SUMMARY

2016/28 Employee compensated for employer's refusal to move her to another office nearer home, as advised by the occupational doctor (FR)

<p>An employer that fails to comply with an occupational doctor's recommendation regarding an employee's health, as it relates to his job, is in breach of its health and safety obligations.</p>

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Facts

The plaintiff in this case was an accounting assistant. She had worked for the defendant, a regional water company, since 1984. She had suffered from poor health since 2003 and in September 2006 she had a stroke. She was off work for about three months, returning from sick leave in December 2006.

Pursuant to French law, the plaintiff saw an occupational doctor before returning to work. Occupational doctors have certain rights and responsibilities. One of these is set out in Article L4624-1 of the French Labour Code. It provides that the doctor is authorised to advise (proposer) the employer to take 'individual measures' where he or she feels that measures are required in connection with an employee's medical condition. One measure is the relocation of the employee to another place of work. The employer must consider the doctor's advice and, if it decides not to heed it, it must specify the reason. If the employer and employee disagree on whether or how to act on the doctor's advice, either party may appeal to the Labour Inspector.

In this case, the occupational doctor found the plaintiff sufficiently recovered to resume work in December 2006. However, he advised the employer to allow her to work from another office closer to her home. The published judgment does not reveal what exactly happened, but it would seem that the employer did not act on the doctor's advice, even after the doctor repeated the advice in 2007, 2008 and 2009. The employer seems to have argued that it had no suitable work for the plaintiff other than in the office where she was based.

The doctor examined the plaintiff again in 2010. As on the previous occasions, he found her fit for her job. This time, however, the doctor did not repeat his previous advice to relocate her to another office.

It would seem that the employment relationship eventually terminated following a dispute in connection with the plaintiff's request to be transferred. The plaintiff reduced her working hours to 80% of full time, claiming that her employer's refusal to accommodate her forced her to do this.

Considering that refusing her requests for a transfer constituted a breach of the employer's obligation to safeguard her health, the employee initiated a legal action before the labour court of Roubaix. She claimed € 50,000 as compensation of moral damage and € 8,466 as remuneration as if she has worked on a full-time basis, € 48,889 as compensation for the additional commuting expenses she had been forced to make as compared to the expenses she would have made had she been allowed to work in an office closer to her home and € 1,368 in lieu of paid leave. The court of first instance turned down her claim.

Judgment

The Court of Appeal of Douai overturned the lower court's judgment and awarded the plaintiff € 5,000. It considered that, even though the doctor's last report, in 2010, did not recommend a change of job, and that the plaintiff therefore had no right to be transferred, the employer had not demonstrated that he had considered the doctor's previous advice (of 2006, 2007, 2008 and 2009). The court of appeal held the employer liable, since no specific adjustments had been made to accommodate the employee at her workplace. The court does not seem to have accepted the employee's argument that she had been forced to reduce her workload to 80% of her working time or that she had had additional travelling expenses.

The Supreme Court confirmed the court of appeal's decision, considering that the employer was not able to demonstrate that he had taken into account the recommendations of the occupational doctor in a sufficiently robust way.

Commentary

France has transposed the OSH Framework Directive, 89/391. The Labour Code, repeating Article 6 of the Directive, requires employers to implement measures necessary for the safety and health of workers on the basis of the following general principles of prevention:

the avoidance of risks;

the assessment of risks which cannot be avoided:

dealing with risks at source;

adapting the work to the individual, especially as regards the design of workplaces, 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 to reducing their effect on health;

adaption to technical progress;

replacement of dangerous equipment etc. by non-dangerous or less dangerous;

development of a coherent overall prevention policy covering technology, the organisation of work, working conditions, social relationships and the influence of factors related to the working environment;

giving collective protective measures priority over individual protective measures;

giving appropriate instructions to workers.

French law requires the employer to adapt its safety and health measures where appropriate and to strive to improve the existing situation. In this context, the employer must implement a risk prevention policy, which takes into consideration the impact of the work on the employees. The employer must also prepare a risk assessment. This document must be updated at least once a year and also whenever there is a development impacting on health and safety at work. Employees must be able to look at the document and it must be made available to the health and safety committee and staff delegates, if any, as well as to the occupational doctor and the Labour Inspector.

In this context, according to Article L. 4624-1 of the French Labour Code, employers must take into account the occupational doctor's recommendations and specifications and, if they refuse to apply them, they must explain why. In the case at issue, the employer had violated the provisions of the Labour Code, since it had not complied with the recommendations made by the occupational doctor and not explained why. Moreover, it had not taken any other actions to adapt the workplace of the employee in light of her medical condition.

What is surprising is that all of the occupational doctor's decisions recognized that the employee was fit for work and his latest decision did not reiterate his recommendation regarding the workplace. But these factors do not seem to have impressed the Supreme Court, which applied the employer's safety obligation strictly and ruled that the employer should have implemented measures to comply with the doctor's recommendation.

This judgment follows the Supreme Court's previous case law. Indeed, the Supreme court had already decided that when an employee challenges a proposal for redeployment on the basis that it conflicts with recommendations by occupational health, the employer must request fresh advice from the doctor about the proposed redeployment before it can decide to dismiss the employee on the grounds that there is no possible redeployment within the company.

Ruling of the Supreme Court of 27 January 2016, no 14-18.641.

If the employer is not able to show it has adapted the employee's job to comply with the recommendations of the doctor, it is in breach of its obligation to execute the employment contract in good faith and is liable to compensate the employee for his or her loss in an amount to be calculated by the court.

Ruling of the Supreme Court of 17 February 2010, no 08-45.610.

Moreover, if an employer demotes an employee to a lower position despite the recommendations of occupational health, this can be regarded as moral harassment, which is a punishable offence.

Ruling of the Supreme Court of 28 January 2010, no 08-42.616.

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