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"Comparison between the French and English approach regarding the principle of non discrimination"

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INTRODUCTION

The right of an individual to equality before the law and protection against discrimination is a universal right recognised by many international instruments such as those enacted by the United Nations or those based on a more regional basis namely, the European Convention on the Human Rights and Fundamental Freedoms. All these instruments have been signed by every EU Member State who have adopted and/or applied their principles within their constitutions for those countries having constitutions.

Furthermore, and this is particularly relevant to our present discussion, the adoption of Article 13 of the Treaty of Amsterdam is undoubtedly an essential stage in the construction of the European Community in providing for the incorporation into the Treaty of the impressive body of case law applied by the ECJ around the principle of equal treatment. It demonstrates the will of Europe to broaden the causes of discrimination outlawed by European law, namely race, ethnic origin, religion, beliefs, disability, age and sexual orientation. Europe has thus embarked upon implementing a general policy of fighting discrimination within the European Union in all areas of European common policy.

This general introduction was felt necessary in order to explain the approach France has taken to combat discriminations and inequality at work, approach which is mainly based upon European law, both taking reference from the legislation and from the abundant case law.

Indeed, the development of European Law has now, established a general trend Member States will quickly have to follow in the area of discrimination and equality of treatment. Discussing about the situation of these two fields in French labour law cannot be relevant if constant reference to European law is omitted. European law interacts with the domestic law of Member States and, having been invited to develop the French approach as regards to its situation at the workplace, I will try to show how European law had a growing importance within the French Labour law field on discrimination.

The aim of my paper is, therefore, not to find out how to resolve the problem of discrimination and harassment at work but to try and understand how the recent phenomena in constant evolution is being tackled by legislators. Although it should logically be asserted that discriminations are prohibited at work whatever their form, reality is elsewhere. Indeed, terms such as positive actions, justifications, even pre-established justifications have appeared in the reasoning developed to fight against discriminations.

Therefore, French Labour Law having experienced rather major changes in the field of discrimination at work owing to the fact it has already implemented both the 2000 directives at the end of 2001, it seemed interesting to explain the French situation with a more specific emphasis on the various amendments and novelties brought by the law of 16 November 2001. We will, therefore, first present the various legislations relevant in Labour law issues, then, analyse this new law specifically enacted to consider situations at work, focusing on the impact of the shift of the onus of proof and the impact justifications have on the aim of the principle of non-discrimination. Finally, we will present the problem of moral harassment, a specificity of discrimination issues and present the implication the recent law of 17 January 2002 can have on the protection of people being victims of harassment at work.

I/ French Legal instruments against discriminations

A/ Legislation in the field of non discrimination applicable to Labour Law issues:

1) Legal provisions of the Penal Code:

Articles 225-1 and 225-2 of the New Penal Code appear to endorse, at least partially, the numerous fundamental, constitutional and international texts which proclaim the principle of equality.

Thus, after providing a general definition of discrimination (art. 225-1), the Criminal Code specifies the cases in which it is punishable (art. 225-2) and the designated penalties, thereby increasing the legislation established by the old Penal Code.

The meaning of discrimination is worded as follows: “any distinction perpetrated between people on the grounds of origin, sex, family situation, health state, disability, customs, political beliefs, trade union activities, membership or non-membership, real or supposed, of a particular ethnic group, nation, race or religion constitutes a discrimination”. This definition has also been adapted in the following paragraph of this article to apply the same prohibition to legal entities.

a- Relevant discriminatory practices and their exceptions

These articles comprised in Section 1 on discriminations of the Chapter V of the New Penal Code show that discrimination on these grounds are prohibited in many areas and as regards to Labour law issues, the prohibition covers the recruitment phase, sanctions and the dismissal of employees.

Moreover, this prohibition also covers the first stage of recruitment, namely the offer of employment which cannot comprise one of the grounds as a condition.

However, it should be noted that the following article sets out a number of situations where a discrimination could be accepted and legally valid. Such applicable discrimination mainly refers to the state of health and the handicap but also to the sex where it constitutes a determining requirement to the for the proper execution of the position or the professional activity.

b- A prohibition enforceable against legal entities

The New Penal Code, which entered into force on 1 March 1994, created an individual criminal responsibility for legal entities which, furthermore, incorporates a prohibition of discrimination as well as the sanctions addressed in response to its violation (art. 121-2, 225-4, 226-24). Notwithstanding the importance of this provision showing that employers could be made responsible for their discriminatory behaviour there are very few court cases concerning legal entities being criminally prosecuted for such acts of discrimination.

2) Other legislative texts: the Labour Code

It is only in more specific areas, such as in the field of Labour law, for instance, that relevant case law is to be found in order to properly enforce and apply the legal provisions enacted by legislators. This wider amount of jurisprudence is understandable as Labour law do remain the main arena of the struggle against discrimination and violation of both the principle of non discrimination and the principle of equality are found to be more detectable and evidenced.

a- New anti-discrimination law adopted

The French Labour law Code contains various provisions covering situations where discriminations of any sort can occur. However, as previously mentioned, November 2001 saw the adoption in France of a new law to prevent discrimination at work. This new law supplements the existing provisions of the Labour Code, on the basis of both EU Directives and French case law, in order to provide better protection for job applicants and employees throughout their careers. This legislation also adds new prohibited grounds of discrimination (including age and sexual orientation), adjusts the burden of proof in discrimination cases and makes it easier to bring court cases.

b- Presentation: Grounds for discrimination and discriminatory practices:

The relevant section of the Labour Code, therefore, now reads: “no person can be eliminated from a recruitment process (…) due to their age, sex, lifestyle, sexual orientation, age, family situation, non-membership, whether genuine or assumed, of an ethnic group, nation or race, political beliefs, trade-union activities, religious beliefs, physical appearance, surname, state of health or disability”. Moreover, the definition of discriminatory practices provided by article L.122-45 of the Labour Code has been broadened to cover an employee’s entire career. From now on, the ban on discrimination extends throughout a person’s working life, covering: recruitment; access to a placement or in-

company training programme; pay; training; redeployment within a company; posting; qualifications; job classification; promotion; transfer from one workplace to another; and renewal of contract.

B/ Consequences of the law of 16 November 2001

1) Amendment to burden of proof

Article L.122-45 of the Labour Code, which defines the various forms of discrimination, is not only expanded and reworked to broaden its field of application but also amends the provisions on the burden of proof so that they are more favourable to the employee.

Indeed, a key point to this law deals with the amendment of the provisions on the burden of proof in discrimination cases. The burden of proof has been amended so that if a legal case is brought, it is no longer only the employee's responsibility. Hitherto, it had been the responsibility of the employee to prove that he or she had been the victim of discrimination, hence the very low number of successful convictions. The burden of proof will now fall equally upon the employer.

a- amount of evidence needed from each party

As a consequence of this law, employees or job applicants who feel that they have been discriminated against must present the courts with evidence "that leads one to believe that direct or indirect discrimination has taken place". In the light of this evidence, it is up to the defendant to "prove that the decision taken was justifiable according to objective facts that had no connection with any form of discrimination". It is the judge's task to reach a conclusion, if needs be after having ordered "any preliminary investigations deemed useful". This measure complies with the case law of the French Supreme Court and the European Court of Justice and transposes into French law the EU Council Directive of 15 December 1997 on the burden of proof in cases of discrimination based on sex.

On analysing the impact of this law it is necessary to say that, although it is clear that its application will surely not resolve all the difficulties involved in bringing often surreptitious forms of discrimination to light, its main virtue remain its dual 'deterrent-suppressive' nature which might bring more discrimination cases before courts.

b- Proof:

Indeed, in terms of justifications and proof, Member States must now bring their systems of evidence into line with the principles laid down in the various European law guidelines on discrimination. Therefore, "an individual who feels harmed by disregard of the principle of equality of treatment must establish within the national jurisdiction facts making it possible to presume direct or indirect discrimination and it is up to the defendant to prove that there has been no violation of the principle of equality of treatment".

Furthermore, the necessity for the defendant to put forward justifications in order to avoid being found guilty of discrimination helps the employee in the sense that, prior to this amendment, it was

extremely difficult for them to bring out a relevant proof of the employer's guilt, such proof being often in the employer's possession, thus inaccessible.

It should however be noted that the requirement of providing justifications is based primarily on the very notion of indirect discrimination. The analysis of justifications carried out by French law can be considered as poor because the notion of indirect discrimination was only really introduced by the Law of 16 November 2001 and had not previously figured in French case law, unlike in Britain where legal scrutiny of justifications is long established. French judges have not systematically to this date used the analysis of the features of justifications put forward by employers to focus on proof that the arguments invoked by the employer are unconnected with any discrimination.

More specifically, domestic law on discrimination has also evolved since the Directive 97/80 on the burden of proof concerning inequality in the treatment of male and female workers came into force. Furthermore, France having already transposed both of the year 2000 Directives in the law of 16 November 2001, case law already provides for some examples of how to deal with justifications.

3) the notion of objective justification

a- Justification from the employer

In French domestic law, and in the line of European law, judges require not only proof of precise and concordant facts making it possible to consider that there is a difference in treatment which may be discriminatory, but also that it is the employer's task to contest the discriminatory nature of a justification on the basis of objective elements unconnected with any discrimination.

Indeed, judges are seeking to be convinced by the justification invoked by the employer. Such expectation from the judge has been translated and confirmed in the Law of 16 November 2001 on discrimination (art. L.123-1 and L.122-42) and the Law of 17 January 2002 on moral harassment which state that " the judge forms his conviction after ordering, in cases of need, the necessary investigatory measures".

In French case law, in the area of unequal pay, the Court of Cassation, which has implemented the new regime of proof, stated very clearly in a ruling of 19 December 2000 that the employer had not produced convincing objective reasons for establishing different remuneration between men and women, "since the women were working nights just like the men, had seniority at least equal to the men, their real functions were equal in value to those of men, and the introduction of new technologies had the effect of making the different machine workstations technically equivalent ".

b- Pre-established justifications:

Case law has shown that in certain circumstances, decisions, practices or policies that are discriminatory, either directly or in effect, are nevertheless regarded as acceptable, for a variety of reasons. In those circumstances, deviation from the principle of non discrimination is legally justified.

Therefore, after providing for general exceptions based on objective and convincing justifications developed by the employer, the legislators also dealt with the causes of discrimination by pointing out

that economic or occupational requirements could sometimes be taken into account, the latter, for example, being a general exception for all causes of discrimination.

In French labour law these pre-established justifications are particularly relevant in the field of disability of workers. The French legislature has, however, not considered it necessary to introduce a specific provision based on the Directive, owing to the abundance of enactments about disabled people that cover priority of access to employment, workplace layout, and above all, the workplace adaptation and rehabilitation obligations incumbent upon the employer when the employee becomes unfit and disabled.

Regarding pre-justifications based on age, French Law includes in article L.122-45-3 a list of legitimate differences such as barring access to employment or putting in place special working conditions to ensure the protection of young and older workers, setting a minimum age for recruitment based on the training required for the job concerned, or the need for a reasonable period of employment before retirement. These justifications set out by law are however, supervised by the fact that the judge still has the obligation of checking that differences in treatment based on age are objectively and reasonably justified by a legitimate objective and that the means of achieving the latter are proportionate and necessary.

II/ The specific status of harassment

A/ The past situation in the field of moral harassment and its evolution

The problem of moral or psychological harassment was the last situation of discrimination to be enacted within the French legal system. Indeed, as we have just seen the principles of non discrimination and equality are nearly exhaustively covered although problems as to their proper protection will inevitably remain. Sexual harassment has also been fully covered by the law.

Unfortunately, compared to the United Kingdom, where the concept of mobbing is once again long established, France was very late to implement a law on moral harassment in the field of employment. Thanks to the law of 17 January 2002, the notion of moral harassment at work can now shift from his sociological status to become a legally protected concept.

a- numerous inefficient laws

It would not however be correct to say that moral harassment was left unpunished. Indeed, it was already indirectly protected by other laws, this new law only shows the desire of the French legislator to adopt a specific legislation capable of combating this growing phenomena of moral harassment. Prior to that, the employee was faced with numerous obstacles. If he had resigned, in accordance with case law, he had to show that his resignation was not clear, non-equivocal and free, but the result of the employer's conduct. The employee could also refer to article R.516-30 to ask the industrial tribunal to order the termination of his employment contract by reason of the employer's fault.

However, he would have had to establish that he has been morally harassed, such harassment rendering impossible the continuation of his work under normal conditions.

b- Difficulties encountered as a result

However, what was shown extremely difficult for the employee, was to prove these practices. The proof of harassment was a recurrent obstacle in case law. Victims could also focus on article L.230-2 of the Labour Code stating that the employer had the responsibility and obligation to ensure the security and protect the employees' health. Unfortunately, the employee was faced once again with the difficulty of proving damage to his health and the harassment In itself.

B/ The arrival of a specific law: the law of 17 January 2002

This demonstrates the incapacity of the previous law to efficiently protect employees against such a suffering. France nevertheless hesitated for a long time before elaborating a proper law. It considered that the laws already established were enough. However the law of 17 January 2002 should now fill in the gaps in this field although one can easily see that already some uncertainties arise as to the definition given. Indeed, this definition questions the management's legitimacy, places the worker's dignity above all things and establishes that the health of the employers is an objective which is automatically guaranteed by the employer. This law is also more concerned by the consequences resulting from than by the reasons of the harassment, and also condemns practices performed between employees themselves.

a- the method of proving the said harassment

As regards to the level of proof required from the employee, the moral harassment law adopted the same formula as in the law of 16 November 2001 to the effect that the plaintiff must "submit to the judge factual elements making it possible to presume direct or indirect discrimination". An individual who feels harmed as the result of repeated acts of moral harassment thus has "to submit factual elements that suggest harassment". In the light of such elements, it is also up to the defendant to prove that the acts concerned do not constitute harassment. It should again be noted that the plaintiff is however, not relieved from having to establish the relevance of precise and concordant facts.

b- a wider definition for potential defendants

In the field of sexual harassment, the former position of the law providing that the harassment is comprised within a employee-employer relationship has been changed with the new law of 2002. The concept of having power over someone is no longer essential in order to establish sexual harassment.

In regards to moral harassment, the definition provides that " No employee can be subjected to repetitive acts of harassment having the aim or the effect of degrading his conditions of employment such as to affect his rights or dignity, alter his physical or metal health or jeopardize his professional

future". Here, the legislator took care to include all attitudes of harassment. He has not reduced the scope of protection to the employee-employer protection but has widened it to comprise acts of moral harassment committed by an other employee having the same grade as the one complaining of the abusive behaviour.

c- progress and deficiencies

Finally, it is important to say that although this law is more than welcomed by associations and trade unions, it will not resolve all the situations of moral harassment encountered at the workplace. Proving these reprehensible behaviours and acts will continue to be extremely difficult and constitute major obstacles in sanctioning employers for their abuses.

However we can note that the definition given in the provision expressly refers to the dignity of the worker. This is undoubtedly a major progress in the view of the dispositions on sexual harassment. Unfortunately the request of repetitive acts of harassment implies a condition of reiteration of the acts which therefore excludes single incidents having some consequences on the conditions of employment.