' contract stated, it was overruled by the fact that there was clear evidence of subordination.

Judgment

The Supreme Court confirmed the Court of Appeals' decision. It found that the workers were in a subordinate relationship vis-à-vis the company and that therefore, their 'independent contractor' status was a misnomer. This meant that those responsible within the company were criminally liable.

Commentary

In France, misrepresentation of worker status is a huge problem. Indeed, the reality is that many workers are performing paid work for others as de facto employees without having been officially accorded the status of employee. Such misclassifications raise serious issues for affected workers, employers and the entire economy. When employers improperly treat employees as independent contractors, the employees may not receive protections such as the minimum wage, overtime compensation or unemployment insurance. In addition, employee misclassification generates substantial losses to the French social security system, as companies do not pay social security contributions for these workers. This undermines the French economy.

In this case, it was clear that the company's failure to fulfil the legal formalities required when hiring and paying employees was intentional. Hence this aspect was not subject to debate. Had the prosecutor not been able to establish intent, it would not have been possible to find the accused criminally liable. In such a case, however, civil liability would still have been a possibility.

Under French employment law, employers who employ workers without declaring them as such are in breach of the employment relationship and may face both criminal and civil prosecution. Many companies have already faced claims from independent contractors asking to be treated as employees. There is a large body of case law on this issue, mainly in the civil courts.

The case law on this subject holds that "the judge is not bound by the treatment of their contract offered by the parties"

Plenary section of the Supreme Court, 4 March 1983, Bull. 1983, Ass. plen., n° 3.

Central to the test is whether the party providing the work to be done (the principal) has control over when, where and how the work is performed, in other words: is the parties'

relationship one of 'subordination'? Must the worker follow detailed orders given by the principal? Indeed, in characterizing employment contracts, the labour courts systematically refer to a 'subordinate relationship', as this is the prevailing criterion by which an independent contractor can be distinguished from an employee. As soon as it becomes clear that an independent contractor is in a subordinate position vis-à-vis the principal, the labour courts will reclassify the independent contract into an employment contract.

In the case at issue, the Supreme Court availed itself of a number of factors cited by the Court of Appeal to hold the two individuals criminally liable, and found that the workers in question were in a subordinate relationship towards the company. The Supreme Court then found, inter alia, that the independent contractors were performing the same duties as they had performed when they were employees, meaning that they were performing salaried tasks for the company. This led the Supreme Court to confirm the decision of the Court of Appeal.

More generally, in order to avoid an independent contract being wrongly classified as such, employers should ensure that, during the performance of his or her duties, the worker should remain fully independent and not be required to work in a subordinate position. This includes consideration of the company's policies, the working conditions and in particular, working hours.. Further, the contract should focus on the specific tasks to be completed and the remuneration provided for in the agreement should not be based on the number of hours worked by the independent contractor. The tasks to be undertaken should also require specific expertise or know-how which the company's employees do not possess.

Where misclassification is confirmed, the labour courts will most likely award the worker the entire legal package (i.e. severance pay calculated in accordance with the applicable collective bargaining agreement, pay in lieu of notice and pay in lieu of leave). In addition, the courts may award damages for abusive dismissal (i.e. a minimum of six months' gross salary) and damages for concealed employment (i.e. a lump sum of six months' gross salary

Article L. 8223-1 of the French Labour Code.

Further, as a de facto employer, the company would be required to pay social security contributions on compensation paid to the worker throughout the employment relationship, as well as penalties for late payment of these (i.e. 10% of the sum owed to the French Social Security Authority plus 2% per quarter, if payment is more than three months late).

'Independent contractor' status was created in 2008

Law n° 2008-776 dated 4 August 2008.

Law n° 2014-626 dated 18 June 2014.

However, the Supreme Court has not changed its position despite the introduction of the statutory presumption in favour of independent contractors. Therefore, it is important for employers to be aware that even if individual contractors are presumed not to be employees, this does not preclude misclassification occurring at some later point: i.e. as soon as subordination enters into the relationship. In the case at issue, the Supreme Court was able to deduce intention from several factors, including the existence of a subordinate relationship. This is unusual, because the workers in this case had registered themselves with the Commercial Register and it implies that it is no more difficult to obtain a misclassification than it was before the new legal presumption.

Usually it is the worker who claims that he or she is not really an independent contractor, and the dispute is litigated before a civil (labour) court. However, misclassification is also a criminal offence, attracting a three-year term of imprisonment and a € 45,000 fine (€ 225,000 for legal entities). Fines are doubled in the case of repeated offences. Additional criminal and administrative sanctions may be imposed on those responsible for the offence, including dissolution or shutdown of the business for a maximum of five years.

In regard to this decision of the Supreme Court it is important to stress that although some employers misclassify their workers as independent contractors in error, many employers do so intentionally in order to reduce labour costs and avoid paying social contributions. If so, termination of the independent contract will be held to be wrongful termination of an employment contract, as it will have been carried out in breach of the procedural rules governing termination of employment contracts in France.

What makes this case most notable is that it was a criminal case, whereas misclassification issues are usually judged by the employment section of the Supreme Court.

Comments from other jurisdictions

The Netherlands (Peter Vas Nunes): In The Netherlands, the issue of work being performed under the guise of contracting rather than as employment has yielded countless judgments, both civil and administrative (not criminal), over the past six or seven decades. It has recently come to the forefront (again) in connection with a change of law that will be taking effect on 1 May 2016 and that has attracted a great deal of criticism by employers and organisations representing self-employed persons. The debate focusses on the repeal of a certificate known as VAR. A VAR is a certificate issued by the tax administration to individuals who consider themselves to be independent contractors. The individual obtains the certificate by completing and submitting a digital questionnaire that asks him questions such as: what sort

of activities are you planning to perform, for how many hours per year do you expect to perform those activities, for how many customers do you expect to work the coming year, do you have the right to let someone else perform the work, which party carries the loss in the event the principal is not satisfied with the work, and have you previously worked for any of those principals as an employee? If the tax administration is satisfied that the answers to these questions indicate independent contractor status, it as a rule issues a VAR with a validity of one calendar year. The effect of a VAR is that, should it later turn out that the individual to whom it was issued was in fact an employee and not an independent contractor, the employers for whom he worked are not liable for the tax and social insurance contributions that should have been paid, unless the work was performed at variance with the answers provided on the questionnaire.

Although a VAR is not a guarantee for the principal that it will on no account be held liable for the relevant taxes or contributions, neither that the worker who initially gives himself out to be a contractor will not later turn round and claim to be an employee, VARs are very popular, and they have helped to increase the number of self-employed entrepreneurs. In fact, VARs became so popular that the legislator decided to replace the VAR regime by a more restrictive regime, under which principals cannot be so sure that they will not be hit (retroactively) by tax or social insurance claims. The new system is likely to dampen enthusiasm for entrepreneurship.

Subject: employment status

Parties: Nord Picardie santé, Mme Carole X and M. Thierry Y -v- France (public prosecution)

Court: Cour de cassation, chambre criminelle (Supreme Court)

Date: 15 December 2015

Case number: 14-85638

Publication:
https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000031658343&fastReqId=996574821&fastPos=1

Creator: Cour de cassation, chambre criminelle (Supreme Court)
Verdict at: 2015-12-15

EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

Case number: 14-85638