SUMMARY

2011/51 Lump-sum agreements in days ("forfait-jours") validated under strict conditions (FR)

<p>The French Supreme Court has validated the principle of lump sum agreements in days (forfait jours)1, despite opposition from the European Committee of Social Rights.</p>

Summary

The French Supreme Court has validated the principle of lump sum agreements in days (forfait jours)[1], despite opposition from the European Committee of Social Rights.

Facts

An employee was hired as a Sales Manager in 2001. His employment contract contained a lump sum (forfait jours) clause, as authorised by the applicable Collective Agreement for the Metallurgical Industry. A forfait jours agreement provides that an employee will work for a certain number of days per year - commonly 216, 217 or 218 - rather than a certain number hours per week. It is up to the employee to decide which days and at which times during those days he works, as long as he works at least the agreed number of whole days. He is paid the agreed fixed salary regardless of how many days or hours he actually works, provided that this is no less than the agreed minimum. The employee is not eligible for overtime compensation if he exceeds the minimum. In 2006 the employee resigned, but brought an action the Industrial Tribunal of Alencon claiming payment of overtime arrears on the grounds that the forfait jours clause in his contract was not enforceable against him. He argued that his employer had not complied with the terms of the Collective Agreement. Under this agreement, the employer had to monitor the number of days that the employee actually worked, as well as his workload. The employer had failed to do this. The Industrial Tribunal dismissed his claim.

The Court of Appeal of Caen also dismissed his claim, on the grounds that his employment contract referred to the Collective Agreement for the Metallurgical Industry, which entitled autonomous executives to benefit from a forfait jours agreement on the basis of 217 working days per year. The Court concluded that since the employee had accepted the benefit of a lump sum agreement in days, this had to be interpreted as excluding any overtime compensation.

The Court of Appeal further held that the employer's non-compliance with the collective agreement did not put into question the validity of forfait jours.

Judgment

The French Supreme Court overruled the decision of the Court of Appeal, referring to an impressive number of domestic and European legal texts.

The Supreme Court held that 'Given the Preamble of the Constitution of 27 October 1946, Article 151 of the Treaty on the Functioning of the European Union as it refers to the European Social Charter and the Community Charter of Fundamental Social Rights of Workers, Article L. 3121-45 of the Labour Code interpreted in the light of Article 17, paragraphs 1 and 4 of EC Directive 1993/104 of 23 November 1993, Articles 17, paragraph 1, and 19 of Directive 2003/88 of the European Parliament and the Council of 4 November 2003, Article 31 of the Charter of Fundamental Rights of the European Union, and Article 14 of the Collective Agreement of Metallurgy, the right to health and rest are constitutional requirements;

It follows from the above-mentioned articles of European Union directives that Member States can only derogate from the provisions relating to working time with respect to general principles of protection, safety and health of employees;

Any lump sum agreement in days must be provided by a collective agreement whose contents provide a guarantee of compliance with maximum working time, daily and weekly rest periods'.

The Supreme Court further held that "whereas the provisions of the Collective Agreement of Metallurgy dated 28 July 1998 which are likely to protect the safety and health of employees who are subject to lump sum agreements in days, were not complied with by the employer, the Court of Appeal should have concluded that the lump sum agreement in days was not enforceable against the employee and that he was therefore entitled to overtime arrears and that the Court should have verified the existence of overtime arrears and the number of hours."

The Supreme Court sent the case back to the Court of Appeal in Paris.

Commentary

Those who feared the end of forfait jours can relax, as the French Supreme Court did not invalidate this working time arrangement, despite strong opposition from the European Committee of Social Rights. However, the Supreme Court did subject its enforceability to strict conditions.

The concept of forfait jours originates from the so-called 'Aubry II' Act of 19 January 2000, which reduced the working week from 39 to 35 hours and allowed working time to be calculated on the basis of days rather than hours for specific categories of employees. Only executives who, due to the nature of their functions, have autonomy in organising their working time and employees whose working hours cannot be predetermined and have real autonomy in the organisation of their working time can enter into such an arrangement.

Broadly, forfait jours is a particular arrangement where employees' working time is not calculated in hours but in days. This means that the employee will have to put in a certain number of days per year (218 days maximum) and receives a lump sum salary for the number of days worked. Such a working time arrangement is only possible if it authorised in the applicable collective agreement[2] and the employee's employment contract.

Employees under forfait jours are free to organise their working time within the working days. French law imposes only a daily rest period of 11 consecutive hours and a weekly rest period of 35 consecutive hours, which leaves an enormous amount of flexibility. In theory, such employees could work, for example, from Monday to Saturday from 7a.m. until 8p.m. (13 hours per day including rest breaks), making a total of 78 hours per week, without breaking the 11 and 35 hour rules.

There is concern in some quarters that the system of forfait jours may lead to abuse. For example, an employee may experience pressure to put in more than the agreed number of days per year, to work excessively long days or to take insufficient breaks or rest, in order to complete the work on time or to achieve targets. For this reason, collective agreements that allow forfait jours frequently provide certain guarantees aimed at avoiding abuse, such as an annual meeting with the employee to monitor the maximum number of hours worked per day and/or per week, weekly and daily rest periods, etc. However, such guarantees are not always implemented by employers.

In 2001 a Council of Europe panel known as the Committee of Social Rights found the forfait jours legislation to be incompatible with the European Social Charter. It did so again in 2004 (twice) and most recently in a judgment dated 23 June 2010 where it held that forfait jours do not comply with Article 2¤1 of the European Social Charter, which provides that Òto ensure the effective exercise of the right to fair working conditions, the Contracting Parties undertake to provide for reasonable daily and weekly working time".

In its decision, the European Committee noted that in order to comply with the provisions of Article 2¤1 of the Charter, flexible working time arrangements should meet three criteria:

they must prevent employees from working unreasonably long working - days or weeks;

- they must provide adequate guarantees; and

- they must provide reasonable reference periods for the calculation of working time.

By applying the above criteria, the European Committee held that forfait jours did not comply with Article 2¤1, since the authorised working week for executives under such working time arrangements could be excessive and the legal guarantees of such a system remain insufficient.

In its ruling, the Supreme Court did not make any direct reference to Article 2¤1 of the European Social Charter, as to do so would have been considered to be an acknowledgement of its horizontal direct effect. Instead, the Supreme Court examined the conformity of forfait jours with other legal provisions, including the preamble of the French Constitution of 1946, guaranteeing the right to rest and health, and the Treaty on the Functioning of the European Union, which, in Article 151, refers specifically to the fundamental rights resulting from the European Social Charter.

Before remanding the case back to the Paris Court of Appeal, the Supreme Court drew several conclusions, which can be summarised as follows:

- forfait jours are not contrary to the Constitution or to EU law;

- collective agreements providing for forfait jours must contain guarantees to ensure compliance with the rules on maximum working time, and with daily and weekly rest periods;

- the Collective Agreement of Metallurgy dated 28 July 1998, which provides for forfait jours,

contains guarantees that are likely to protect employee's health and safety; and

- strict compliance with those guarantees by the employer is crucial, otherwise a forfait jours clause will be unenforceable against the employee.

We can only approve of this decision, as to have declared the popular forfait jours system invalid would have been nothing short of an earthquake in the French world of business, depriving both employers and employees of a working time arrangement that works well. Indeed, employees under forfait jours are free to organise their working time each day and benefit from extra days of paid leave (on top of paid holidays and bank holidays), known as RTT days (the number of which varies per year between 9 to 13 days).[3]

However, employers need to be more vigilant than before, since the Supreme Court has toughened its position. Indeed, by ruling as it did, the Supreme Court has changed from its previous position, which was that failure by an employer to implement the guarantees provided in a collective agreement for employees under forfait jours, merely entitles those employees to damages[4]. Henceforth, such failure would mean the unenforceability of forfait jours and, hence, payment of overtime arrears for up to five years.

In summary then, the enforceability of forfait jours depends on three cumulative conditions: (1) it must be authorised by the applicable collective agreement, (2) it must contain guarantees ensuring compliance with the maximum working time, and daily and weekly rest rules and (3) such guarantees should be diligently implemented by the employer. Unfortunately, the Supreme Court has not specified the minimum requirements for these guarantees. We hope it will do so in a future judgment.

In order to avoid an avalanche of claims for overtime arrears then, all employers should review collective agreements that authorise forfait jours and ensure that they contain the required guarantees as specified by the Supreme Court and, if not, insert the necessary provisions to ensure compliance with the maximum working time and daily and weekly rest. Last but not least, employers must comply with these guarantees scrupulously in order to avoid having to pay overtime arrears.

It should be noted that employers cannot rely on the Supreme Court's former doctrine. This means that in sectors where the collective agreement does not contain guarantees and/or where the guarantees were not complied with, claims for overtime arrears are possible.

In any event, the Supreme Court's decision seems in line with the level of importance given in Europe to employees' health and safety at work, leaving the field open to an evolution of case

law.

Comments from other jurisdictions

Germany (Paul Schreiner): In Germany forfait-jours agreements are unknown. In some industries it is quite common practice for the parties to employment contracts to agree to a flexible workload, set out in terms of working hours ('working on demand'). The employer is free, then, to ask the employee to work in accordance with its needs at its discretion.

What is crucial in that situation, however, is the working time regulations as contained in the Arbeitszeitgesetz (Working time Act). According to Section 3 of the Arbeitszeitgesetz working time each day must not exceed eight hours. However, working time can be extended to ten hours if an average of eight hours has not been exceeded within six calendar months or 24 weeks. Because of this regulation it would be difficult to benefit from the forfait-jours system in Germany, even if it could be set up.

Footnotes

1 Lump sum agreements in days are a particular working time arrangement where an employee's working time is not calculated in hours but in days. The employee will have to work a certain number of days per year and will receive a lump sum salary for the number of days worked. Such a working time arrangement is only possible if it is both authorised by the applicable Collective Agreement and is also provided for in the employee's employment contract.

2 Not all employees are covered by a collective agreement. If there is no applicable collective agreement there can be no forfait jours arrangement.

3 The number of RTT days is calculated by subtracting from the number of days in a year (365 or 366): weekends, bank holidays, regular paid leave and the number of agreed forfait jours days.

4 Cass. soc. 13 January 2010 n¡ 08-43.201.

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