

## SUMMARY

# 2012/5: Not allowing male waiter to wear earrings is discriminatory (FR)

***&lt;p&gt;A waiter alleged that his employer had discriminated against him on grounds of gender when he dismissed him because he was wearing earrings. In January 2012, the Supreme Court ruled in favour of the employee and considered that a dismissal based on the fact that a waiter wears earrings constitutes sex discrimination.&lt;/p&gt;***

### Summary

A waiter alleged that his employer had discriminated against him on grounds of gender when he dismissed him because he was wearing earrings. In January 2012, the Supreme Court ruled in favour of the employee and considered that a dismissal based on the fact that a waiter wears earrings constitutes sex discrimination.

### Facts

A man is hired as a waiter in a gourmet restaurant. Five years later, the waiter comes to work wearing two earrings. Despite his employer's request, he refuses to remove them.

His employer sends him a formal letter asking him to remove said earrings while serving (he could wear them when preparing tables but not when clients are present), considering that this is not consistent with the standards of the restaurant and associated clientele.

The employee does not comply with this instruction and as a consequence is dismissed for personal reasons. The dismissal letter sets out the facts and the employee's refusal and states "*your status in the service of our customers does not permit us to tolerate the wearing of earrings by a man, which you are*".

The employee lodges a case before the Industrial Tribunal against this measure, alleging that his feminine colleagues wore earrings without any problem for the clients or the employer.

The Industrial Tribunal dismissed the employee's claim, ruling that the dismissal was valid and justified.

The Court of Appeal of Montpellier overruled the first instance judgment and ruled in favour of the employee, considering that the dismissal letter demonstrated the existence of direct discrimination on grounds of gender. As a result, the dismissal was declared void.

Under French law, when a dismissal is declared void, the employee can:

ask for reinstatement in his previous position or in similar position, in which case he is entitled to payment of his salary from the dismissal to the date of reinstatement; or, in the event he elects to be reinstated and the employer refuses to reinstate him, claim entitlement to all termination indemnities as well as salary from the termination date until the date of renunciation; or  
elect to be awarded salary in lieu of notice, severance pay and damages with a minimum equivalent of six months' salary.

### **Supreme Court**

The Supreme Court ruled in the employee's favour on 11 January 2012 on the grounds that "*by virtue of Article L. 1132-1 of the Labor Code, no employee may be dismissed because of his or her sex or physical appearance*" and that the dismissal letter of the employee provided evidence that the employee's dismissal was because of his appearance based on his gender.

### **Commentary**

Like judgments pronounced in the past about wearing bermuda shorts or track suits to work, the decision by the Supreme Court on 11 January 2011 is one that brings on a smile at first glance.

But beyond the anecdote, this decision is in fact particularly interesting when we examine the sanction pronounced. Whereas, until now, decisions relating to clothing and accessories had been found to be without real and serious cause in relation to dismissal, and the issue was damages for unfair dismissal, in this case, the dismissal was declared void on grounds of discrimination concerning the physical appearance based on the sex of the employee.

Thus, forbidding a man to wear earrings constitutes discrimination.

This is the first time this has been accepted by the Supreme Court. However, such an unprecedented approach is not without consequences, notably concerning the sanction

incurred and the burden of proof.

Up until now, in matters concerning jewellery and clothing, the case law was based on breach of the principle of proportionality laid down by Article L.1121 of the French Labor Code. Dismissals not complying with this principle led solely to award of damages.

For example, it was held that a salesman wearing a small diamond was not at fault. The judges considered that the piece of jewellery in question was both discreet and of a type often worn by men of his generation and therefore found his dismissal not to have been based on a real and serious cause (Court of Appeal, Toulouse, 27 November 1998) On the other hand, this same principle of proportionality justified a dismissal for a real and serious cause in a case of a nose-piercing and earrings worn by a waiter, as these accessories were of a nature likely to "shock" clients (Court of Appeal of Versailles, 22 September 2006).

The decision of last 11 January innovates by being grounded on Article L.1132-1 of the French Labor Code relating to discrimination.

One consequence of this is on the burden of proof. In order to establish discrimination, an employee need only furnish elements showing the existence of discrimination (here, the terms of the dismissal letter) and it is up to the employer to demonstrate that his decision rests on objective factors that have nothing to do with discrimination.

In the case in point, the fact that the employee was in direct contact with the clients of a high class restaurant was not considered by the judge as being an objective factor unrelated to discrimination. Witness statements about this from clients were submitted by the employer, but these were not considered as sufficient to justify the differential treatment (quite apart from the fact that direct sex discrimination cannot be objectively justified other than in circumstances not relevant to this case).

Secondly, there are consequences for the sanction. By ruling on grounds of discrimination, the Supreme Court had no option but to declare the dismissal void. The employee thus had the right to be reinstated and/or to receive higher damages.

However, the actual significance of this decision remains uncertain. Certain authors see it as a serious warning by the Supreme Court concerning discrimination. Others consider that the dismissal letter in this case was so badly drafted that it left little leeway to the Supreme Court. Stay tuned for the next episode.

*Subject: Gender discrimination*

*Parties: Mr Alister WYLOCK v. SARL BESSIERE FRERES*

*Court: Cour de Cassation (Supreme Court)*

*Date : 11 January 2012*

*Case number: 10- 28213*

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**Creator:** Cour de cassation (French Supreme Court)

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