INTERNAL INVESTIGATIONS OF HARASSMENT CLAIMS

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EU Labor, Employment, and Workplace Safety Alert

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In areas of French law that are ambiguous, the French Supreme Court regularly issues rulings to specify the scope of an employer's obligations, including in the context of harassment claims. French caselaw has set the rules relating to the implementation and outcome of an internal investigation conducted by a company in response to a claim of harassment. In an interesting decision[1], the French Supreme Court has clarified the principle of "freedom of evidence" in internal investigations and its consequences in practice.

THE FACTS

A manager in the accounting department of a company was accused of moral harassment. The allegations included acts of manipulation and disparagement of coworkers through the use of humiliating remarks.

The employer conducted an internal investigation and gathered several pieces of evidence, including audio recordings made without the employee's knowledge or consent, affidavits from coworkers, and several other documents. Based on the investigation's findings, the employer decided to dismiss the employee for gross misconduct.

The employee challenged her dismissal before the French labor court claiming that the investigation relied on audio recordings made without her knowledge and consent and that the investigation report, on which her termination was based, should have been disregarded.

The French Supreme Court rejected the employee's claim based on the following:

- Employers are under an obligation to ensure their employees' health and safety and must take all necessary measures to prevent moral harassment;
- Before the French labor courts, there is a principle of "freedom of evidence" meaning that evidence can be provided by any means; and
- Neither the internal investigation nor the final report constituted illegal evidence as they were not the result of any clandestine monitoring of the employee's activities. In any event, in this case, the investigation report did not solely rely on the audio recordings but also on detailed testimonies from the employee's coworkers and other documents.

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WHY MUST EMPLOYERS CONDUCT AN INTERNAL INVESTIGATION?

The French Labor Code requires employers to take all necessary measures to ensure their employees' safety and protect their physical and mental health.[2] In particular, employers must prevent acts of moral harassment.[3] When such a situation is reported, employers must act effectively to address it and take appropriate measures, as the Supreme Court has now made clear.

In such cases, the employer must conduct an internal investigation to determine if the reported harassment facts are true. If the allegations are true, the employer must then take such action as is necessary.

HOW SHOULD AN INTERNAL INVESTIGATION BE CONDUCTED?

Although the French Labor Code does not prescribe any rules for conducting an internal investigation, over time French caselaw has set out the following guiding principles to implement such a procedure:

Initiating the Investigation

The investigation must start as soon as possible once the employer is aware of allegations of harassment. Any delay to the investigation could be interpreted as a failure by the employer to comply with its obligation to prevent risks of harassment;

Investigation actors and neutrality

Depending on the company's internal regulations and the circumstances, the investigation may be carried out as part of a whistleblowing alert, in accordance with the procedure implemented by the “Sapin II” law and the company's code of conduct, by a dedicated team or dedicated department, with or without the assistance of employee representatives. In practice, more and more companies ask for the assistance of a third party, whether lawyers or external consultants, for objectivity and practical reasons; and

Preparation and Conduct of the Investigation

The investigation usually starts with a detailed and precise study of the facts and elements that led to the employee's complaint. Investigators then prepare the necessary steps for the investigation (list of employees to be interviewed, list of questions to ask, preparation of a questionnaire, etc.). When the investigators are lawyers, they are subject to their ethical rules, which guarantee the probity, confidentiality, and impartiality of the investigation. The lawyer-investigator, as a lawyer, is also bound by rules of professional secrecy towards his/her client. Even though the internal investigation is in principle covered by professional secrecy (although the French Anti-Corruption Agency and the National Financial Prosecutor's office take a different view), in practice, the investigation report can be disclosed by the company, especially in order to be used as evidence in case of trial.

During the investigation, investigators may consider all elements that they deem useful for the purpose of the investigation. This was confirmed by the French Supreme Court in this decision: “The investigation carried out within a company following a complaint for moral harassment [...] does not constitute an illegal piece of evidence as it does not arise from a clandestine process implemented to monitor the employee's activity.”[4] To clarify, the French Supreme Court does not say that an investigation can solely rely on recordings made without the employee's knowledge. The reality of the facts must be established by objective evidence, in particular by testimonies and probative documents.

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WHAT HAPPENS FOLLOWING THE INTERNAL INVESTIGATION?

After conducting interviews, the investigators will draft an investigation report based on the evidence brought to their attention during the investigation. This report should include an analysis of the situation based on French employment law, pursuant to which the employer can quickly take any measures deemed necessary.

It is for this reason that the preparation and conduct of an investigation is so important.

FOOTNOTES

[1] French Supreme Court, 6 December 2023, n° 22-14.062

[2] Article L.4121-1 of the French Labor Code

[3] Article L.1152-4 of the French Labor Code

[4] French Supreme Court, 6 December 2023, n° 22-14.062

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