EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

2011/57: Facts that constitute sexual harassment may be found outside working hours (FR)

<p>Sexual remarks and inappropriate behaviour by an employee towards an individual who he is in contact with through his work do not fall under the scope of his private life. Such behaviour may therefore be considered as sexual harassment, which justifies a dismissal for serious misconduct, even if it occurred outside working hours and outside the workplace.</p>

Summary

Sexual remarks and inappropriate behaviour by an employee towards an individual who he is in contact with through his work do not fall under the scope of his private life. Such behaviour may therefore be considered as sexual harassment, which justifies a dismissal for serious misconduct, even if it occurred outside working hours and outside the workplace.

Facts

In 2000, SNGT hired Mr Daniel A., the plaintiff, as a telemarketer. In 2006 he was dismissed for serious misconduct, having allegedly sent two female colleagues obscene text messages and behaved inappropriately towards female co-employees outside working hours and outside the workplace.

The plaintiff brought the case before the labour law tribunal, disputing the legality of his disciplinary dismissal and claiming compensation. He claimed, in particular, that his dismissal was decided on grounds of mere rumour, and not on conclusive evidence. The court of first instance ruled in favour of the employer. It decided that the dismissal was based on serious misconduct. However, by a decision rendered on 22 October 2009, the Versailles Court of

Appeal reversed the judgment of the court of first instance, ruling that the dismissal did not have a genuine and proper cause.

The Court of Appeal was unconvinced by the inconclusive testimonies of the plaintiff's co-employees that the company had used as evidence to justify the dismissal. The testimonies were either based on rumours or contained invitations to female co-workers to have a drink. Moreover, the Court of Appeal held that the facts that occurred outside working hours fell within the scope of the legislation protecting an employee's private life, and could therefore not be considered in establishing the existence of professional misconduct.

Judgment

In a decision rendered on 19 October 2011, the French Supreme Court overruled the Court of Appeal's decision that the matter was beyond the scope of the law, on the grounds that *"sexual remarks and inappropriate behaviour from an employee towards persons he is in contact with through his work do not fall within the scope of his private life".* The Supreme Court restricted the scope of the concept of "private life" and, in doing so, extended that of misconduct in cases of sexual harassment.

Commentary

The Supreme Court focuses on the definition of "private life" in this decision, without reference to the rule, recalled by the Court of Appeal, according to which facts that fall within the scope of an employee's private life cannot be held against the employee as constituting professional misconduct (e.g. notably: Cass. Soc. 26/09/2001, n¡99-43.636; Cass. Soc. 19/12/2007, n¡06-41.731).

The Supreme Court could have based its reasoning on the existence of a disturbance caused within the company, which according to its own jurisprudence allows for derogation from the principle that matters concerning private life cannot constitute professional misconduct (e.g. Cass. Soc. 28/11/1989, n¡86-41.268, which concerns the *"indecent repeated behaviour of an employee towards his female colleagues"*). This was, in fact, the employer's primary argument. However, the Supreme Court ruled otherwise.

The decision to adjudicate the matter by defining the scope of "private life" rather than of sexual harassment, may be seen as a radical way of penalising sexual harassment, given that it makes it easier to show harassment (in this case, by excluding from the scope of employee's private life behaviour that could be linked to the working relationship). This principle has already been seen in French case law: Cass. Soc. 24/09/2008, n¡06-46.517, concerning the *'harassment of an employee towards his female colleague at her home';* and Cass. Soc.,

3/03/2009 n¡07-44082, concerning the *'harassment of an employee towards his female colleague outside of working hours"*.

Thus, the Supreme Court followed existing case law in treating sexual harassment as a serious matter that can, after all, constitute a criminal offence. In terms of employment, once sexual harassment has been established, this implies the existence of serious misconduct (Cass. Soc. 5 March 2002, n¡ 00-40.717). However, the Court did not focus on the definition of sexual harassment provided by Article L.1153-1 of the French Civil Code, although the employer had invited the Court to do so, as it wished to speak more generally about what may or may not be regarded as a working relationship in the application of disciplinary measures. Indeed, the Court held that it is *"towards persons that the employee was in contact with* ***through his work*** " that his behaviour was inappropriate. In doing so, the Supreme Court rejected the notion that a work context necessarily means that the conduct in question takes place within working hours: the link between the facts and a work context may be deduced simply from the nature of the relationship between the individuals concerned.

As a result, in the choice that the Court had to make between (i) the principle of "private life", deriving from Article 9 of the French Civil Code, which protects the right to private life; (ii) the procedural and probationary guarantees granted to employees during disciplinary dismissal; and (iii) the sanctioning of the violation of intimacy, which characterises sexual harassment, the Supreme Court decided to prioritise the sanction. However - and this is the meaning of the exact phrase it has chosen - the Court does not give this priority at the cost of the integrity of the principle of the right to private life: although it found that the facts alleged against the employee 'did not fall within the scope of his private life", the Court considered that the question of privacy simply did not arise, thus ensuring that both respect for private life and the sanction of sexual harassment at work remain intact.

Subject: Sexual harassment, dismissal

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