Rest days and covid-19: Possibility for the employer, in the interest of the company, to impose on employees taking of rest days and to unilaterally modify the dates of already set rest days (ruling n° 892 - 21-15.189)

06/07/2022

Ruling No. 892 FP-B+R

Partial quashing

Public hearing of 6 July 2022

Partial quashing

Mr CATHALA, President

Ruling No. 892 FP-B+R

Appeal No. U 21-15.189

FRENCH REPUBLIC ON BEHALF OF THE FRENCH PEOPLE

RULING OF THE SOCIAL CHAMBER OF THE *COUR DE CASSATION* (COURT OF CASSATION) OF 6 JULY 2022

1) SIP, a limited partnership, with registered office at [Address 6],

2) Genzyme Polyclonals SAS, a single-member, simplified joint stock company, with registered office at [Address 4],

3) Sanofi-Aventis group, a public limited company, with registered office at [Address 6],

4) the company Sanofi chimie, a public limited company, with registered office at [Address 7],

5) the company Sanofi Pasteur, a public limited-liability company, with registered office at [Address 2],

6) the company Sanofi Pasteur Europe, a single-member simplified joint stock company, with registered office at [Address 2],

7) Sanofi Winthrop industrie, a public limited company, with registered office at [Address 3],

8) the company Sanofi-Aventis France, a public limited company, with registered office at [Address 7],

9) Sanofi-Aventis Research & Development, a public limited company, with registered office at [Address 1],

lodged appeal No. U 21-15.189 against the ruling delivered on 1 April 2021 by the *Cour d'appel* (Court of Appeal) of Paris, Division 6, Chamber 2, in the dispute between them and the Fédération nationale des industries chimiques-CGT, with registered office at [Address 5], respondent in the quashing.

The National Federation of Chemical Industries-CGT lodged a cross-appeal against the same ruling.

[...]

The case file has been sent to the Prosecutor General.

On the report of Ms Marguerite, judge referee and Mr Flores, judge, the observations of SCP Gatineau, Fattaccini and Rebeyrol, lawyer of SIP, of Genzyme Polyclonals SAS, of Sanofi-Aventis Group, of Sanofi-Chemistry, of Sanofi Pasteur, of Sanofi Pasteur Europe, of Sanofi Winthrop Industrie, of Sanofi-Aventis France and of Sanofi-Aventis Research & Development, of SCP Thouvenin, Coudray and Grevy, lawyer of the Federation and the advisory opinion of Ms Roques, advocate-general referee, after discussions in a public hearing on 2 June 2022 attended by Mr Cathala, President, Ms Marguerite, judge referee - co-rapporteur, Mr Flores, judge - co-rapporteur, Mr Huglo, elder judge, Ms Farthouat-Danon, Mr Schamber, Ms Mariette, Messrs Rinuy, Ricour, Van Ruymbeke, Pietton, Monge, Ott, Le Lay, judges, Ala, Lanoue, Valéry, judges referee, Roques, advocate-general referee, and Piquot, Chamber Registrar,

The social chamber of the *Cour de cassation* (Court of Cassation), composed, pursuant to Articles R. 421-4-1 and R. 431-5 of the Judicial Code, of the above-mentioned President and Judges, having deliberated in accordance with the law, has delivered the present ruling.

Facts and procedure

1. According to the ruling under appeal (Paris, 1 April 2021), issued in interim proceedings, by two memoranda dated 26 March and 29 April 2020, the companies Sanofi Winthrop industrie, Sanofi-Aventis France, Sanofi-Aventis group, Sanofi chimie, Genzyme Polyclonals SAS, Sanofi-Aventis recherche & développement, Sanofi Pasteur, SIP and Sanofi Pasteur Europe (the companies) decided to implement articles 2 and 4 of order No. 2020-323 of 25 March 2020 in order to impose the taking of rest days or days saved on the time savings account, on the one hand, for employees who could not work from home during lockdown and, on the other, for employees who could not work from home and stayed at home, after 4 May 2020, to look after a child under 16 years of age or because of their vulnerability to covid-19 or that of a person with whom they share their home.

2. The Fédération nationale des industries chimiques-CGT (the trade union) brought an action before the interimmeasure judge of a tribunal judiciaire (Tribunal of First Instance) in order to put an end to the manifestly unlawful disturbance resulting from the implementation of these memoranda and to restore the rights of the employees concerned.

Reviewing pleas

On the grounds of the trade union's cross-appeal

Statement of the plea

3. The trade union criticises to the ruling that it declares inadmissible its request to order the companies to restore the rights of the employees concerned by the memoranda of 26 March and 29 April 2020 and in particular to re-credit the days of RTT/OTT illegally imposed and the rights illegally deducted from the time savings account of the said employees, whereas "the professional unions have the right to take legal action and may, before all courts, exercise all the rights reserved to the civil party concerning facts that directly or indirectly harm the collective interest of the profession they represent; that by refraining from considering admissible the union's request, based on the collective interest of the profession, that the employer companies be ordered to restore the employees' rights affected by the manifestly unlawful disturbance duly noted, without requesting the constitution of specific rights for the benefit of specifically designated employees, the Court of Appeal violated Article L. 2132-3 of the Labour Code, together with Article 835 of the Civil Procedure Code.

Court’s response

4. According to Article L. 2132-3 of the Labour Code, trade unions have the right to take legal action. They may, before all courts, exercise all the rights reserved to the civil party in respect of facts which directly or indirectly damage the collective interest of the profession they represent.

5. If a trade union can take legal action to compel an employer to put an end to an irregular arrangement, with regard to Articles 2 and 4 of Order No. 2020-323 of 25 March 2020, for taking rest days acquired under the reduction of working time or a fixed-term agreement or resulting from the use of rights allocated to a time savings account, its request that the employees concerned be restored their rights, which implies determining, for each of them, the exact number of rest days the employer has used under the measures of derogation, which is not intended to defend the collective interest of

the profession, is not admissible.

6. The plea to the contrary is unfounded.

On the second plea of the main appeal of the companies

Statement of plea

7. The companies criticises to the the ruling to state that the measures they took in the memorandum of 29 April 2020 constitute a manifestly unlawful disturbance, whereas:

"(1) the partial activity system provided for in Articles L 5122-1 et seq. of the Labour Code, adapted in the context of the health crisis linked to covid 19, constitutes an optional system for the employer, who may decide not to use it and to exempt his employees from work while maintaining their full salary, which is more favourable for them; whereas the companies in the Sanofi group argued that since the beginning of the health crisis, they had chosen not to resort to partial activity by placing all of their employees who were unable to work on leave, while maintaining 100% of their remuneration; whereas, by ruling that the provisions of Article 20 of the amending finance law No. 2020-473 of 25 April 2020 were imperative, having substituted, as from 1 May 2020, for employees prevented from working due to the care of children under 16 years of age or due to their vulnerability, the partial activity scheme for the derogatory work stoppage scheme from which these employees had benefited until then, to deduce that the companies in the Sanofi group should have placed them on part-time work as from this date and could not consequently impose on them the taking of rest days in application of articles 2 and 4 of order No. 2020-323 of 25 March 2020, the Court of Appeal violated article 20 of the Revised Budget Law No. 2020-473 of 25 April 2020, together with articles L. 5122-1 and following of the Labour Code;

(2) Law No. 2020-290 of 23 March 2020 authorised the government to take by orders any measure falling within the scope of the law ''in order to deal with the economic, financial and social consequences of the spread of the covid-19 epidemic and the consequences of the measures taken to limit said spread, and in particular in order to prevent and limit the cessation of activity of natural and legal persons exercising an economic activity and that of associations, as well as its impact on employment'', the purpose of which is to ''allow any employer to impose or unilaterally modify the dates of the days for the reduction of working time, rest days provided for in fixed price agreements and rest days allocated to the employee's time savings account, by derogating from the notice periods and the terms of use defined in Book I of Part Three of the Labour Code, by collective agreements and by the general statute of the civil service''; whereas, in application of this provision, Articles 2 and 4 of order No. 2020-323 of 25 March 2020 provide that, ''when the interest of the company justifies it in view of the economic difficulties linked to the spread of covid-19'', the employer may impose, on specific dates, the taking of days of reduction of working time, unilaterally modify the date when such these days are to be taken or impose that the rights allocated on the employee's time-saving account be used as rest days; whereas this option, which is open to 'any employer' in the context of measures intended to deal with the national economic crisis caused by the spread of covid 19, is not subject to the employer demonstrating economic difficulties of his own; in holding the contrary, to deduce that in the absence of proof that the companies in the Sanofi group were facing economic difficulties, they could not use this derogatory arrangement for rest days, the Court of Appeal violated Article 11 of Law No. 2020-290 of 23 March 2020 and Articles 2 and 4 of Order No. 2020-323 of 25 March 2020."

Court’s response

8. Under the terms of Article 20(I) of Law No. 2020-473 of 25 April 2020 on the Revised Budget Law for 2020, private law employees who find themselves unable to continue working for one of the following reasons are placed on part-time work:

- the employee is a vulnerable person at risk of developing a serious form of SARS-CoV-2 virus infection, according to criteria defined by regulation;

- the employee shares the same home as a vulnerable person as defined in paragraph 2 of this I;

- the employee is the parent of a child under the age of sixteen or of a person with a disability who is the subject of a measure of isolation, eviction or maintenance at home.

9. According to Article 20(II) of the same text, the employees mentioned in I of the said article receive the partial activity allowance referred to in II of Article L. 5122-1 of the Labour Code, without the conditions provided for in I of the same Article L. 5122-1 being required, and their employer benefits from the part-time work allowance provided for in II of this text.

10. These provisions establish a system for opening up part-time work, distinct from that opened up by Articles L. 5122-1 and R. 5122-1 of the Labour Code with regard to the company's situation, which is based on the personal situation of certain employees and which applies to them, unless the employer ensures the maintenance of remuneration and benefits arising from the employment contract, despite the employees' inability to work.

11. Thus, the measures of Articles 2 to 5 of Order No. 2020-323 of 25 March 2020, which allow the employer, when the interest of the company so justifies with regard to the economic difficulties linked to the spread of covid-19, to unilaterally impose the use of acquired rest rights, do not apply to employees who are unable to continue working on the grounds that, due to their personal situation, they would fall under the partial activity scheme instituted by Article 20 of Law No. 2020-473 of 25 April 2020.

12. Having rightly held that the employer could not rely on Articles 2 to 4 of Order No. 2020-323 of 25 March 2020 to deal with the situation of employees covered by Article 20(I) of Law No. 2020-473 of 25 April 2020, the Court of Appeal was able to decide that the measures provided for in the memorandum of 29 April 2020 constituted a manifestly unlawful disturbance.

13. Therefore, the plea irrelevant in the second branch is unfounded.

On the third branch of the first plea in the main appeal

Statement of plea

14. The companies criticize the ruling for saying that the measures taken by them in the memorandum of 26 March 2020 constitute a manifestly unlawful disturbance, while "Law No. 2020-290 of 23 March 2020 authorised the government to take by order any measure falling within the scope of the law 'in order to deal with the economic, financial and social consequences of the spread of the covid-19 epidemic and the consequences of the measures taken to limit said spread, and in particular in order to prevent and limit the cessation of activity of natural and legal persons exercising an economic activity and that of associations, as well as its impact on employment', the purpose of which is to 'allow any employer to impose or unilaterally modify the dates of the days for the reduction of working time, days of rest provided for in fixed price agreements and days of rest allocated to the employee's time savings account, by derogating from the notice periods and the terms of use defined in Book I of Part Three of the Labour Code, by collective agreements and by the general statute of the civil service'; whereas, in application of this provision, Articles 2 and 4 of Order No. 2020-323 of 25 March 2020 provide that, 'when the interest of the company justifies it in view of the economic difficulties linked to the spread of covid-19', the employer may impose, on specific dates, the taking of days of reduction of working time,

unilaterally modify the date when such days are to be taken or impose that the rights allocated on the employee's time-saving account be used as rest days; whereas this option, which is open to 'any employer' in the context of measures intended to deal with the national economic crisis caused by the spread of covid 19, is not subject to the employer demonstrating economic difficulties of his own; in holding the contrary, to deduce that in the absence of proof that the companies in the Sanofi group were facing economic difficulties, they could not have recourse to this derogatory arrangement for rest days, the Court of Appeal violated Article 11 of Law No. 2020-290 of 23 March 2020 and Articles 2 and 4 of Order No. 2020-323 of 25 March 2020."

Court's response

Having examined Articles 2 to 5 of Order No. 2020-323 of 25 March 2020 on emergency measures relating to paid leave, working hours and rest days:

15. According to the aforementioned texts, when the interest of the company so justifies in view of economic difficulties linked to the spread of covid-19, the employer may, notwithstanding applicable legal or conventional provisions, subject to observing a notice period of at least one clear day, impose the taking, within the limit of ten days, on dates determined by him, of rest days acquired by the employee under the reduction of working time and which he may freely determine, of the rest days provided for by agreement, or of rest days resulting from the use of rights allocated to the employee's time savings account. The employer may, under the same conditions, unilaterally change the dates on which rest days acquired under a reduction of working time or fixed-term contract are taken.

16. In the event of a dispute, it is up to the judge to verify that the employer, who has the burden of proof, justifies that the measures of derogation, which it adopted pursuant to Articles 2 to 5 of Order No. 2020-323 of 25 March 2020, were taken because of the repercussions of the health crisis situation on the company.

17. In deciding that the measures taken by the companies in memoranda dated 26 March and 29 April 2020 constituted a manifestly unlawful disturbance, the judgment noted that the companies invoked the need to adapt their organisation, in the face of an unexpected increase in absenteeism due to the fact that some of their employees were at home without being able to work from home, to adapt the work spaces and occupancy rate of the premises according to the health situation. The ruling further notes that the companies did not demonstrate economic difficulties linked to the spread of covid-19, as they were not characterised by the adaptation measures they claimed.

18. In so ruling, on the unavailing grounds of the absence of proof of economic difficulties linked to the spread of covid-19, without specifying how the factors based on the obligation to adapt the organisation of work, in the face of an unexpected increase in absenteeism due to the fact that some of the employees were at home without being able to work from home, the need to adapt the work spaces and the occupancy rate of the premises according to the health situation, were not such as to justify recourse to the measures permitted by Articles 2 to 5 of Order No. 2020-323 of 25 March 2020, the Court of Appeal did not provide a legal basis to its decision.

ON THESE GROUNDS, and without having to rule on the other pleas, the Court:

QUASHES AND SETS ASIDE, but only insofar as it states that the measures taken by Sanofi Winthrop industrie, Sanofi-Aventis France, Sanofi-Aventis groupe, Sanofi chimie, Genzyme Polyclonals SAS, Sanofi-Aventis recherche & développement, Sanofi Pasteur, SIP and Sanofi Pasteur Europe in the memorandum of 26 March 2020 constitute a manifestly unlawful disturbance and orders in solidum Sanofi-Aventis industrie, Sanofi-Aventis France, Sanofi-Aventis groupe, Sanofi chimie, Genzyme Polyclonals SAS, Sanofi-Aventis recherche & développement, Sanofi Pasteur, SIP and Sanofi Pasteur Europe to pay the Fédération nationale des industries chimiques-CGT to pay the sum of 6,000 euros pursuant to Article 700 of the Civil Procedure Code and to pay the costs of the proceedings at first instance and on appeal, the ruling of the Paris *Cour d'appel* (Court of Appeal) delivered on 1 April 2021, between the parties;

Returns the case and the parties on these points back to the status existing prior to the said ruling and refers them to the Paris *Cour d'appel* (Court of Appeal) otherwise composed ;

Orders the Fédération nationale des industries chimiques-CGT to pay the costs;

Pursuant to Article 700 of the Civil Procedure Code, dismisses the claims;

At the request of the Prosecutor-General of the Court of Cassation, this ruling shall be forwarded for transcription along with or further to the partially quashed ruling;

Thus decided by the social chamber of the *Cour de cassation* (Court of Cassation), and pronounced by the President at the public hearing of the sixth day of the month of July of the year two thousand and twenty-two.

President : Mr Cathala
Judge referee : Ms Marguerite
Advocate-General : Ms Roques
Lawyer(s) : SCP Gatineau, Fattaccini and Rebeyrol - SCP Thouvenin, Coudray and Grevy

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