SUMMARY

2014/60 Harassed employee can claim damages for breach of health and safety rules as well as compensation for mental injury (FR)

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Facts

Mr X, an assistant driver employed by the Chaillan Company, was put on sick leave on 13 October 2009 for two months after having had several altercations with his supervisor, who had verbally abused him a number of times. On one occasion, his supervisor had severely insulted him during a meeting in front of his colleagues. While on sick leave, Mr X sent the managing director a letter informing him of what had occurred. The managing director and the head of human resources organised a meeting, during which the supervisor apologised for his behaviour. Management took adequate measures to stop the harassing behaviour as soon as they knew about it, one of those measures being the replacement of Mr X's supervisor.

Despite this, when Mr X returned from sick leave six months later, he resigned and brought an action against the company, seeking damages for unfair termination and moral harassment.

Judgment

The Court of Appeals of Aix-en-Provence dismissed the plaintiff's claim for unfair termination, holding that he had not expressed any reservations in his resignation letter and that the harassment itself (which the employer had put a swift end to) had occurred more than six months prior to the resignation date. Hence, his resignation had been unconditional and he could not later claim unfair termination. However, the Court of Appeals recognized that the plaintiff was the victim of moral harassment before going on sick leave and awarded him € 12,000 in damages for the emotional suffering he had endured along with an additional € 8,000 in damages on the basis that the employer had breached its health and safety obligation vis-à-vis the plaintiff.

Both parties appealed the case; the company claimed that the Court of Appeals had twice remedied the moral harassment suffered by the employee by making two separate awards of damages.

The French Supreme Court dismissed this argument and upheld the Court of Appeals' position, holding that "*the employer, which is under a duty to ensure its employees' health and safety in the workplace, fails to fulfil this obligation if an employee is the victim of moral or sexual harassment in workplace by one of his or her colleagues, even if the employer takes the necessary measures to end the harassing behaviour. Consequently, the Court of Appeals has correctly awarded two separate amounts, corresponding to the harm resulting from the employer's failure to prevent the harassing behaviour and the harm incurred as a result of the harassing behaviour itself*". The Supreme Court dismissed the employee's claim for unfair termination and upheld the position of the Court of Appeals, in particular because the resignation letter did not contain any reservations and was therefore unequivocal.

Commentary

French employers are the guardians of employees' health and safety in the workplace. Their duty in this regard stems from the terms of Article L.4121-1 of the French labour Code, which provides that: "the employer shall take the necessary measures to ensure and protect its employees' safety and physical and mental health". This obligation is deemed to be an "obligation de résultat", meaning an obligation to "achieve a result"

-the result being that the employee's health and safety is protected. Hence, when the health and/or safety of employees are jeopardized, the employer is automatically liable even though

it may not be at fault. Prompt action and remedial measures are expected from the employer, but its ability to react may be limited.

It is not uncommon for an employee to be harassed in the workplace by a colleague, for example, without the employer's knowledge. In such a case, being the guardian of its employees is not enough - the employer is required to be an infallible guardian. Indeed, Article L.4121-1 goes so far as to entitle employees to compensation even where they have not actually suffered injury or loss, for example in a 'near miss' situation, where, as a result of inadequate compliance with health and safety rules, an accident at work almost occurred.

It is not the first time that the French Supreme Court has held that damages for breach of the health and safety duty (albeit a breach that the employer could not have avoided) are distinct from damages for the harassing behaviour itself and the employee is entitled to two separate amounts: (i) damages for the harm resulting from the employer's failure to prevent the harassing behaviour and hence breach of its health and safety duty and (ii) damages for the harm caused by the harassing behaviour itself.

That said, the distinction appears quite artificial as, in practice, in a harassment situation, one fails to understand which actual distinct damage has been suffered that is not repaired by the award for harassment.

The outcome can be even more complex if the employee can demonstrate that the termination was caused by the harassment. It is then possible to obtain a third type of damage. This is what the employee here tried to do. Even though he had resigned, he tried to demonstrate that his resignation was the result of harassment and not of his own volition, and therefore it should be classified as constructive dismissal2. This argument failed to convince the court. It held that his resignation letter (which was unequivocal and expressed no reservations) came six months after the harassing behaviour. If he had not waited six months before resigning, it seems likely that the resignation might have been reclassified as unfair and he might have walked away with at least an additional six months' salary in damages for unfair termination.

To conclude, in cases of harassment, the employer cannot avoid liability even if it has taken all appropriate steps to put an end to the situation. Having said that, the courts are also mindful of employers that have ignored an employee's complaint or have taken inadequate steps to deal with it when awarding damages to the victim. Thus again, the amount of damages would certainly have been much higher if the employer had not reacted promptly and taken appropriate measures.

The strict approach of the courts is another reason why employers doing business in France should ensure comprehensive regulatory compliance.

Comments from other jurisdictions

Austria (Manuel Schallar): In Austria harassed employees have two legal bases for claims. One is section 1157 of the Austrian Civil Code (*Allgemeines Bürgerliches Gesetzbuch*, 'ABGB'). It provides a general fiduciary duty for every employer, such that an employer must prevent any damage to health or other material or immaterial interests of the employee, including harm resulting from harassment (i.e. harm to physical and mental integrity). According to the Austrian Supreme Court (9 Ob A 131/11x), as a direct effect of the employer's general fiduciary duty, it must take all necessary measures to avoid and stop any harassment of which it has knowledge in order to protect employees.

Apart from certain specific categories, compensation for harm resulting from harassment can be based on this general fiduciary duty. It follows the principles of general tort law and can cover both material and immaterial damage. According to these general rules, only harm that has actually occurred can be compensated for (i.e. there is no compensation for a near miss). Compensation for pain and suffering is traditionally quite low and does not include punitive damages.

The other legal basis for a claim of harassment is the Equal Treatment Act (Gleichbehandlungsgesetz, 'GlBG'). It transposes directives 2000/43/EC and 2000/78/EC and provides for equal treatment irrespective of gender, ethnic origin, religion, age or sexual orientation. It provides for sanctions in cases of discrimination on these grounds and covers cases of harassment occurring in working life.

Greece (Effie Mitsopoulou): Greek law provides that the employer, through his supervisors and their substitutes, must take all required precautionary measures within its control to ensure the safety of the workplace and the elimination of all possible risk of accidents to staff.

All employees must willingly comply with all instructions, written or otherwise, from the employer regarding their work and the health and safety condition of the workplace.

If the employer fails to comply with all measures provided by law and to ensure that the health and life of the employees are not endangered and there is an accident affecting any of the employees, that employee is entitled to file a claim for moral harm and loss of income. If the employee becomes disabled as a result of the accident, he or she is entitled to claim further compensation for the disability.

As in Dutch law, Greek Law imposes a duty of care on the employer, not an "*obligation de résultat*". If the employer proves it has taken all required precautionary measures to ensure the safety of the workplace and the labour accident was caused by employee negligence, then the

employer will be released from liability under civil or criminal law.

According to prevailing Greek case law, the existence of a claim in relation to moral harm and the extent of that claim should be determined by the court based on the following criteria: the facts and the historical background of the case; the type and extent of moral harm suffered; the personal and financial condition of the parties; the conditions under which the harm was caused; the liability of each party and the behaviour of the defendant.

An amount of € 20,000 in favour of the claimant in the case reported here would not be considered reasonable by a Greek Court, given the facts of the dispute and the nature of the case. For example, there was a voluntary and unreserved resignation following the incident and a long time lapse between the incident and making the claim before the courts. Amounts of this size would normally only be awarded in cases of car accidents and/or severe personality insults. Larger amounts than this would only be awarded for death and/or serious medical negligence.

Finally the resignation would not be considered as constructive dismissal by a Greek court as it occurred six months after the harassing behaviour.. In addition, the fact that it was unconditional means that it was voluntary. It would have been different if the employee had expressly stated in the resignation that he was driven to resign because of the employer's actions. This would have been considered as a constructive dismissal, possibly leading to a ruling of invalid dismissal and an award of unpaid salary.

The Netherlands (Peter Vas Nunes): I used to think that Dutch law on employer liability for injury at work was strict. It seems to be mild by comparison to French law.

All Member States have transposed Framework Directive 89/391 on occupational safety and health. However, both that directive and the Framework Agreement on harassment and violence at work (COM (2007) 686 final of 8 November 2007) are silent on matters such as the burden of proof and sanctions in the event of non-compliance. Consequently, the law is different in every member state.

Dutch law provides that an employer is liable towards an employee who has sustained an injury at work (be it physical or mental) unless the employer proves (i) that it has complied with all relevant rules in

the field of safety and health at work and has done all it reasonably could to avoid an injury such as that sustained, or (ii) that the injury was caused by the employee's gross negligence. Thus, Dutch law imposes a duty of care on the employer, not an *obligation de résultat*. However, the burden of proof is such, and the courts are so quick to accept a causal

relationship between an employer's shortcoming and the injury, that in practice Dutch law comes close to an *obligation de résultat*. A recent example of this is a Supreme Court judgment dated 3 October 2014. The employee in that case had broken four toes in an accident at work for which the employer was liable. He was on sick leave for about six weeks. He returned to work, initially on a part-time basis and with an adjustment to his duties so that he could work sitting down. A few days after returning to work in this manner, he fell over the doormat of his home, sustaining serious injury to his knee. The employer was held liable for this knee injury because there was sufficient causal relationship between the original injury to the employee's toes and his tripping over the doormat of his home.

A Dutch court cannot award an injured employee more compensation than the loss (material and, where appropriate, non-material) that he has suffered. A double or even triple compensation, as apparently possible in France, would not be awarded. However, the employer can be ordered to pay the State a fine and to pay the employee compensation. Compensation to an employee who almost sustained an injury, but was not actually injured, such as in a near miss situation, would not be possible.

Romania (Andreea Suciu and Andreea Tortov): The Romanian Labour Code provides that the employer is obliged to compensate the employee for material or moral harm suffered during or related to his work duties, where this was the fault of the employer. The Romanian Law regarding safety at work stipulates that the employer is liable for loss suffered on account of an accident at work or a professional disease. However, this liability does not go beyond the difference between an amount for the harm suffered and the portion of this that is covered by the public social insurance system. The employer will be liable even if a third party is hired to implement the rules on health and safety at work. The fact that employees themselves have certain obligations in relation to health and safety at work, does not exonerate the employer of its responsibility.

Employees are legally obliged to fulfil their work-related duties so that neither they nor any other participants in the work process are exposed to any danger of injuries at work or disease.

Overall, the employer has a duty of care in this area but not an *obligation de résultat*, as in France.

In their recent case law on accidents at work, the Romanian courts have not awarded employees monetary compensation for work injuries unless the culpable actions of the employer, the harm suffered by the employee and a causal relationship between the two are clearly proven. For example, one court held that the employee was not entitled to compensation, since he ignored the employer's instructions to separate a dangerous area and

thus exposed himself to the risk of work injury.

In another case, an employee injured himself while operating industrial machinery. The Court of Appeal found that the employer had omitted to inform the employee about the normal conditions of use of the machinery or about the what could go wrong with the machinery. The employer was also unable to prove that it had instructed the employee in the use of the machinery and the possible risks. Thus, the employer did not fulfil the obligations provided by the law relating to safety at work. The employee was granted all the pecuniary compensation requested, but only € 15,000 of the € 100,000 claimed for moral harm.

As for moral harassment of the employee, there is little case law in this area in Romania. However, one court considered that the following do not amount to moral harassment: the manager of a company did not respond to the employee's greetings ("good morning", etc.); a supervisor was continuously critical of certain aspects of the employee's work; the employee was instructed to perform certain work-related duties that he felt to be degrading. The employee was not entitled to compensation for moral harm, as no harm was proved.

In conclusion, unlike the French Courts, the Romanian Courts will grant employees compensation for material loss (where proven) and for moral harm where appropriate. The employer may also be required to pay a fine for failing to fulfil its health and safety at work obligations. In the case of a 'near miss' situation, in which the employee is almost, but not actually injured, the employee is not entitled to compensation.

Subject: Miscellaneous

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