

The compensation due in case of violation of the protective status gives the right to an indemnity in lieu of paid holidays under the following conditions (Ruling No. 963 – 21-13.552)

21/09/2022



Appeal No. 21-13.552

Partial quashing

FRENCH REPUBLIC ON BEHALF OF THE FRENCH PEOPLE

THE COURT OF CASSATION, SOCIAL CHAMBER, ruled as follows:

SOC.

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COUR DE CASSATION (COURT OF CASSATION)

Public Hearing of 21 September 2022

Partial quashing

Mr CATHALA, President

Ruling No. 963 FS-B+R

Appeal No. Q 21-13.552

FRENCH REPUBLIC

ON BEHALF OF THE FRENCH PEOPLE

RULING OF THE COURT OF CASSATION, SOCIAL CHAMBER, 21 SEPTEMBER 2022

Mr Guy Loup Mignot, domiciled at [Address 1], brought appeal No. Q 21-13.552 against the ruling of the Versailles Court of Appeal, 19th Chamber, delivered on 20 January 2021 in the dispute with Impairoussot, a single-member limited liability company, whose registered office is [Address 2],

respondent at the quashing.

The appellant relies in support of his appeal on the two grounds of quashing attached to this ruling.

The case file has been sent to the Prosecutor General.

On the report of Ms Ott, judge, the comments of SCP Thouvenin, Coudray and Grevy, counsel for Mr [Z], of SCP Ricard, Bendel-Vasseur, Ghnassia, counsel for the Impairoussot company, and the opinion of Ms Roques, Advocate-General and judge-referee, after discussions in the public hearing of 15 June 2022, attended by Mr Cathala, President, Ms Ott, judge Rapporteur, Mr Huglo, elder judge, Mr Rinuy, Ms Sommé, Ms Agostini, judges, Ms Chamley-Coulet, Lanoue, Mr Le Masne de Chermont, judge-referees, Ms Roques, Advocate-General and judge-referee, Ms Lavigne, Chamber Registrar,

the social chamber of the Court of Cassation, composed, pursuant to Article R. 431-5 of the Judicial Code, of the above-mentioned President and judges, after deliberation thereof in accordance with law, has delivered this ruling.

Facts and Procedure

1. According to the ruling under appeal (Versailles, 20 January 2021), Mr [Z] was engaged as of 6 July 2015 by Impair, now Impairoussot (the company), as Director of Operations.

2. By registered letter of 17 July 2016, the employee asked his employer to set up the elections for staff delegates, informing him of his candidacy.

3. On 11 August 2016, he was summoned to a pre-dismissal interview with a protective lay-off. He was dismissed on 7 September 2016 for incompetence and serious misconduct without the employer having sought permission from the labour inspector to dismiss him.

4. On 31 October 2016, the employee brought an action before the industrial tribunal for the purpose of declaring his dismissal void, ordering his reinstatement and ordering the employer to pay him various monetary sums.

5. He asserted his retirement rights on 30 June 2019.

Reviewing pleas

On the first plea

[...]

On the second plea

Statement of plea

12. The employee objects to the ruling dismissing his claim for payment of paid leave based on the compensation due for violation of his protective status, whereas "an employee whose dismissal is annulled by a court decision because of the violation of his protective status against dismissal is entitled to paid annual leave for the period between the date of dismissal and the date of retirement; by denying in the present case the employee, whose dismissal was annulled for breach of his protective status, and who retired on 1 July 2019, the right to paid leave relating to the compensation for the period between his dismissal and his retirement, the Court of Appeal infringed Articles L. 2411-6 and L. 3141-1 of the Labour Code."

Court's response

Admissibility of plea

13. The company disputes the admissibility of the plea. It maintains that the plea is new since the employee did not avail himself in any way, in his appeal submissions, even after the ruling of 25 June 2020 of the Court of Justice of the European Union, of the position taken by that court, which held that the period of expulsion of an employee between his dismissal, which was held to be null and his reinstatement, can be assimilated to effective working time allowing the right to paid leave to be granted.

14. However, the employee, who was dismissed in violation of his protective status, demanded payment of the paid leave relating to the compensation to be granted to him for the breach of protective status.

15. The plea, based purely on the law as it is, is therefore admissible.

Merits of the plea

Considering Articles L. 2411-1, L. 2411-2 and L. 2411-6 of the Labour Code and Article 7 of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organization of working time:

16. It follows from Articles L. 2411-1, L. 2411-2 and L. 2411-6 of the Labour Code that the dismissal of a protected employee, without administrative authorization for dismissal or despite refusal of authorization for dismissal, entitles the latter to compensation for breach of protective status.

17. According to the settled case law of the Court of Cassation (Soc., 25 November 1997, Appeal No. 94-43.651, Bull. 1997, V, No. 405), the penalty for the employer's failure to recognize the protective status of an employee representative who has been unlawfully dismissed and who does not request his reinstatement is the remuneration that the employee would have received until the end of the current protection period and not compensation for the damage actually suffered by the protected employee during that period. This compensation is payable even if the employee has returned to work during the period in question.

18. Similarly, the indemnity due for the breach of protective status is a flat-rate indemnity, such that an employee who does not request his reinstatement cannot claim payment of the related paid leave (Soc., 30 June 2016, appeal No. 15-12.984; Soc., 21 November 2018, Appeal No. 17-15.874; Soc., 21 November 2018, Appeal No. 17-11.653).

19. Furthermore, the Court of Justice of the European Union, in its ruling of 25 June 2020 (CJEU, 25 June 2020, Varhoven kasatsionen sad na Republika Bulgaria, Case C-762/18 Iccrea Banca, ff. C-37-19), held that Article 7(1) of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 on certain aspects of the organization of working time must be interpreted as precluding national case law under which a worker unlawfully dismissed and then reinstated in his employment, in accordance with national law, following the annulment of his dismissal by a court decision, is not entitled to paid annual leave for the period between the date of dismissal and the date of reinstatement in his employment, on the ground that, during that period, that worker did not perform actual work in the service of the employer.

20. The Court of Justice stated in said decision that, according to the settled case law of the Court, the right to annual leave, enshrined in Article 7 of Directive 2003/88, has a dual purpose, namely to enable the worker to rest in relation to the performance of the tasks assigned to him under his employment contract, on the one hand, and to have a period of relaxation and leisure, on the other (ruling of 20 July 2016, Maschek, C-341/15, EU:C:2016:576, paragraph 34 and the case law cited) (paragraph 57).

21. This purpose, which distinguishes the right to paid annual leave from other types of leave for different purposes, is based on the premise that the worker actually worked during the reference period. The objective of allowing the worker to rest presupposes that the worker has carried out an activity justifying, in order to ensure the protection of his safety and health covered by Directive 2003/88, the benefit of a period of rest, relaxation and leisure. Accordingly, the entitlement to paid annual leave must in principle be determined on the basis of the periods of actual work completed under the employment contract (ruling of 4 October 2018, Dicu, C-12/17, EU:C:2018:799, paragraph 28 and the case law cited) (paragraph 58).

22. Therefore, the period between the date of unlawful dismissal and the date of reinstatement of the worker in his employment, in accordance with national law, following the annulment of that dismissal by a judicial decision, must be treated as an actual period of work for the purposes of determining the entitlement to paid annual leave (paragraph 69).

23. Finally, the Court of Justice has stated that, if the worker concerned has held another post during the period between the unlawful dismissal and the date of his reinstatement in his first post, that worker cannot claim, in respect of his first employer, annual leave entitlements corresponding to the period during which he held another post (paragraphs 79 and 88).

24. According to settled case law of the Court of Cassation (Soc., 14 November 2018, appeal No. 17-14.932, published), in order to receive his retirement pension, the employee must break any professional link with his employer. It follows that an employee whose contract has been broken by the employer and who has asserted his pension rights cannot subsequently apply for his reinstatement in his employment or in equivalent employment. In this case, the employee who has asserted his pension rights, thus making his reintegration impossible, is entitled to the remuneration he would

have received from the date of his being removed until the date of his retirement (Soc., 13 February 2019, appeal No. 16-25.764 published).

25. In that regard, the Court of Justice of the European Union has held that Article 7(2) of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 on certain aspects of the organization of working time must be interpreted as precluding national legislation, such as that which is at issue in the main proceedings, which deprives a worker of entitlement to financial compensation for annual paid leave not taken where that worker's employment relationship has ended following his request for entry into retirement and who has been unable to take up the entirety of his rights before the termination of the said employment relationship (CJEU, 20 July 2016, Maschek, Case C-341/15).

26. In the grounds for its decision, the Court of Justice has stated that Article 7(2) of Directive 2003/88, as interpreted by the Court, lays down no conditions for entitlement to compensation other than that arising from the fact, on the one hand, that the employment relationship has ended and, on the other hand, that the worker did not take all the paid annual leave to which he was entitled at the date on which that relationship ended (ruling of 12 June 2014, Bollacke, C-118/13, EU:C 2014:1755, paragraph 23). It follows, in accordance with Article 7(2) of Directive 2003/88, that a worker who has not been able to take all his paid annual leave rights before the end of his employment relationship is entitled to a financial allowance for unpaid paid annual leave. The reason for the termination of the employment relationship is irrelevant in this regard. Therefore, the fact that a worker voluntarily terminates his employment relationship has no bearing on his right to receive, where appropriate, a financial allowance for the paid annual leave entitlements which he was unable to use up before the end of his employment relationship (paragraphs 27 to 29).

27. It follows that, where the protected employee, whose dismissal is void in the absence of an administrative authorization for dismissal and who has applied for his reinstatement, has subsequently asserted his pension rights, thus making his reinstatement in the undertaking impossible, the compensation due for the breach of protective status is entitled to payment, in respect of the paid leave relating thereto, of a compensatory allowance for paid leave. If the employee has been employed in another job during the period between the unlawful dismissal and the date of his retirement, he cannot, however, claim annual leave entitlements in respect of his first employer corresponding to the period during which he has been employed in another job.

28. After setting the compensation for breach of protective status due to the employee at the amount of remuneration which the latter was deprived of between his expulsion from the undertaking and his retirement on 30 June 2019, the ruling holds that the compensation does not carry the right to paid leave.

29. In so ruling, the Court of Appeal violated the above-mentioned texts.

Scope and consequences of the quashing

30. Pursuant to Article 624 of the Civil Procedure Code, the dismissal of the operative part of the ruling rejecting the employee's request for payment of overtime shall entail the dismissal of the operative part of the ruling rejecting the employee's requests for compulsory compensation in respect of rest and for the allowance for concealed work, as well as of the operative part of the ruling ordering the company to pay the employee the amounts of EUR 4,129.58 as back pay during the period of protective layoff, of EUR 412.95 corresponding to the leave with pay relating thereto and of leave with pay EUR 160,577.12 as compensation for breach of protective status and ordering the company to give the employee a summary pay slip, a work certificate and a job centre certificate, which are linked to it by a necessary relationship of dependence.

ON THESE GROUNDS, the Court:

QUASHES AND SETS ASIDE, except in that it rejects Mr [Z]'s claim for non-material damage, in that it says that the lump-sum agreement in days is not enforceable against Mr [Z] and states that his dismissal is void and in that it orders

Impairoussot to pay Mr [Z], in respect of the objective bonus, the amounts of EUR 4,333 as back pay for the year 2015 and EUR 433.30 for paid leave and EUR 7,333 as a back pay for the year 2016 and EUR 733.30 for paid leave, and in so far as it orders Impairoussot to pay Mr [Z] the sum of EUR 3,000 for the proceedings at first instance and on appeal on the basis of Article 700 of the Civil Procedure Code, dismisses the application by Impairoussot on the same basis and orders it to pay costs, this ruling being delivered on 20 January 2021 between the parties by the Versailles Court of Appeal;

Refers, except on these points, the case and the parties as they were before that ruling and sends them back to the Versailles Court of Appeal, otherwise composed;

Orders Impairoussot to pay costs;

In accordance with Article 700 of the Civil Procedure Code, rejects the application made by Impairoussot and orders it to pay Mr. [Z] EUR 3,000;

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 Court of Cassation, Social Chamber, pronounced and signed by Mr Huglo, elder judge, having deliberated, in place of the absent president, in the public hearing of the twenty-first of September two thousand twenty-two, in accordance with the provisions of Articles 456 and 1021 of the Civil Procedure Code.

President : Mr Cathala

Reporting Judge : Ms Ott

Advocate-general : Ms Roques

**Lawyer(s) : SCP Thouvenin, Coudray and Grevy – SCP Ricard, Bendel-Vasseur,
Ghnassia**

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