iel International Employment Lawyer

Dismissals in France: the case for selecting grievances

By Caroline Scherrmann, partner at Flichy Grangé Avocats

7 March 2024

When an employee in a management position criticises the company's culture and management's methods, are they failing to uphold their professional obligations or rather exercising their freedom of expression? Well, on 30 January, the Paris Court of Appeal upheld a Supreme Court decision ruling that a dismissal based on an employee's exercise of their freedom of expression, or their right to report harassment, is null and void.

In the case in question, the employer had held the employee's criticism of the "fun" company culture, as well as his refusal to take part in various behaviours during workplace events, against him. The Paris Court of Appeal confirmed that the employee's dismissal was null and void, and ordered the company to both reinstate him and pay him close to €500,000 gross in backpay.

This case provides an opportunity to recall a number of French law principles relating to the dismissal of employees, in order to mitigate the risk of employers being subject to potentially serious sanctions.

The employee was hired in 2011 as a senior consultant, then promoted to director, at a consulting firm specialised in operational excellence and skill development. On its website, the consulting firm highlighted one of its values: learning while having fun.

During the course of the contractual relationship, the employee criticised certain managerial practices related to this culture and, in particular, the hosting of end-of-week gatherings that frequently led to employees excessively drinking, which was encouraged by the firm's partners, as well as practices involving promiscuity, bullying, and the encouragement of various border-line behaviours between employees.

The employee wrote to his employer to complain about deteriorated working conditions. Notably, he claimed he was under a great deal of pressure, which was impacting on his health.

A few days later, the employee was summoned to a preliminary meeting, which is, as a general rule, the first step in a dismissal process in France. He was then dismissed for poor performance.

In the dismissal letter, the employer referred to the fact that the employee was no longer in line with the company's culture and had not embraced its “fun” values. He was also criticised for failing to listen to, and sometimes being abrupt with, those working under his management. The company also addressed the employee’s letter complaining about the working conditions, stating that his comments were "unacceptable".

The employee brought proceedings before the Industrial Tribunal (Conseil de prud’hommes) with the view of having his dismissal nullified. He claimed there had been an infringement on his freedom of expression, and that the decision had been made in retaliation for reporting acts of moral harassment.

Both the Industrial Tribunal and, then, the Paris Court of Appeal dismissed the employee's claims. According to the judges, the facts held against the employee amounted to criticism of his professional behaviour and did not call into question his personal opinions. Consequently, the criticism did not amount to an infringement upon his freedom of expression. In addition, the judges ruled that the employee could not benefit from the protection under French law afforded in the context of the reporting of acts of moral harassment insofar as his letter to the employer did not explicitly refer to a situation of "moral harassment".

Subsequently, however, the Supreme Court overruled the Court of Appeal’s decision. It held that the dismissal was null and void as it was based, even if only in part, on the employee’s criticisms and his refusal to accept the company culture, which fell within the scope of his freedom of expression.

The Supreme Court reiterated the fact that, on the basis of the French Labour Code and the European Convention on the Protection of Human Rights and Fundamental Freedom, except where there has been abuse (such as insults, aggressive behaviour, etc), employees enjoy freedom of expression both inside and outside the company, and that freedom of expression is a fundamental freedom.

The case was remanded to the Paris Court of Appeal, which upheld the fact that the dismissal was null and void, but on different legal grounds. The Court of Appeal based its decision solely on the employee's reporting of moral harassment. It considered that, given the fact the dismissal occurred only a few days after the employee's critical letter, referred to in the dismissal letter, a causal connection existed between the two events. Consequently, the dismissal amounted to unlawful retaliation, regardless of the fact that the employee had not expressly described the acts he complained of as “moral harassment” in his letter.

These rulings act as a reminder of the fact that, under French law, an employee’s dismissal may be deemed null and void if it amounts to an infringement upon a fundamental freedom (in the matter at hand, freedom of expression and the reporting of harassment).

In such a case, the sanction incurred by the employer is more severe than where the dismissal is deemed “unfair”. The employee can choose between two possible sanctions: either they can claim for increased compensation, or to be reinstated within the company while seeking backpay from the date of the dismissal up to the date of reinstatement.

In the case in question, the employee chose to be reinstated and the Court of Appeal ordered the company to implement said reinstatement as well as pay the employee close to €500,000 gross in back pay as of the date of his dismissal.

Practical advice

In France, when an employer is considering dismissing an employee, it must base the dismissal on a real and serious reason, otherwise the dismissal may be deemed to be without real and serious cause and the employer liable for damages.

Further still, the dismissal must not be vitiated by any of the nullities provided for in the Labour Code (for instance, violation of a fundamental freedom, dismissal in connection with acts of moral or sexual harassment, discrimination, etc). Failing that, the employer may face a potential reinstatement of the employee.

To mitigate the risk of finding themselves in either of those situations, employers are strongly advised to think carefully before initiating dismissal proceedings about the strategy to implement, having regard to the context of the contractual relationship, and the grounds to be invoked to justify the dismissal, particularly if the employee has recently reported shortcomings on the employer's part.

In addition, care must be taken when drafting the dismissal letter, as it sets the scope of any subsequent dispute. The reason behind the dismissal must be based on precise and objective facts rather than on the employer's feelings (for example, loss of trust in the employee is not in itself valid reason for dismissal). It is sometimes advisable not to mention certain grievances in the dismissal letter if there is a risk that they may be construed by a judge as grounds for deeming that the termination is null and void.

In the case outlined above, the dismissal would perhaps have been deemed valid if the employer had chosen to limit the grievances to more objective and precise facts, such as the repeated criticism of the employee's management style expressed by his subordinates.