July 2016

FLASH INFO

1. Employment Safeguard Plan: definition of the professional category by the French Council of State

French Council of State May 30, 2016 N°. 387798

Last May, 30 2016, the French Council of State has clarified the notion of professional categories under the framework of the application of the order of the layoff's and the consequences resulting from a wrong definition of professional categories on the approval decision of the French Labour Administration.

In the framework of a layoff for economic reasons, Fnac had signed a majority collective agreement which set forth the provisions of an Employment Safeguard Plan, and established an unilateral document in addition to, providing for the number of redundancies and the unique professional category concerned.

According to such unilateral document, the professional category affected by redundancies was *"the sellers of the disk sector*".

The French Council of State considered that the French Labour Administration must verify that the professional categories concerned are mentioned into the unilateral document and ensure that those categories have been properly defined. In addition, the French Council of State Council also deemed, in line with the case law of the French Supreme Court, that the professional category is characterized by the identity of functions and professional training, taking into account the professional experience exceeding the adaptation arising from the evolution of the jobs.

In the light of the foregoing, the French Council of State decided that "*the sellers of the disk sector*" cannot be deemed as belonging to a different professional category from "*the sellers of the sector books*". Therefore, the provisions regarding the order of the layoffs must be suppressed, which allows dismissed employees to ask for their reinstatement or to claim damages.

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2. Possibility to negotiate a settlement agreement with Labour inspection

From July 1st, 2016, labour administration/inspection may offer, under certain conditions, to employers who are not complying with the rules governing health and safety to enter into a criminal settlement agreement.

This offer must include certain provisions as the obligations to stop the offense concerned, to prevent its renewal or the measures in order to comply with applicable rules.

The employer has a period of one month from the receipt of the offer to return the settlement signed. Otherwise, the offer is deemed as refused. If the settlement is accepted, it must be approved by the public prosecutor.

3. Increased of administrative fines

From July 1st, 2016, failure to comply with the rules regarding health and safety are subject to a criminal fine increased to 10 000 euros instead of 3 750 euros (in case of repeat offenses, the applicable fine is amounting to 30 000 euros instead of 9 000 euros).

In addition, the applicable fine in case of obstruction to Labour inspection is multiplied by 10 and increased to 37 500 euros. This offence occurs notably when the employer refuses (i) to provide the Labour Inspectorate with the mandatory documents, (ii) the Labour Inspectorate to go into the company's premises, and (iii) to display the schedules of the company despite the injunctions of the Labour Inspectorate.

4. Mutual termination by agreement ("rupture conventionnelle") is not applicable to a tripartite transfer agreement

French Supreme Court, Labour Chamber, June 8, 2016, N°. 15-17.555

A tripartite agreement materializes mutations transfers between the employee and his two successive employers; such agreement implies the termination of the first employment contract and the signing of an employment contract with the second employer.

According to the expected decision the French Supreme Court of June 8, 2016, Article L.1237-11 of the French Labour Code relating to the mutual termination by agreement is not applicable to a tripartite agreement between an employee and two successive employers since the purpose of a tripartite agreement is to organize the continuation of the initial employment contract and not its termination.

Thus, the French Supreme Court recommends in such situation the signing of a tripartite agreement in order to allow the continuation of the employment contract, and not to resort to a mutual termination by agreement.

5. Failure to comply with specifics labour rules does not automatically harm the employee

French Supreme Court, Labour Chamber, Avril 13, 2016, N°. 14-28.293 and May 25, 2016, N°. 14-20.578

In the framework of the first case, the French Supreme Court started calling into question the automatic sentence of employer who delivers too late the documents in respect of the termination of the employment contract, which was into force for many years.

Indeed, the employee had sued his employer in order to obtain the delivery of his work certificate and his pays slip under penalty and the payment of damages as such, without proving any injury.

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The Labour Court deemed that the employee did not bring any element to justify the alleged damage and did not sentence the employer consequently. The French Supreme Court also rejected the employee's claim considering that the existence and the assessment of an injury is the sovereign power of the tribunals.

Given the general nature of the decision, it appears that the existence of a damage resulting from the late delivery of the documents in relation to the termination of the employment contract must be proved.

In the second case, and in line with the previous case, the French Supreme Court had decided that an employee cannot obtain damages on the basis of an invalid non-compete clause.

Considering the above, and pursuant to the rules of civil liability, in such cases, the employee must prove the existence of a fault, an injury and a causal connection between both.

6. Harassment: the employer's liability may be avoided

French Supreme Court, Labour Chamber, June 1, 2016 N°. 14-19.702

The employer liability for moral harassment may not be automatic. As a reminder, since 2002, the French Supreme Court considered that employers have an absolute contractual duty to protect employees' safety. In this respect, employers are bound by a strict obligation to ensure security results towards employees. Therefore, the employer is liable as soon as a risk to health and safety is confirmed.

Last November 2015, the French Supreme Court considered that an employer is not liable if he is in a position to justify that he had taken all the preventive measures according to Articles L.4121-1 and L.4121-2 of the French Labour code in a case involving an employee who pertaining to a flight crew and had been directly exposed to the terrorism attack as September 11, 2001 (Labour Chamber November 25, 2015 N°. 14-24444). The question was to know whether this case law was applicable to moral harassment.

June 1, 2016, the French Supreme Court recognized that the employer does not neglect its obligation to ensure employees' security if he can prove he had taken all the preventive actions provided for Articles L.4121-1 and L.4121-2 of the French Labour Code, and he took immediate measures to stop the situation once it was informed of the existence of facts that could constitute moral harassment.

This decision should encourage companies to develop preventive actions as soon as clues of moral harassment appear. Only virtuous preventive practices and measures taken in response to a moral harassment situation might lead to avoiding the liability of the employer.

7. Decree in relation to the rules regarding the meetings of staff representatives

Decree No. 2016-453 decree of April 12, 2016

Rebsamen Law had set forth or changed certain rules relating to the meetings of staff representatives.

The related decree specifies the terms and the periods regarding the establishment of the minutes of Works council's meetings. It also specifies how to use the recording or the scenography of the Works council's meetings, and the conditions for implementing video conferencing.

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