SUMMARY

# 2012/52 Investment fund to compensate employees for mismanagement (FR)

***<p>This judgment offers a further illustration of the different actions that employees of French companies in financial difficulties can take against their employers’ shareholders. Not only can employees who have been laid off bring a claim, their non-redundant colleagues can claim compensation for moral damages suffered as a result of restructuring.</p>***

**Summary**

This judgment offers a further illustration of the different actions that employees of French companies in financial difficulties can take against their employers' shareholders. Not only can employees who have been laid off bring a claim, their non-redundant colleagues can claim compensation for moral damages suffered as a result of restructuring.

**Facts**

In 2007, the German investment fund Aurelius AG, which specialised in the restructuring of firms in difficulty, took over the French postal order group Quelle La Source ('QLS'), which at the time was facing financial difficulties, through a German holding company ('EDS Group'). The purchase price was one token Euro. Aurelius had promised QLS's works council that it would expand QLS, bring in fresh capital and honour QLS's existing recovery plan.

In 2009, three of the QLS group's French companies (the 'French subsidiaries') became insolvent and 170 employees were laid off. Over 500 employees, including many of those who had not been made redundant, filed claims totalling over € 12.5 million. One of these claims, against Aurelius, was brought before the Commercial Court of Orléans. The plaintiffs argued that Aurelius had knowingly caused the insolvency of the French subsidiaries and had

deliberately fostered its own interests at the expense of the employees. The claim was based on the doctrine of tort, provided in Section 1382 of the French Civil Code. The plaintiffs asked the court to order Aurelius to compensate them for both financial and moral harm, caused by its wrongful conduct, and - in the case of those plaintiffs who had lost their job - for their redundancy.

**Judgment**

The Court held that Aurelius was liable for having committed serious mistakes entailing significant economic difficulties for the French companies it had taken over and distress for the employees.

In a detailed decision of one hundred pages, the Court found that Aurelius had intervened in the management of its three French subsidiaries and that this involvement was reprehensible, as Aurelius had disregarded their restructuring commitments, had maintained a cash-pooling arrangement that deprived the French subsidiaries of urgently needed capital and had failed to support them as the insolvency procedure became inevitable.

The Court characterised Aurelius' conduct as "financial drift, contradicting the very notion of what an enterprise should be and the respect due to the workforce". The Court went on to describe the harm suffered by the employees.

In particular, the Court noted that various commitments had been made by the President of Aurelius towards staff at works council meetings: "Staff, already affected by the 2006 restructuring, which had entailed 297 redundancies, could believe that their future was assured and that they could trust the Purchaser." In sum, Aurelius had breached the confidence which the employees had placed in it.

The Court also held that each employee "has suffered for a long time in an environment of unfulfilled commitments, stress caused by the loss of an opportunity for recovery of the company, the risk of job loss and uncertainty about his future career".

Aurelius was ordered to pay each employee an indemnity of € 3,000 covering the harm resulting from stress. As for the employees who were actually made redundant, they were afforded the equivalent of four months' wages as additional compensation (they had initially requested two years' wages per employee).

The judgment has been appealed and is currently pending before the Court of Appeal of Orléans.

**Commentary**

This case provides further illustration of the actions that employees can take to hold their employer's parent company to account, on the basis that the restructuring decision taken by the parent company was negligent.

A previous issue of EELC reported a 2011 decision of the French Supreme Court regarding a parent company (Novoceram) that was held liable towards the employees of its subsidiary (BSA) who had lost their jobs following the subsidiary's bankruptcy (EELC 2012/6). The reasoning in that case was that the parent company had intervened actively and intensively in the running of the subsidiary's business. It had become the subsidiary's sole client, had set the price of the subsidiary's products, had created a situation where assets and staff were shared and had, in brief, made the subsidiary totally dependent on itself. In view of these and other facts, the Supreme Court concluded "that there was a confluence of interests, activities and management between the two companies manifested by the involvement of Novoceram in the management of BSA, which was sufficient to give it the status of co-employer". Thus, the legal basis for the parent company's liability in that 2011 case was "co-employership". In the case reported here, the employees brought the action before the Commercial Court on a different basis, relying on Article 1382 of the French Civil Code, according to which "any act whatever, which causes damage to another, obliges the party through whose fault it occurred, to compensate it".[1] The Court in this case had to answer two decisive questions: (i) was the claim against Aurelius admissible given the insolvency of the subsidiaries in question and, if so, (ii) had the plaintiffs suffered loss that was eligible for compensation?

When a company is declared insolvent, the court appoints a receiver (mandataire judiciaire). Only the receiver has the power to act on behalf of the company's collective creditors. The QLS employees in this case claimed to have a case against their (former) employers, i.e. against the receiver, and, if Aurelius had mismanaged its three French subsidiaries tortiously, then it was the receiver and not the plaintiffs who had a claim against Aurelius. The first question was therefore, could the plaintiffs bypass the receiver and claim directly against Aurelius?

The Supreme Court answered this question affirmatively. For an individual action, it is necessary to prove the existence of a personal interest distinct from that of the creditors. Previous case law had acknowledged that employees who have lost their jobs can have a personal interest distinct from that of the creditors.[2]

What was novel in this case was the answer to the second question. The Supreme Court had already held that the loss incurred to employees through redundancy, where a subsidiary is sold off, qualifies as loss for which a parent company can be liable.[3] The Orleans Commercial Court in this case followed this precedent. However, it also went further, in agreeing to

entertain claims filed by employees who had not been made redundant. In order to do so, it found, for the first time, that loss arising from 'stress' and 'uncertainty' can qualify as loss for which a parent company is liable.

Although the Court recognised that such stress and uncertainty "may vary for each employee based not only on age, training, qualifications and career prospects (...)", it declined to calculate each person's loss individually and instead awarded each employee € 3,000 to compensate for his or her distress. Without doubt, this was a punitive award. As for the employees who were actually made redundant, they were afforded extra compensation as a result of the loss of employment, but, as already noted, this was not novel.

This decision by the Orleans Commercial Court must be seen as turning a new page in the law insofar as staff who have not in fact been made redundant are concerned. It is also a new development in the recent trend towards recognising 'anxiety' as a distinct form of harm. This follows from a Supreme Court decision of 2010, in relation to employees working in a plant classified by the French authorities as eligible for early decommissioning owing to the presence of asbestos. According to the Supreme Court, the employees in that case were, "because of the employer, in a permanent state of anxiety as a result of the risk that an asbestos-related disease could be discovered at any time and because they had to undergo periodic medical examinations, which could reactivate this anxiety".[4]

That being said, the Commercial Court decision opens a Pandora's box, as in that case, the management by the shareholder of its subsidiaries was at stake.

Although the Commercial Court has apparently taken care to emphasise the exceptional mismanagement by this particular parent company, one might wonder whether its strong signal will not have a broader discouraging effect on foreign investment in France, at a time when French businesses and their employees need their support.

What is certain is that potential investors in loss-making subsidiaries in France will henceforth be well-advised to exercise greater caution than in the past and will need to be confident that their plan to restructure the business will succeed.

**Footnotes**

1 For another example of the application of this provision in the context of insolvency and redundancies, see Court of Appeals of Pau, 10 May 2012, 11/02325.

2 Supreme Court, social chamber, 11 November 1994, n°90-16.309.

3 Supreme Court, social chamber, 14 November 2007, n°05-21.239.

4 Cass. soc. 11 mai 2010 n° 09-42.241, Sté Ahlstrom Labelpack c/ Ardilley.

**Subject**: Miscellaneous

**Parties**: (Former) employees - v - Aurelius AG

**Court**: Tribunal de commerce d'Orléans (Commercial Court of Orleans)

**Date**: 1 June 2012

**Case number**: 2010-11170

**Publication**: not yet published

---

**Creator**: Tribunal de commerce d'Orléans (Commercial Court of Orleans)
**Verdict at**: 2012-06-01
**Case number**: 2010-11170