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Wage-setting in France: a Complex Interaction between Law, Case Law and Collective Bargaining

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1. Wage-setting Criteria. 2. Limits to Free Wage-setting. 2.1. The Minimum Wage (SMIC). 2.2. Wage equality. 3. The Collective Performance Agreements or the Reduction of Pay by Collective Agreement.

Abstract

Wage-setting in France obeys to the principle of contractual freedom and refers to the effective working time performed by the employee (par. 1). That freedom is however limited twofold: from the one hand, by the Legal Minimum Wage (Salaire Minimum Légal hereinafter also SMIC); from the other, by the principle "equal pay for equal work" (par. 2). Moreover, it is limited by the right to collective bargaining, which includes, since some years, a peculiar mechanism – the Collective Performance Agreements – that allows, among the others, a reduction of wages, excluding, de facto, any possibility of opposition by the employees (par. 3).

Keywords: Wage-setting; Incentive Wage; SMIC; Collective Performance Agreements; Wage Reduction.

1. Wage-setting Criteria.

Working time – Wage-setting relies in principle on an objective criterion, independent upon the risk of the undertaking, that one of working time. This is one of the differences between employment and self-employment, notwithstanding the ongoing approximation of the two because of the increasing presence of employment contracts "*à la mission*" and "*par projet*". In such a perspective, the *Ordonnances Macron* of 2017[1] have enhanced the importance of the "construction site" and "operation" contracts, the termination of which is linked to the end of the activity. More in general, pay depends upon the number of hours effectively worked by the employee (the so-called *temps de travail effectif*).

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[1] Ordonnance 22 September 2017, n. 1385, Reinforcement of collective bargaining. Ordonnance 22 September 2017, n. 1386, New organisation of the social and economic dialogue in the undertaking in order to enhance trade unions responsibilities. Ordonnance 22 September 2017, n. 1387, Foreseeability and securement of employment relations. Ordonnance 22 September 2017, n. 1388, Measures on collective bargaining machinery. Ordonnance 22 September 2017, n. 1389, Health and safety preventive and protective measures.

In France, the criterion of monthly payment applies, with the result that pay is calculated on a monthly basis. The general application of monthly payment has an end to the differences between *ouvriers*, paid on hourly basis and *salariés*, paid on a monthly basis. Homeworkers, agency workers, on call workers and seasonal workers excluded, monthly pay is now the rule.

More problematic is to sort out the elements that matter in terms of effective working time in order to understand whether the minimum wage has been respected. As results of disputes, dressing and undressing time, breaks as well as availability periods have been assimilated to effective working time.

Incentive wage – Although wage calculated on working time is still the most common form of pay, various qualitative criteria have boomed recently, linked to the performance of the employee or to his or her work commitment. Such criteria are acceptable only if they are objective and transparent. In fact, incentive wage is made conditional upon several limits. It cannot result in an amount below the minimum wage. It shall not transfer the entrepreneurial risk on the employee. It has to relay on objective criteria and shall not expose the employee to excessive work pace (as in the case of truck drivers pushed to drive too fast in order to get the incentive). Prohibited in case of dangerous, difficult and heavy jobs, incentive wage, whatever the task assigned, shall respect the safety obligation.

2. Limits to Free Wage-setting.

Contrary to ordinary goods, wage is not left to the free market game as for its setting. At the opposite, the French Labour Code explicitly provides that the adoption of a minimum wage is justified by the political will, on the one hand, to guarantee "workers' purchasing power", on the other, that they "participate to the economic development of the nation"[2]. By consequence, wage-setting undergoes two essential limits: the minimum wage (SMIC) and the wage equality principle.

2.1. The Minimum Wage (SMIC).

Although widespread and approached by ILO Convention n. 131, minimum wage is not fully recognized either at global or at European level, despite the fact that, as common opinion, it could be useful in order to fight both social dumping and poverty.

By now, 22 Member States have adopted a minimum wage that, in 2018, varies from 261 euros for Bulgaria to approximately 2000 euros in Luxembourg. France finds itself at the 5th place, *ex aequo* with Germany, with a minimum wage of 1500 euros (or 1200, social security contribution excluded)[3].

The SMIC applies to all adult workers, whatever the pay method (time, performance, result, piecemeal, commission or tips). The definition of the calculation base of the SMIC is the main problem. The employer in fact could be tempted to include all kinds of elements in order to affirm that the employee perceives the minimum wage, whereas the employee is

[2] Art. L3231-2 Labour Code.
[3] Figures Eurostat second term 2018.

interested in excluding from the base the majority of the amounts due. In any case, fringe benefits are included, contrary to costs reimbursement that, together with transport allowance for the Paris region, are excluded from the calculation. The key difficulty refers, however, to wage supplements that are not included in the calculation base if they do not present a direct link with the performance. Performance bonuses[4] as well bonuses allotted in relation to work output are included. On the contrary, further to reimbursements (transport allowance outside the Paris region included), additional payments for overtime, profit-sharing bonuses, seniority payments, regular attendance premiums, unhealthy work environment allowances, holiday and end-of-year bonuses, unless paid by monthly instalments, are excluded.

The SMIC enjoys a double reevaluation. The first, mandatory, aimed to guarantee employees' purchase power; this is about an indexation on the evolution of the national retail price index. The second is in the hands of the Government that may, every year, after consultation with the national commission for collective bargaining, grant a rise higher than that in the retail price index. One talks about a governmental "boost". The last "boost" to the SMIC, further to the mandatory reevaluation, dates back to July 2012. It has coincided with François Hollande's election, even if President Macron has granted a bonus of 100 euros following to the movement of the so-called *Gilets Jaunes* that, without technically being a "boost" to the SMIC, it is close to it to a certain extent.

If the legislator sets the SMIC, the majority of collective agreements provides for what it is called "minimum conventional standards". These are objects of discussion under two aspects.

First, a certain number of professional branches are not that active (one may talk about "dead branches") and provide for useless minimum conventional standards, since they fall below the SMIC. Due to the application by French Labour Law of the principle of favor in the relationship between law and collective agreements, employees have the right, in that case, to the SMIC, being it higher. This is one of the reasons why the French Government has decided, in 2014, an extensive "restructuring of branches", passing from approximately 900 to 200, with the objective of eliminating or merging the inactive ones.

Second, that of minimum conventional standards is a matter of discussion as far as the linkage between branch and undertaking collective agreements. Minimum conventional standards or, as the Civil Code names them "*salaire minimum hiérarchique*", are part of the few topics in relation to which the branch collective agreement prevails on the undertaking one, while, on the contrary, as for the bonuses, the latter may prevail on the former. By way of consequence, trade unions advocate the inclusion of bonuses within the very notion of "*salaire minimum hiérarchique*" in order to exclude the possibility for the undertaking collective agreement to withdraw those foreseen by the branch one.

2.2. Wage Equality.

Besides the respect of minimum conventional standards, employer's freedom to set wages is limited mainly by the "equal work, equal wage" principle.

[4] Ministerial circular letter 29 July 1981, n. 3.

The scope of the principle - The "equal work, equal wage" principle relies on the idea that a fair wage policy implies the recognition to employees performing a job of the same value the same pay. What is a stake it is not an antidiscrimination but an equality rule, which requires comparing the employees concerned. In order to compare, it is necessary first to define the scope of the comparison that coincides, basically, with the undertaking, which means that employees of the same undertaking who perform the same job or a job of equal "value" shall receive the same wage. Employees of separate undertakings cannot rely on the "equal work, equal wage" principle, even if they belong to the same professional group[5].

Once defined the scope of the comparison, it is for the judge to sort out, among the employees included within it, those who perform the same job or a job of equal "value". Article L3221-4 of the Employment Code, contained within the Title headed "Equal wage between men and women", defines as having the same value "jobs that require from the worker a comparable set of professional knowledges certified by a degree, a diploma or a professional practice, capabilities deriving from experiences acquired, responsibilities and physical or nervous burdens". Employees included within the scope of the comparison, who perform a job of the same value, shall receive the same wage, unless the employer is able to justify the difference adequately.

Admissible justifications – As far as the admissible justifications of a different treatment are concerned, the *Cour de cassation* requires "objective and material verifiable grounds the tangible existence and relevance of which shall be controlled by the judge"[6]. More in general, the employer may grant some particular advantages to specific employees if all the employees who would find themselves in the same conditions could enjoy them and that the requirements had been predetermined and could be verifiable. Entitlement criteria shall be previously communicated to the relevant employees[7]. At present, the admissible justifications are so many that the exception is close to become the rule[8].

The first and foremost grounds of justification refer to the differences related to employee's task or to his or her professional status, like seniority[9], a diploma[10] and the experience[11], the level of training[12] or of the skill balance record[13]. Particularly frequent and sensitive is the ground derived from the professional skills of the employee, which cannot be taken into account unless under condition that "a specific diploma certifies particular knowledges useful for the exercise of that function"[14].

[5] Cass. Soc. 16 September 2015, n. 13-28415.
[6] Cass. Soc. 21 January 2009, n. 07-43452.
[7] Cass. Soc. 10 October 2013, n. 12-21167.
[8] Gasser J. - M., *Les justifications de l'inégalité des rémunérations ou que reste-t-il du principe "à travail égal, salaire égal ?"*, in *Revue de jurisprudence sociale*, 2007, 687.
[9] Cass. Soc. 20 June 2001, n. 99-43905.
[10] See on it, Cass. Soc. 16 December 2008, n. 07-42107, in *Revue du droit du travail,* 2009, 173, commentary Aubert-Montpeyssen T., in *Juris-classeur périodique*, 2009, 1005, commentary Cesaro J. F., according to which "differences in diplomas of equivalent level do not allow justifying different pay among workers who exercise the same functions, unless it is demonstrated on objective grounds, the tangible existence and relevance of which shall be controlled by the judge, that that specific diploma certifies some particular knowledges useful for the exercise of that function".
[11] Cass. Soc. 15 November 2006, in *Bulletin des arrêts des chambres civiles de la Cour de cassation,* V, n. 340.
[12] Cass. Soc. 12 March 2008, n. 06-40999.
[13] Cass. Soc. 20 February 2008, n. 06-40085, in *Semaine sociale Lamy*, 2008, n. 1344, 8, report Gosselin H.
[14] Cass. Soc. 13 November 2014, n. 12-20069.

Justifications not related to the job or to the professional status of the employee have been admitted progressively by the case law and constitute a list that does not stop to extend. The difference in the juridical status (employee in the private sector or civil servant) represents a first justification. Even the low number of available employees on the market may justify a difference of pay for instance by authorizing the urgent advertisement of a position of a crèche manager in maternity leave by granting to the substitute a higher wage.

In particular circumstances, courts have deemed justified a bonus reserved to foreign employees in the view of making undertakings of a certain region attractive and of establishing there an international scientific pole of excellence[15]. A highly controversial solution, at the borderline of non-discrimination and of the "equal work, equal wage" principle[16]. On the contrary, the possibility of establishing differences among the employees in order to compensate an earlier prejudice does not present the same difficulties[17]. A collective agreement reducing the working time may reserve to those employed at that moment it has been concluded the entitlement to a "differential allowance" aimed to compensate the reduction of the basic pay of the former those hired successively not finding themselves in the identical condition[18].

In consideration of the number of exceptions to the "equal work, equal wage" principle, one can agree upon its progressive dilution. In such a perspective, the *Cour de cassation* has been pushed to state that the "difference of occupational group in itself cannot justify, as for the granting of a bonus, a different treatment among the employees who find themselves in an identical situation with reference to that bonus". By doing this, the Court has shattered with a stroke of a pen the practice of the majority of undertaking i.e. their wage policies[19].

By consequence of such a statement, contrary to what was happening since a number of years, the status of *cadre* cannot justify anymore, in itself, a higher wage as well as a certain set of advantages (period of notice, amount of the dismissal indemnity…). In fact, the employer is obliged, in order to maintain it, to provide some objective grounds the tangible existence and relevance of which shall be controlled by the judge.

The just mentioned solution applies if the difference in pay is established by unilateral employment decision. It does not apply in case it has been set by collective agreement. In that case, under certain conditions, the difference is presumed to be justified and it is up to the employee to prove that it is not linked to any occupational reason.

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[15] Cass. Soc. November 2005, n. 03-47720, in *Droit social,* 2006, 221, commentary Jeammaud A., in *Recueil Dalloz*, 2006, Pan. 419, commentary Guiomard F.; in *Juris-classeur périodique, édition Sociale*, 2006, 1276, remark by Picq M.

[16] Jeammaud A., (13); the Court has been convinced that the contentious expatriation bonus (*prime d'expatriation litigieuse*), aimed at attracting the most performant employees employed abroad by compensating their relocation costs in France has nothing to do with discrimination since the latter constitutes an objective ground of differentiation.

[17] For a critical approach to the reference to prejudice (the author being convinced it constitutes a guarantee), see Pignarre G., in *Revue du droit du travail,* 2007, 661.

[18] Cass. Soc. 1 December 2005, n. 03-47197, in *Juris-classeur périodique, édition Sociale*, 2006, 1071, remarks by Cesaro J. F.

[19] Cass. Soc. 20 February 2008, in *Droit social,* 2008, 530, remarks by Radé C., tickets restaurants reserved to non-cadre (difference established by unilateral managerial decision); Cass. Soc. 1 July 2009, n. 07-42675, in *Juris-classeur périodique, édition Entreprise*, 2198, commentary Aubert-Montpeyssen T.; in *Juris-classeur périodique, edition Sociale*, 2009, 1451, commentary Cesaro J.-F.; in *Droit social,* 2009, 1002, remarks by Radé C.; Cass. Soc. 8 June 2011, n. 10-14725 and n. 10-11933, in *Semaine sociale Lamy*, 2011, n. 1497, and remarks by Champeaux F., Lyon-Caen A., Serizay B. (difference established by collective agreement).

3. The Collective Performance Agreements or the Reduction of Pay by Collective Agreement.

The already mentioned ordonnances Macron of September 2017 have introduced, among the others, the so-called Collective Performance Agreements (*accords de performance collective*).

They are collective agreements that allow managing working time, its organisation and distribution modalities, fixing the wage within the boundaries of the "*salaire minimum hiérarchique*" and determining the conditions of the professional or geographical mobility inside the undertaking. The principle of favor does not apply to this kind of agreements with the consequence that they can be both favorable and unfavorable for the employees.

Therefore, Collective Performance Agreements may reduce pay in the undertaking, with the only limit of the SMIC. In order to do this, no economic difficulty as ground is needed. All it takes is that the agreement would be justified by grounds linked to the functioning of the undertaking or by the safeguard or increase of occupation. The first of this justification is evidently very wide and allows ultimately the conclusion of such agreements in any circumstance.

The substantive requirements of the agreement are very limited since it shall only state its goals in the preamble. It may precise, without being obliged to do it, the modalities of information to the employees on its application and effects, the conditions upon which the shareholders and the managers are affected by the changes in a way proportional to that applied to the employees or also work-life balance arrangements, if any. The key innovation of these Collective Performance Agreements is to be found in their effect on the employment contract. Indeed, employee's refusal of changes provided by the agreement, for instance a reduction in pay, is *per se* a ground of dismissal to which the normal procedure for dismissal applies, instead of that one foreseen for the economic dismissal.

In other words, if the employer decides unilaterally a reduction of pay its effect is made conditional upon the agreement of the employee. Due to the lack of power to impose it on the employee, the employer may dismiss him or her for economic ground, being however obliged to apply the economic dismissal procedure. If, on the contrary, the reduction is established by collective agreement, the employer may dismiss the employee who refuses it without the need to provide any economic ground and without applying the economic dismissal procedure.

The introduction of the Collective Performance Agreements that relies almost exclusively on the trust between the social partners, without any real safeguard for the single employee, is too recent to allow any prediction on its success. The time being approximately 200 agreements of this kind have been singed.

Bibliography

Gasser J. - M., *Les justifications de l'inégalité des rémunérations ou que reste-t-il du principe "à travail égal, salaire égal ?"*, in *Revue de jurisprudence sociale*, 2007, 687.

Gosselin H., Report, in *Semaine sociale Lamy*, 2008, 1344, 8.

Jeammaud A., *Commentary* to Cass. Soc. November 2005, n. 03-47720, in *Droit social,* 2006, 221.

Pignarre G., *Que reste-t-il du principe "À travail égal, salaire égal ..."?, Application de la règle en cas de disparités organisées par le statut collectif dans la même entreprise*, in *Revue du droit du travail,* 2007, 661.