The New Impact of Employees' Health on EU and French Employment Law

By François Berbinau

For more than a decade now French employment law on working hours has considerably changed through legislative measures and case law. It all started in 1998, when French lawmakers decided to reduce the 39-hour work week to 35 hours per week.[1] The then Socialist government thought this reform would be regarded as a significant milestone. The endless political controversy it has generated has led to numerous amendments of this pillar of French Socialists' ideology with majorities coming and going. But from a purely legal standpoint, and sometimes under the influence of the EU, French employment law on working hours has suffered from multiple changes, adjustments and "clarifications," which have led to a very complex and much criticized system, hardly secure and practicable for most mid-sized and small companies. Now, while everything in that system was revolving around the working time, for a couple of years, under the influence of both European and French courts, players have started considering it from another angle: the protection of employees against undue influence of their work on their private life and general health. The safeguard of employees' health and private sphere has become a key issue in recent developments in European and French employment law on work time and other topics. Below are some topical examples of the practical consequences of this recent trend.

Limitation to the Use of the "*Cadre Dirigeant*" Status

The "*Cadre Dirigeant*" (executive manager) status sets an exception to the general French employment law principles on work time. Thus, the executive managers are not subject to the work time regulations; in particular they are not affected by (i) the 35-hour act and payments of overtime hours, (ii) nor by any limitation on daily or weekly work time, nor (iii) the obligation to benefit from a daily and weekly rest period.

Pursuant to article L.3111-2 of the French Labor code the executive manager status can be defined based on a combination of three criteria: (i) they bear many responsibilities so important that they need considerable independence in their time schedule, (ii) they are able to make decisions in the most autonomous way, and (iii) their remunerations are within the highest levels of the remuneration rankings of the company.

This status potentially allows employers to expect unlimited working hours from their executive managers. Therefore, judges consider that it can only apply to a very limited number of executives who are the real managers of their company. And they are concerned that other executives lower in the hierarchy, because they are bound by this status, be led to give priority to their work to the detriment of their health and private life.

By two recent decisions the *Cour de cassation*[2] has thus restricted the use this status. In the first decision the French Supreme Court held that the status of executive managers is not strictly dependent on certain fixed criteria such as the existence or lack of "an express agreement between the employer and the employee," or the ranking of the employee in the applicable collective bargaining agreement job classification.[3] Therefore, the French Supreme Court called upon courts addressing the issue on the merits to determine in concreto the employee's real position in the company.

In the second decision the *Cour de cassation* has recalled the test for the status to apply and it has come to the conclusion that "these cumulative criteria imply that executive managers are only those who participate in the company's management."[4]

Therefore an executive manager is an employee who participates in the creation of the company's financial, economic and social policy.

This case law raises serious concerns for employers who are used to applying the status of executive managers to avoid paying overtime hours to certain of their executives, though they are not necessarily involved in the management of the company. In case these employees, abusively branded as "executive managers," would successfully challenge their status, they would be entitled to the payment of all the overtime above 35 hours per week over a period of five years. Since the burden of proof lies both on the employee and the employer, the latter will need to bring to the court a clear proof of the hours effectively done by its employee. And there is the catch, because employers typically do not keep track of the time spent by their executive managers.

Concerns about the impact of work time on employees' general health also impacted another executives' status used to avoid paying overtime hours: the "*forfait-jours.*"

Recent Evolutions of the French *"Forfait-jours"* System Prompted by the EU

The *"forfait-jours"* system (annual number of working days remunerated by a lump sum on a monthly basis) is an innovative way to organize work time for executives. It applies to a certain category of executives, those who are independent enough in the organization of their daily work. Their work time is not recorded in hours but in days. This system was put in place in 2000[5] and has been amended since. Practically, the employer and the employee conclude a *"forfait-jours"* agreement which provides for a maximum number of days that the employee can work per year. This derogating way of organizing and counting work time exempts the company from most of the regulations relating to the 35-hour work week, with the exception of those concerning minimum rest time provisions. In case of litigation, the employer must show that (i) the employee's position can justify the use of a *"forfait-jours"* system, (ii) the employee has given his/her consent at the time of the signature of the employment contract or at the time where an amendment to his/her contract was signed and (iii) a labor collective bargaining agreement applicable within the company allows for a *"forfait-jours"* system to be implemented.

Ever since it has been enacted in France this system has been criticized by EU bodies and in particular by the European Committee of Social Rights,[6] whose role is to judge whether States party are in conformity in law and in practice with the provisions of the European Social Charter. This Charter sets out social and economic human rights and establishes a supervisory mechanism guaranteeing their respect by the Member States.[7]

In 2010, the European Committee of Social Rights confirmed its previous decisions and declared that the French *"forfait-jours"* system violated the Charter and in particular its provisions endorsing the employee's right to a reasonable daily and weekly working hours and his/her right to an increased rate of the remuneration for overtime work.[8]

As the legal implementation status of the European Social Charter and of the European Committee of Social Rights decisions is unclear in France, the legislature did not deem it appropriate to amend the law.

But unlike lawmakers, French courts have decided to uphold the decisions of the European Committee of Social Rights. By a reversal of its then-established case law the *Cour de cassation* held that the *"forfait-jours"* system in general was valid but that the enforceability of the collective bargaining agreement allowing the conclusion of *"forfait-jours"* contracts was subject to the incorporation in the said collective bargaining agreement of adequate provisions concerning the monitoring of workload and the intensity of the employees' work days.[9] The concerned collective bargaining agreements shall provide for maximum working hours as well as compulsory daily and weekly minimum rest periods.

Failure to meet these conditions thus results in the *"forfait-jours"* agreement being null and void. This means that the 35-hour work week rule will apply to the employment contract and that every hour above this cap will have to be recorded and paid as overtime work. The financial consequences for the employer can be rather significant as most executives work more than forty-five hours per week. Moreover, as mentioned hereinabove, in case of litigation, it will be for the employer to prove the effective number of hours worked by its employee, which hours it thought it did not have to monitor thanks to the *"forfait-jours"* agreement.

In September last year, the *Cour de cassation* went a step further towards protecting employees against the undue influence of work time on their health and personal life.[10] Beyond the mere requirement for maximum daily working hours and minimum rest time, the French Supreme Court has significantly reinforced the employers' related monitoring obligations.

Article L.3121-46 of the French Labor code provides that when a *"forfait-jours"* agreement has been concluded between an employer and its employee, an individual annual meeting must be held in order to discuss the workload of the employee, the work organization in the company, the employee's remuneration, as well as the balance between the employee's personal and professional life. In its September 26, 2012 decision, the *Cour de cassation* declared that the said statutory requirement was merely a minimum and that collective bargaining agreements shall provide for a constant monitoring of employees' workload under pain of nullity of the *"forfait-jours"* agreements. This decision, which answers a French union's persistent claim,[11] clearly imposes that the *"forfait-jours"* agreements be more strictly controlled since it may negatively impact the employees' general health and personal life.

The Supreme Court does not specify what exactly is required from employers, but one thing is certain, a mere respect of the minimum standard set by the law is not enough and may ultimately lead to a forced payment of overtime hours to employees who the employer thought were working under a *"forfait-jours."*

As of today, this decision has raised many questions, which remain unanswered: it is not clear (i) who should be conducting the meeting with the employee (the HR manager? or an independent party?), (ii) whether a confidentiality agreement should be signed to cover such meetings, (iii) what the employer should do with the in-

formation collected and whether it should be considered personal or professional data, and (iv) whether the employer should thus seek the authorization of the "CNIL" (the French Data Protection Agency)[12] to collect these data?

The new focus brought on the balance between the employee's workload and personal life forms part of a larger effort towards the protection of harmful consequences of work and the working environment in general on the employee's personal life, including his/her health. The following recent examples give a taste of what courts and lawmakers are trying to achieve.

Geo-tracking

Another work time control and personal life's protection related issue is the geo-tracking of employees' vehicles. It concerns employees whose office hours cannot be controlled, mainly the traveling sales representatives. A little over a year ago, the *Cour de cassation* handed down a ruling concerning the possibility to control the work time of the employees by geo-tracking their vehicles.[13] The French Supreme Court held that the use of a geo-tracking system to control the employee's work time is not valid when he/she has an extensive discretion in organizing his/her work. This decision does not prohibit the use of a geo-tracking system per se but it limits its scope in order to avoid any abusive venture into the employees' personal life.

In issuing this decision the *Cour de cassation* came in line with the *CNIL*'s recommendation on the conditions necessary for a geo-tracking system to be valid: (i) it should comply with the *CNIL* regulations, (ii) it should be used for specific purposes and (iii) it should be subject to pre-requirements before its implementation (e.g.: a declaration of compliance).

A New Statutory Definition of Sexual Harassment

Sexual and moral harassments are both civil wrongdoings under the French Labor code and criminal offenses under the French Penal code. In the past ten years, France a experienced a tremendous evolution towards the protection of employees against both types of harassment in the workplace and the employer is now under a strict obligation to protect both the physical and psychological health of its employees and thus to secure that no harassment will occur in the company and to take action when necessary. But in the early days of May 2012, a decision by the *Conseil Constitutionnel* (the French Constitutional Court) threw everybody off balance when it decided, following a priority preliminary ruling on the constitutionality of then-article 222-33 of the French Penal code.[14] that this statutory provision defining sexual harassment was in breach of the French constitution as it was not precise enough on the elements constituting the offence.[15] As a direct consequence, perpetrators could no longer be sued and convicted for sexual harassment until a new act was adopted. Three months later a new law was adopted by the French Parliament at the initiative of the government.[16]

The new statutory definition distinguishes two kinds of offenses.

The first one is "sexual harassment" per se: the perpetrator imposes on another person repeated sexual remarks or behaviors which will either affect his/her dignity because they are degrading or humiliating, or create an intimidating, hostile or offensive situation.

The second offense is assimilated to sexual harassment but it is rather "sexual blackmail." It was never covered as such by any statutory provision before. It is defined as the use of any kind of pressure, whether repeatedly or not, really or apparently aiming at obtaining an act of a sexual nature, to the benefit of the offender or of a third party.

They are both punished by possible imprisonment of 2 to 3 years maximum and fines of 30,000 Euros to 45,000 Euros maximum.

Under this new act the employer's obligations have been reinforced. Since it must prevent any such harassment, the employer must alert his/her employees to sexual and moral harassment possible situations. Therefore, it must display within the workplace a copy of the new article 222-33 of the French Penal code and of article 222-33-2 of the same code related to moral harassment, and it may also set up training sessions in order to improve the prevention and identification of harassment situations, and take appropriate measures to easily identify harassment offences.

Worth mentioning are the latest episodes of the French saga on harassment in the workplace. By a combination of two decisions of February 7, 2012 and June 6, 2012 the *Cour de cassation* held that an employee who wrongfully denounces an alleged harassment within the company cannot be dismissed for this reason[17] unless he/she has acted in bad faith, in which case he/she may be dismissed for gross misconduct.[18]

All the above-mentioned issues illustrate a wind of change blowing on employment law which is likely to bring more changes to European and French employment law, thus impacting the ways and organization of companies doing business in Europe and especially in France, including subsidiaries of foreign groups.

Endnotes

1. Act N°98-461 of June 13, 1998 is one of the acts known as the "Aubry Acts."
2. French Supreme Court.
3. French Supreme Court (Labor Section) Decision N° 09-67.798 of November 30, 2011.
4. French Supreme Court (Labor Section) Decision N° 10-24.412 of January 31, 2012.
5. Act N°2000-37 of January 19, 2000.
6. In respect of national reports the Committee adopts conclusions and in respect of collective complaints the Committee adopts decisions. The Committee is composed of 15 independent, impartial experts, elected by the Committee of Ministers for a 6-year term of office, renewable once.
7. It was adopted in 1961, then revised in 1996 and came into force in 1999.
8. European Committee of Social Rights decisions: CGT v. France, complaint No. 55/2009 and CFE-CGC v. France, complaint No. 56/2009 of June 23, 2010.
9. French Supreme Court (Labor Section) Decision N°09-71107 of June 29, 2011.
10. French Supreme Court (Labor Section) Decision N°11-14.540 of September 26, 2012.
11. *Revue du droit du travail* 2011, p. 474.
12. The *Commission Nationale de l'Informatique et des Libertés* ("CNIL") is an independent administrative authority set up in January 6, 1978. It is responsible for ensuring that information technology remains at the service of citizens and does not jeopardize human identity or breach human rights, privacy or civil liberties. The CNIL's missions include the information and assistance of individuals in the exercise of their rights relating to data protection. It receives complaints and claims from individuals. The CNIL also ensures that the methods used to implement an individual's statutory right to access his/her data on files do not impair the free exercise of that right. All "sensitive" data processing is subject to the CNIL's prior authorization. Therefore, an employer has to notify any employee data file and its characteristics to the CNIL in order to ensure that each employee is in a position to exercise his/her rights; it must ensure the security of these data and their confidentiality and accept on-site inspections by the CNIL.
13. French Supreme Court (Labor Section) Decision N°10-18.036 of November 3, 2011.
14. The priority ruling on constitutionality has been created by the Act n°2008-724 of July 23, 2008. It allows any party to a litigation to challenge during the proceedings the constitutionality of any French legal provision referred to by another party.
15. French Supreme Court (Labor Section) Decision N°2012-240 QPC of May 4, 2012.
16. Act N°2012-954 of August 6, 2012.
17. French Supreme Court (Labor Section) Decision N°10-18.035 of February 7, 2012.
18. French Supreme Court (Labor Section) Decision N°10-28.345 of June 6, 2012.

François Berbinau is a partner at BFPL Avocats A.A.R.P.I. and is based in Paris, France. He has extensive experience in the settlement of individual labor claims and in particular issues arising in connection with certain categories of employment. He often provides counsel to senior executives and managers or companies during negotiations relating to the signature or termination of employment agreements and/or corporate mandates, and represents them where appropriate during labor court and commercial court proceedings.