EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

2015/5 Supreme Court reverses doctrine on cadre/non-cadre discrimination (FR)

<p>Different treatment in terms of benefits amongst different categories of employees, set by company or collective bargaining agreements and negotiated with representative trade unions, is presumed to be justified.</p>

Summary

Different treatment in terms of benefits amongst different categories of employees, set by company or collective bargaining agreements and negotiated with representative trade unions, is presumed to be justified.

Facts

The CGT National Federation of Staff in Research, Consulting and Prevention Companies (the 'Union') is not party to the 'SYNTEC' collective bargaining agreement (the 'Agreement'). The Union brought a legal action before the French High Court seeking a declaration that several provisions of the Agreement were unlawful and void. It claimed the provisions were in breach of the principle of equal treatment because they afforded greater advantages to executive employees (cadres) than to non-executive employees (non-cadres). These included a longer notice period and a more generous dismissal indemnity. The Union also applied for an injunction to bring together all signatory trade unions and employers' associations to the negotiating table to make the provisions compliant with the principle of equal treatment.

Judgment

The Union's legal action was dismissed by both the High Court and the Court of Appeals of Paris. The latter, in its decision of 30 May 2013 held that the differential treatment set by the Agreement with respect to various benefits between cadres and non-cadres employees was objectively justified, notably by the specific and different nature of their responsibilities.

The Union appealed the decision before the French Supreme Court and it upheld the decision of the Court of Appeals, ruling that *"differential treatment between different categories of employees by means of (industry-wide or company-level) collective bargaining agreements which have been negotiated and signed by the representative trade unions invested with the power to defend the employees' rights and interests (as the employees have directly participated in voting for them), are presumed justified. Therefore, it is up to employees who challenge those differences to demonstrate that they are unrelated to any consideration of a professional nature"*. The Supreme Court further held that the Court of Appeals had correctly dismissed the claim, as the Union had not established that the differential treatment was unrelated to any professional consideration.

Commentary

It seems the French Supreme Court has finally decided to reverse its longstanding position, as established in the well-known "Pain" case[1] that *"belonging to different professional categories cannot per se justify allocation of a benefit"*, that *"any difference in treatment amongst employees should be based on objective reasons"* and that the reality and relevance of these reasons must be verifiable by a judge.

The *Pain case* was heard in 2009 and concerned differential treatment set by a company-level agreement. A non-executive salesperson hired by DHL Express, challenged his entitlement to only 25 annual paid holidays under the applicable company agreement, compared to his fellow executive colleagues who were entitled to 30 paid holidays. He brought legal action seeking payment of arrears in the form of paid leave. The employee's claim was upheld by the Supreme Court.

The Supreme Court has made several decisions since 2009 that support the conclusion it reached in Pain and this has had the effect of an earthquake in France. The distinction between executive and nonexecutive employees is an important one and the majority of collective bargaining agreements provide different amounts of benefits to each category (e.g. in terms of the dismissal indemnity, notice periods, sick pay and the retirement indemnity).

Up till now, when an employee claimed the benefit of an advantage reserved to another category of worker, the burden of proof lay with the employer to justify - under judicial control - the relevance of the advantage set out in the collective bargaining agreement. Similar

reasoning also had to be applied to any inequality amongst employees that derived from a unilateral decision by the employer.

However, proof of objective reasons in many cases was not an easy task, especially when the benefit in question had been granted by a collective bargaining agreement at national level. How could the employer be expected to justify differences negotiated by social partners at the national level? And how could it possibly provide objective reasons, not having directly participated in the negotiations – given that most of the national collective bargaining agreements are several decades old?

With this new decision of 27 January 2015, the French Supreme Court has finally decided to reverse its logic by setting a new principle, which is that the differences in treatment between different categories of employees in a collective bargaining agreement (whether at national or company level) are presumed to be justified, as those differences have been negotiated with the unions that are the guardians of employees' rights and interests.

We can only commend this, as it significantly reduces the legal uncertainty created in 2009. Now that the burden of proof has been reversed, it is no longer enough for an employee to claim the existence of a differential treatment in benefits. The employee will need to demonstrate that the treatment is unrelated to any professional consideration. With this decision the Supreme Court hopefully closes the Pandora's Box that it opened back in 2009.

Finally, it is worth noting that the ruling of the Supreme Court is clear that this new reasoning only applies to differential treatment originating from collective agreements negotiated with the unions. Any differential treatment resulting from the employer's unilateral decisions remains subject to the Supreme Court's previous case law.

Footnote

1 Cass. soc. July 1st, 2009 n° 07-42.675 (reported in EELC 2010/51)

Subject: Collective agreements, unequal treatment

Parties: Fédération nationale des personnels des sociétés d'études de conseil et de protection CGT – v - Fédération des syndicats des sociétés d'études et de conseils et Chambre d'Ingénierie et du conseil de France

Court: Cour de cassation (French Supreme Court)

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Date: 27 January 2015

Case Number: No 13-22.179

Hard copy publication: Official Journal

Internet publication: www.legifrance.gouv.fr>judiciaire>cour de cassation>Numéro d'affaire = 13-22179

Creator: Cour de cassation (French Supreme Court)
Verdict at: 2015-01-27
Case number: No 13-22.179