Dismissal for misconduct: principles of secularism and neutrality of the public service tested against comments made on the Facebook account of an employee of a private-sector entity managing a public service (Ruling No. 1119 - 21-12.370)

19/10/2022

Appeal No. 21-12.370

Quashing

Summary

The principles of secularism and neutrality of the public service which result from Article 1 of the Constitution of 4 October 1958 are applicable to all public services, including those provided by bodies governed by private law. Pursuant to Articles L. 5314-1 and L. 5314-2 of the Labour Code, local missions for the professional and social integration of young people formed as associations are persons governed by private law that manage a public service. It also follows from Article 61-1 of Law No. 84-53 of 26 January 1984 laying down statutory provisions relating to the territorial civil service, in its wording derived from Law No. 2007-148 of 2 February 2007 on the modernization of the civil service, and from Article 11 of Decree No. 2008-580 of 18 June 2008 on the system of availability for territorial authorities and local public administrative establishments, that a private employee made available to a local authority is subject to the principles of secularism and neutrality of public service. It follows that an employee governed by private law, employed by a local mission for the professional and social integration of young people and placed at the disposal of a local authority, is subject to the principles of secularism and neutrality of the public service and therefore to a duty of restraint beyond the exercise of his duties, both as an employee of a person governed by private law managing a public service and as an employee placed at the disposal of a public authority. The Court of Appeal did not provide a legal basis for its decision when it ruled that the dismissal of an employee was null and void because it was discriminatory on the grounds of the employee's expression of his political opinions and religious beliefs, even though it was clear from its findings that the employee in question, who was a referral agent within a municipality for the integration of young people in difficulty at school and at work, who were in a very fragile social situation, had posted comments on his Facebook account, which was open to everyone, under his own name, at the end of November and beginning of December 2015, mentioning "I refuse to put the flag ... I will never sacrifice my religion, my faith, for any flag." "Prophet! Remember the morning when you left your family to go and place the believers at their battle stations", without investigating, as it was asked to do, whether the consultation of the employee's Facebook account made it possible to identify him as a social and professional integration counsellor assigned to the municipality, in particular by the young people in difficulty with whom he carried out his duties, and whether, in view of the virulence of the disputed comments and the publicity given to them, the said comments were likely to characterise a breach of the employee's duty of restraint beyond the exercise of his duties as a public employment service employee placed at the disposal of a local authority, so that his dismissal was justified by an essential and determining professional requirement as defined in Article L. 1133-1 of the Labour Code, relating to the failure to comply with his duty of restraint.

FRENCH REPUBLIC ON BEHALF OF THE FRENCH PEOPLE

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

SOC.

CDS

COUR DE CASSATION (COURT OF CASSATION)

_____

Public hearing of 19 October 2022

Quashing

Mr SOMMER, President

Ruling No. 1119 FS-B

Appeal No. E 21-12.370

Partial legal aid in defence

for the benefit of Mr [Z].

Admission of the Legal Aid Office

Court of Cassation

as of 21 March 2021.

FRENCH REPUBLIC

_____

ON BEHALF OF THE FRENCH PEOPLE

_____

RULING OF THE COURT OF CASSATION, SOCIAL CHAMBER, 19 OCTOBER 2022

The association Mission locale du pays salonais, whose registered office is [Address 2], brought appeal No. E 21-12.370 against the ruling of the Court of Appeal of Aix-en-Provence (Chamber 4-2) of 18 December 2020 in the dispute between Mr [D] [Z], domiciled [Address 1], respondent at the quashing.

The applicant bases its appeal on the single plea for quashing appended to this ruling.

The case file has been sent to the Prosecutor General.

On the report of Ms Sommé, judge, the observations of SCP Rocheteau, Uzan-Sarano and Goulet, counsel for the association Mission locale du pays salonais, of SARL Cabinet Rousseau and Tapie, counsel for Mr [Z], and the opinion of Ms Laulom, Advocate-General, after discussion at the public hearing on 7 September 2022, attended by Mr Sommer, President, Ms Sommé, judge-rapporteur, Mr Huglo, elder judge, Mr Rinuy, Ms Ott, judges, Ms Chamley-Coulet, Ms Lanoue, Mr Le Masne de Chermont, Ms Ollivier, judge-referees, Ms Laulom, Advocate-General, and Ms Pontonnier, 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 (Aix-en-Provence, 18 December 2020), Mr [Z] was engaged by the association Mission locale du pays salonais (the local mission) as a counsellor in social and professional integration, first by fixed-term contracts of 2 February 2009 and 1 March 2010, then under an open-ended contract, with effect from 1 March 2011, with resumption of seniority on 2 February 2009.

2. On 1 May 2015, the employee was placed at the disposal of the municipality of [Locality 3] to carry out his duties under the "second chance" scheme, resulting from a partnership agreement between the city of [Locality 3] and the local mission. This scheme aims to support young people in difficulty by offering them individualized, personalized support, allowing them to register in a career path.

3. In a letter dated 15 December 2015, the local mission dismissed the employee for serious misconduct, accusing him of having posted on his publicly accessible Facebook account "comments incompatible with the performance of [his] duties and, in particular, significant and tendentious criticism of the political party Les Républicains and [the] Front National, as

well as calls for the dissemination of the Koran, accompanied by quotations from suras calling for violence", these facts characterise "political and religious manifestations which extend beyond [his] personal life on the one hand and, on the other, which involve excesses that call into question the minimum loyalty required by the legal status of [his] public service mission". They also constitute an infringement of the employee's duty of neutrality, which "encompasses a duty of restraint and an obligation to respect secularism", and an abuse of his freedom of expression.

Reviewing plea

The second, fourth and fifth parts of the plea

Statement of plea

4. The local mission criticizes the ruling for saying that it discriminated against the employee on the basis of his political opinions and religious beliefs in carrying out his dismissal, for declaring the dismissal void, for ordering it to reinstate the employee in a job equivalent to the one he was holding and for ordering it to pay various monetary sums, so:

"(2) the employee who participates in a public service mission is bound, even outside the service, by a duty of restraint which requires him to refrain from any expression of opinion likely to bring into disrepute the authority responsible for the public service mission in which he participates; whereas this applies, in particular, to an employee called upon to work with young people; whereas in this case, the Mission locale du pays salonais argued that it had dismissed Mr [Z] for having violently criticised, on his publicly available Facebook account, the action of the government and for not having respected the emblems of the Republic, such as the French flag, which was incompatible with the duty of restraint to which the employee was bound in his capacity as an agent of a Mission locale invested with a public service mission; whereas, by assuming that Mr [Z] participated in a public service mission, it did not prevent him from being able to "freely criticize the State outside its work", the Court of Appeal infringed the duty of restraint and Articles L. 1121-1, L. 1132-1 and L. 5314-2 of the Labour Code;

(4) the employee who participates in a public service mission is bound by an obligation of secularism which prohibits him from making religious proselytism; whereas this applies, in particular, to an employee called upon to work with young people; in this case, the Mission locale du pays salonais claimed that it had dismissed Mr [Z] for having engaged, on his publicly available Facebook page, in aggressive religious proselytism by, inter alia, broadcasting suras from the Koran calling for combat and inviting mass dissemination of the Koran; that by holding that "the employer could not ... prohibit the employee from engaging in acts of religious proselytism in the public space outside his work" and that "the duty of restraint imposed on [the employee] beyond his duties cannot concern the public expression of his faith or the propagation of the religious message", the Court of Appeal infringed the principle of secularism of the public service, together with Articles L. 5314-2, L. 1121-1 and L. 1132-1 of the Labour Code;

(5) employees governed by private law who are placed at the disposal of a local authority are subject to the same obligations as civil servants, including obligations of neutrality and secularism; whereas, in this case, by holding that an integration counsellor within a local mission, even if made available to a municipality, did not lose his freedom of political engagement and public expression of that commitment beyond the exercise of his duties and that he could freely criticize the State and engage in acts of religious proselytism in the public space outside his work, the Court of Appeal infringed Article 61(2) of Law No. 2007-148 on the modernization of the civil service of 2 February 2007 and Article 11 of the implementing decree of 18 June 2008 on the availability system for local authorities and local public administrative establishments."

Court's response

Admissibility of the fifth part of the plea

5. The employee disputes the admissibility of the plea. He submits that the plea is new in that the local mission did not invoke before the substantive judges the application of Articles 61-2 of Law No. 2007-148 on the modernization of the civil service of 2 February 2007 and 11 of the implementing decree of 18 June 2008 on the availability system for local authorities and local public administrative establishments.

6. However, before the judges hearing the case, the employer claimed that the employee had breached his obligation of neutrality as an employee of the local mission made available to the municipality of [Locality 3].

7. The plea is therefore admissible.

Merits of the plea

In view of the principles of secularism and neutrality of the public service, Articles L. 1133-1, L. 5314-1 and L. 5314-2 of the Labour Code, Article 61-1 of Law No. 84-53 of 26 January 1984 laying down statutory provisions relating to the territorial civil service, in its wording resulting from Law No. 2007-148 on the modernization of the civil service of 2 February 2007, and Article 11 of Decree No. 2008-580 of 18 June 2 2008 on the availability system for local authorities and local public administrative bodies:

8. Firstly, the principles of secularism and neutrality of the public service which result from Article 1 of the Constitution of 4 October 1958 are applicable to all public services, including those provided by bodies governed by private law.

9. Article L. 5314-1 of the Labour Code provides that local tasks for the professional and social integration of young people may be set up between the State, local authorities, public establishments, professional and trade union organizations and associations. They shall take the form of a public interest association or group.

10. According to Article L. 5314-2 of the same Code, local missions for the vocational and social integration of young people, within the framework of their public service mission for work, are intended to help young people aged sixteen to twenty-five years to solve all the problems related to their professional and social integration by providing reception, information, guidance and support functions for access to initial or continuing vocational training or to a job. They shall promote consultation between the various partners with a view to reinforcing or supplementing the actions carried out, in particular for young people who encounter particular difficulties in their integration into the labour market and society.

In their area of competence, they shall contribute to the development and implementation of an approved local policy for the professional and social integration of young people. The performance of local missions in terms of professional and social integration, as well as the quality of reception, information, guidance and support they provide to young people, shall be assessed under conditions agreed with the State, the region and the other local authorities which finance them. The funding provided takes these results into account.

11. It follows from these provisions that local missions for the professional and social integration of young people established in the form of an association are persons under private law managing a public service.

12. It follows that a private-law employee employed by a local mission for the professional and social integration of young people, constituted in the form of an association, is subject to the principles of secularism and neutrality of the public service and therefore to a duty of restraint beyond his work.

13. Second, Article 61-1 of Law No. 84-53 of 26 January 1984, in its applicable wording, provides that, where functions performed within them require a specialized technical qualification, local and regional authorities and their public administrative establishments may benefit from the availability of staff governed by private law in the cases and under the conditions defined by decree of the Council of State and that the staff thus made available are subject to the rules of

organization and operation of the service where they serve and to the obligations imposed on civil servants.

14. According to Article 11(I) of Decree No. 2008-580 of 18 June 2008, where the needs of the service so justify, local and regional authorities and public establishments mentioned in Article 2 of the Law of 26 January 1984 may benefit from the provision of staff governed by private law for the performance of a specific task or project that could not be carried out without the specialized technical qualifications held by a private employee.

15. Under Article 11(III) of the same decree, the rules of ethics applicable to civil servants are enforceable against the staff made available under Article I.

16. It follows that a private-law employee placed at the disposal of a territorial public authority is subject to the principles of secularism and neutrality of the public service and therefore to a duty of restraint beyond his work.

17. In order to say that the local mission discriminated against the employee on the basis of the expression of his political opinions and his religious convictions by dismissing him and consequently annulling the dismissal, the ruling holds that an integration counsellor in a local mission, even if made available to a municipality, does not lose his freedom of political engagement and public expression of that commitment beyond the exercise of his duties and may freely criticize the State outside his work.

18. The ruling also held that the local mission could not impose on the employee the respect for secularism outside his professional activity, prohibiting him from any religious proselytising in the public space outside the framework of his service, that in fact the employer was in no way a denominational organisation and secularism was not imposed on citizens in the public space outside the public service, since on the contrary, secularism guaranteed everyone the public exercise of their faith, that the employer could therefore not prohibit the employee from engaging in acts of religious proselytising in the public space outside of his work, as the duty of restraint imposed on him beyond his duties cannot concern the public expression of his faith or the propagation of the religious message, regardless of any relationship between faith and professional activity, where said relationship is in no way characterised in this case.

19. The ruling therefore concludes that by accusing the employee, in support of the dismissal measure, of having failed to comply with the illegitimate injunction intended to restrict his political and religious freedom, the employer has committed discrimination as defined in Article L. 1132-1 of the Labour Code, which requires the dismissal to be declared null and void under Article L. 1132-4 of the Labour Code.

20. In so ruling, when it was clear from the findings that the employee, a social and professional integration counsellor, a reference within the municipality of [Locality 3] for integration missions with a public of young people with educational and professional difficulties and in great social fragility, had published on his public Facebook account, under his own name, at the end of November and beginning of December 2015, comments mentioning "I refuse to put the flag... I will never sacrifice my religion, my faith, for any flag," "Prophet! Remember the morning when you left your family to go and place the believers at their battle stations", without investigating, as it was asked to do, whether the consultation of the employee's Facebook account made it possible to identify him as a social and professional integration counsellor assigned to the municipality, in particular by the young people in difficulty with whom he worked, and whether, in view of the virulence of the disputed comments as well as the publicity given to them, the said comments were likely to characterise a breach of the employee's duty of restraint beyond the exercise of his duties as a public employment service employee placed at the disposal of a local authority, so that his dismissal was justified by an essential and determining professional requirement as defined in Article L. 1133-1 of the Labour Code, relating to the failure to comply with his duty of restraint.

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

QUASHES AND SETS ASIDE, in all its provisions, the ruling delivered on 18 December 2020 between the parties by the Court of Appeal of Aix-en-Provence;

Returns the case and the parties to the status existing prior to the said ruling and refers them to the Court of Appeal of Nîmes;

Orders Mr [Z] to pay 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, orders that this ruling be transcribed in the margin or following the quashed ruling.

Thus decided by the social chamber of the Court of Cassation, and pronounced by the President at the public hearing of the nineteenth of October two

thousand and twenty-two.

President : Mr Sommer
Reporting Judge : Ms Sommé
Advocate-general : Ms Laulom
Lawyer(s) : SCP Rocheteau, Uzan-Sarano and Goulet - SARL Cabinet Rousseau and Tapie

READ THE FRENCH VERSION

International | Translated rulings