SUMMARY

2010/51: Difference in professional category (Cadre/Non-Cadre) cannot alone justify different treatment (FR)

<p>Belonging to different professional categories cannot per se justify awarding different benefits. Any difference in treatment among employees must be based on objective reasons that the employer is able to justify.</p>

Summary

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Facts

A home sales delivery man was hired on 1 December 1991 by the DHL International Company, which later became DHL Express ("DHL"). As a non-executive employee within DHL; and in accordance with the applicable company agreement, he was entitled to 25 days of paid leave per year. Managers, by contrast, were entitled to 30 days per year.

As he considered it unfair to be entitled to only 25 days of paid leave compared to his manager colleagues under the company agreement, he brought an action before the Industrial tribunal and claimed back pay of five additional days of paid leave.

Court of Appeal

The Court of Appeal of Paris confirmed the industrial tribunal's decision and dismissed the

plaintiff's claim on the grounds that (i) there are no legal or contractual provisions prohibiting social partners from providing a different number of days of paid annual leave for different staff categories and (ii) that the special responsibilities entrusted to managers, justify different treatment.

Supreme Court

The French Supreme Court was not convinced by the Court of Appeal's arguments and overruled its decision on the grounds that, based on the principle of equality of treatment, differences in professional categories alone (i.e. in this case, between managers and others) could not by itself justify a difference in treatment between employees in the same situation for the purpose of granting a benefit. The difference must be based on objective reasons, the reality and relevance of which must be specifically verified by the judge. The Supreme Court held that, by ruling as it did, without investigating the justification of awarding more benefits to managers than other employees, there had been no legal basis for the Court of Appeal's decision.

Commentary

The fact that the Supreme Court considers that the distinction between executives and non-executives ("cadre" and "non-Cadre"), which is a major one in France, does not alone justify differential treatment, has had a seismic effect on French labour law.

The decision is of paramount importance as most employees are covered either by national or company agreements which make such a distinction. Collective bargaining agreements commonly provide for differences in treatment based on those professional categories without justification (e.g. in relation to dismissal indemnities, sick pay, retirement indemnities and so forth).

This is the second time that the French Supreme Court has challenged the distinction between executive and non-executive employees. In a decision of 20 February 2008, employee-lawyers had been excluded from the benefit of lunch vouchers on the sole grounds that they were executives (in that case, it was the more senior staff who were discriminated against). The French Supreme Court decided that a difference in professional category alone could not justify a difference in treatment among employees in the same situation with regard to the benefit granted. However, that previous decision did not raise as much concern as the one reported here, since it remained isolated and the difference in treatment had been established by a unilateral decision of the employer and not by a company agreement. In its decision of 1 July 2009, by contrast, the Supreme Court applied its reasoning to a company agreement.

By this judgement, it is the responsibility of the employer to provide objective reasons for granting a benefit to a particular category of employees and if the judge thinks fit, the difference in treatment is permissible. However, such a proof of objective reasons may, in many cases, be impossible. How could an employer justify the difference between dismissal indemnities for example?

The position of the Supreme Court regarding company agreements is likely to apply to branch collective bargaining agreements as well. Indeed, the Court of Appeal of Montpellier in a decision of 4 November 2009 demonstrates the application of the Supreme Court's reasoning to a collective bargaining agreement. In this case, a non-executive employee was dismissed for economic reasons. She sought severance pay in line with what was provided by the applicable CBA for executives. The judges held that even though such a difference in treatment was provided by the applicable agricultural wine-making CBA, no objective reasons justified it and therefore ruled in favour of the employee.

Application of such reasoning to collective bargaining agreements may have serious consequences if we consider the number of agreements containing a distinction between professional categories. There is a risk of a flood of individual disputes on this issue - Pandora's Box is open.

From now on, in relation to each national and company agreement, the employer should ask itself whether for each given benefit, the executive/non-executive distinction is relevant and can be justified. The Supreme Court may not even stop here. Perhaps it might also begin to question regional agreements, taking the view that working in different regions does not in themselves justify differential treatment in terms of social advantages? Consequently, it is imperative for social partners to consider the merits of the benefits they could retain and, where necessary, modify their agreements.

Comments from other jurisdictions

Germany (Paul Schreiner): In Germany the principle of equality had some relevance to this when, a few years ago, the German Constitutional Court (*Bundesverfassungsgericht*) declared the distinction between blue and white collar employees to be unjustified and therefore, different treatment based solely on these categories, invalid. However, it may be more relevant to the case at hand that a claim under German law requires that either one or a group of employees is treated less favourably than another group of employees. If only individual employees are treated better that the rest of the work force such a claim cannot be made. Since executive employees in Germany usually have very individual contracts with different provisions, claims resulting from a breach of the principle of equality cannot usually be

brought.

Subject: Other forms of discrimination

Parties: not known

Court: Supreme Court (*Cour de cassation*)

Date: 1 July 2009

Case number: 07-42675

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