SUMMARY

2014/47 Another case where terminated staff were awarded damages against their former employer’s shareholder (FR)

<p>Liability in tort is an alternative way for redundant employees to seek damages from a parent company, even where that company has no ‘co-employment’ relationship.</p>

Summary

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Facts

Capdevielle was a company that specialised in the manufacture of chairs or seats (*sièges*). In 2005 it underwent a restructuring in which 166 employees lost their jobs. In 2008 its shares were sold to Sofarec, the French subsidiary of the Luxembourg investment fund GMS Investment. In 2010, Capdevielle went into receivership; a liquidator was appointed and all its employees lost their jobs.

Judgment

A number of redundant employees brought an action against both Sofarec and GMS Investment for tortious liability for having taken detrimental decisions leading to the liquidation of Capdevielle. In particular, they alleged that:

Sofarec/GMS did nothing to address Capdevielle's huge cash flow and other financial problems;
Sofarec/GMS caused Capdevielle to spend unjustifiable and disproportionate amounts, including on several financial, commercial and marketing studies. One of these studies produced a memorandum entitled "How to reignite the sustainable competitiveness of Capdevielle". The memorandum consisted of only a few pages and cost the company € 425,000, a sum corresponding to the annual remuneration of seven executives;
Sofarec/GMS caused Capdevielle to enter into a trademark agreement in which Capdevielle sold some of its trademark rights to Sofarec for € 299,000, the purchase price being set off against the company's debt to Sofarec.

The Court of Appeal of Pau, in its decision of 7 February 2013, agreed with the plaintiffs that the price of the memorandum had been exorbitant and not justified by need; that the trademark transfer did nothing but worsen an already bad situation; and that the behaviour of Sofarec/GMS was tortious towards the employees. The court upheld the claim and ordered Sofarec and GMS Investment jointly and severally to pay each employee € 3,000 in damages.

Sofarec appealed the decision before the French Supreme Court, arguing that a parent company can only be held liable if it is involved in the management of its subsidiary, whereas in the case at hand there was no interference of Sofarec in the management of Capdevielle, whose decisions were taken independently by its own directors.

The French Supreme Court dismissed the appeal and confirmed the Court of Appeal's decision, holding that "*Sofarec, directly or indirectly through GMS Investment, had made decisions detrimental to Capdevielle, which had aggravated the difficult economic situation of the latter, decisions that were not useful for Capdevielle but purely in the interests of its sole shareholder. Therefore, the Court of Appeal had rightly concluded that these companies, by their faulty and blameworthy lack of responsibility, had contributed to the insolvency of Capdevielle and the loss of employees' jobs*".

Commentary

EELC previously reported a 2011 Supreme Court judgment in a somewhat similar case and with a similar outcome (see EELC 2012/3 nr 6). In that case, the shareholder of a company that went into receivership and dismissed its staff was also held liable, but on the basis of a different legal doctrine. In the 2011 case, the Supreme Court applied the doctrine of co-employership. In the case reported here, the court held the shareholder (and its parent company) to be liable on the basis of the general doctrine of tort (*délit*). This commentary will

explore the similarities and the differences between both doctrines.

The position of the Supreme Court in this decision is not new; indeed it had set the principle of tortious liability of parent companies in a similar case where the parent company in that case (with no 'co-employment' situation) had taken detrimental decisions on behalf of its subsidiary, leading to the dismissal of its staff. In its ruling, the Supreme Court held "*the employees are entitled to bring an action in tort against the [parent] company even though the latter is not their employer*"[1].

The confirmation of this principle by the Supreme Court opens the door to an alternative for employees to seek damages from the parent company, not through employment law (i.e. co-employment), but through tort law.

"Co-employment" is a legal technique which allows a court to identify involvement of a company – not being the direct employer - in the employment relationships with employees of another company in the group, resulting in the joint liability of the two companies. According to case law, there is co-employment when there is "*confluence of interests, activities and management between different entities*".

The Supreme Court has recently begun to make it harder for courts to identify co-employment relationships. In a recent decision, it held that "*a company belonging to a group can only be considered as a joint employer in respect of the staff employed by another company in the group if there is between them a confluence of interests, activities and management manifested by involvement in the other entity's economic and social management beyond the necessary coordination of their economic activities and the state of economic domination this can generate […] The fact that the directors of the subsidiary are appointed from the group and that the parent company has taken part in the overall policy for group decisions affecting the future of its subsidiary, along with being committed to financing the social plan for the site closure of its subsidiary, are insufficient reasons to characterize the parent company as having a co-employment relationship*"[2].

As the case law requirements for recognition of co-employment relationships have become more stringent, tortious liability now appears to be the best way for redundant employees to seek damages from parent companies. Under Articles 1382 and 1383 of the French Civil Code, tortious liability can be engaged where three elements can be proved: fault, damage and causal link.

In this case, the employees had not brought a co-employment relationship claim against Sofarec and GMS Investment, but only an action in tort. After reviewing the facts, the Supreme Court recognized the three elements of tortious liability and required Sofarec and GMS

Investment jointly and severally to pay to each redundant employee € 3,000 in damages for failing to retain their jobs or to enable them to be reclassified and for failing to allow them the opportunity to benefit from a well-funded social plan.

The approach taken in this case by the Supreme Court shows two major differences with co-employment based decisions. Firstly, it seems generally easier to establish liability in tort on the parent company than it is to establish liability under co-employment. In this case, the Court noted that the parent company had taken decisions that had worsened the situation of its subsidiary, based on the parent company's sole interests. However, secondly, the consequences in tort are less severe. In this case, the amount awarded for the loss of opportunity to benefit from a more generous social plan was € 3,000 per employee, which is well below the sanction for unfair termination in co-employment situations.

Future court decisions will tell us if actions in tort will become the new trend for employees seeking damages. This may depend on whether the sanctions imposed by the courts remain low.

Nevertheless, this decision is another reason why parent companies should be careful when taking decisions that impact on their subsidiaries. They should particularly avoid thinking that they can get away with justifying decisions that are detrimental to their subsidiaries' interests for their own profit.

Comments from other jurisdictions

The Netherlands (Peter Vas Nunes): my understanding of the author's Commentary on this case report is that in France there are two legal doctrines that a former employee can apply in an effort to claim compensation for redundancy-related loss from his former employer's shareholder:

1° co-employership
2° tort

and that until recently shareholder liability was, as a rule, based on 1° but that now 2° is being used.

The Dutch courts have for many years applied doctrine 2°. Essentially, the Supreme Court accepts that if the bonds between a shareholder and its subsidiary are close as a result of intensive involvement/interference by the shareholder in the subsidiary's business, the shareholder may have a duty of care vis-à-vis the subsidiary's employees. One situation in

which this duty can be said to have been breached is where the subsidiary's financial difficulties have been caused by the shareholder favouring itself over the interests of the subsidiary. In such cases the courts may (but do not easily) accept tort. The courts are reluctant to accept co-employership, reserving this technique for extreme cases of abuse or lack of independent identity.

Subject: Parent company liability

Parties: Employees - v - Sofarec and GMS Investment

Court: Cour de cassation (French Supreme Court)

Date: 8 July 2014

Case number: N° 13-15573

Publication: www.legifrance.gouv.fr -> jurisprudence judiciaire -> nom de la jurisdiction = cour de cassation; numéro d'affaire = case number -> rechercher

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Creator: Cour de cassation (French Supreme Court)
Verdict at: 2014-07-08
Case number: 13-15573