

# Clarification of the conditions under which a traveling employee's travel time can be considered as actual working time (Ruling n° 1328 - 20-21.924)

23/11/2022



Ruling No. 1328

**DISMISSAL**

FRENCH REPUBLIC

ON BEHALF OF THE FRENCH PEOPLE

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## **RULING OF THE SOCIAL CHAMBER OF THE *COUR DE CASSATION* (COURT OF CASSATION) OF 23 NOVEMBER 2022**

Etablissements Decayeux, a simplified joint-stock company with registered office at [Address 1], lodged appeal No. U 20-21.924 against the ruling delivered on 17 September 2020 by the *Cour d'appel* (Court of Appeal) of Rennes (7th Labour Chamber) in the dispute with Mr [N] [O], domiciled at [Address 1], respondent at the quashing.

In support of the appeal, the appellant relies on the five pleas of quashing attached to this ruling.

The case file was sent to the Prosecutor-General.

Concerning the report by Ms Techer, judge referee, and Mr Flores, judge, the observations of SCP Marc Lévis, lawyer of Etablissements Decayeux, SCP Rocheteau, Uzan-Sarano and Goulet, lawyer of Mr [O], and the advisory opinion of Ms Molina, Advocate-General referee, after discussions in the public hearing of 20 October 2022, attended by Mr Sommer, President, Ms Techer, co-reporting judge referee, Mr Flores, co-reporting judge, Mr Huglo, elder judge, Ms Capitaine, Monge, Ms Mariette, Mr Rinuy, Mr Pion, Ms Van Ruymbeke, Mr Pietton, Ms Sommé, Mr Sornay, Ms Le Lay, judges, Mr Le Corre, Ms Chamley-Coulet, Ms Valéry, judge referees, Ms Molina, Advocate-General referee, and Ms 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 abovementioned President and judges, after having taken deliberation thereof in accordance with the law, has delivered this ruling.

Account of the dispute

### **Facts and Procedure**

1. According to the ruling under appeal (Rennes, 17 September 2020) and the exhibits, Mr [O] was engaged as a sales representative by the company Etablissements Decayeux on 4 May 2009.
2. The employee brought an action before the industrial tribunal on 15 January 2015 in order to obtain the judicial termination of his employment contract.
3. He was dismissed on 19 October 2019.

### **Pleas**

#### **Examination of the pleas**

##### **On the first, second, fourth, and fifth pleas, appended hereafter**

Statement of reasons

4. Pursuant to Article 1014(2) of the Code of Civil Procedure, there is no need to give a decision in respect of these pleas, the latter two of which are inadmissible and the other two of which are clearly not eligible for quashing.

## Pleas

### On the third plea

#### Statement of plea

5. The employer objects to the ruling ordering them to pay to the employee various sums by way of back pay for overtime, related paid leave and a lump-sum statutory compensation for concealed employment, consequently declaring the judicial termination of the employment contract against said party and ordering them to pay to the employee various sums by way of statutory compensation in lieu of notice, in addition to the related paid leave, statutory compensation for dismissal and damages for dismissal without actual and serious cause where, "the time spent travelling for business to get from home to the places where the employment contract is performed is not actual working time and carries a right only to a financial consideration or rest if it exceeds the normal travel time between the home and the habitual place of work; whereas, by ordering the employer to pay overtime and paid leave relating to the travel time carried out by the employee to go to the places where the employment contract is performed, the *cour d'appel* (Court of Appeal) infringed Article L. 3121-4 of the Labour Code in its wording prior to that resulting from Law No. 2016-1088 of 8 August 2016."

#### Statement of reasons

#### Court's response

6. According to Article L. 3121-1 of the Labour Code, the actual working time is the time during which the employee is at the employer's disposal and complies with the latter's instructions without being able to carry out personal activities.
7. Under the terms of Article L. 3121-4 of the same code, in its wording prior to Law No. 2016-1088 of 8 August 2016, the professional travel time to the place of performance of the employment contract is not actual working time. However, if the journey exceeds the normal time spent travelling between home and the usual place of work, consideration shall be given either in the form of rest or in monetary compensation. This consideration shall be determined by means of a collective employment agreement or convention or, in the absence thereof, by the employer's unilateral decision made after consultation with the Works Council or staff representatives, if any. The part of this time spent on business travel which coincides with working hours does not entail any loss of salary.
8. The Court of Justice of the European Union has ruled that Article 2(1) of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time must be interpreted as meaning that, in circumstances such as those at issue in the main proceedings, in which the workers have no fixed or habitual place of work, "working time", as defined in that provision, includes the travel time workers devote to daily journeys between their home and the sites of the first and last customers indicated by their employer (CJEU, 10 September 2015, Tyco, C-266/14).
9. Admittedly, as stated in the abovementioned ruling (paragraphs 48 and 49), it follows from the case-law of the Court that, with the exception of the particular situation referred to in Article 7(1) of Directive 2003/88/EC in relation to paid annual leave, said directive is limited to regulating certain aspects of the organisation of working

time, such that, in principle, it does not apply to the remuneration of workers.

10. The Court of Justice further considers that the Directive does not preclude the application of a Member State regulation, a collective agreement or a decision of an employer which, for the purpose of remuneration for a service, takes different account of the periods during which work is actually carried out and those during which no actual work is carried out, even when said periods are to be regarded in their entirety as 'working time' for the purposes of the Directive, *Radiotelevizija Slovenija* (Period of standby duty in a remote location), C-344/19, point 58. (CJEU, 9 March 2021, *State Offenbach am Main*, C-580/19).
11. The *Cour de cassation* (Court of Cassation) has ruled that the method of remuneration of workers in a situation in which the workers have no fixed or usual workplace and make daily journeys between their home and the sites of the first and last customers indicated by their employer does not fall within the scope of the said directive, but rather within the scope of the relevant provisions of national law and that, pursuant to Article L. 3121-4 of the Labour Code, the travel time that exceeds normal travel time, which is not actual working time, must be subject to consideration either in the form of rest or money (Soc., 30 May 2018, appeal No. 16-20.634, Bull. 2018, V, No. 97).
12. However, in the ruling of 9 March 2021 (*Radiotelevizija Slovenija*, C-344/19), the Court of Justice of the European Union holds that the notions of "working time" and "rest period" constitute concepts of Union law which should be defined objectively by reference to the system and purpose of Directive 2003/88/EC. Only such an autonomous interpretation is to ensure that the directive is fully effective and that said concepts are applied consistently across the Member States (point 30). The Court of Justice of the European Union states that, despite the reference to "national legislation and/or practice" in Article 2 of Directive 2003/88/EC, Member States cannot unilaterally determine the scope of the notions of "working time" and "rest period" by making the right—recognised directly for workers by said directive—subject to any condition or restriction, and that work periods and, accordingly, rest periods must be duly taken into account. Any other interpretation would render Directive 2003/88/EC null and void and would disregard its purpose (point 31).
13. Having regard to the obligation to interpret Articles L. 3121-1 and L. 3121-4 of the Labour Code in the light of Directive 2003/88/EC, it must therefore now be held that, where the travel time completed by a travelling employee between his home and the sites of the first and last customers meets the definition of actual working time as set out in Article L. 3121-1 of the Labour Code, that time does not fall within the scope of Article L. 3121-4 of said code.
14. The *cour d'appel* (Court of Appeal) found that the employee, who argued, without being contradicted on this point by the employer, that, while driving, he had to be able to set appointments, call and respond to his various contacts, customers, commercial directors, assistants and technicians by using his professional mobile telephone and his hands-free kit integrated into the vehicle made available by the company, carried out the duties of a travelling "sales assistant", only went to the company's headquarters for work purposes occasionally, and had a company vehicle to work with the company's customers, who were spread out over seven departments of the *Grand Ouest* region far from his home, which sometimes led him, at the end of a day of professional travel, to book a hotel room in order to be able to complete his scheduled visits the following day.
15. It thus pointed out that, during the time spent travelling between his home and the first and last customers, the employee had to remain at the employer's disposal and follow its instructions without being able to carry out personal activities.
16. It rightly decided that this time should be integrated into his actual working time and remunerated accordingly.
17. The plea is therefore unfounded.

Operative part of the ruling

**ON THESE GROUNDS, the Court:**

**DISMISSES the request;**

Orders Etablissements Decayeux to pay the costs;

In application of Article 700 of the Code of Civil Procedure, dismisses the application made by the company

Établissements Decayeux and orders it to pay Mr [O] EUR 3,000;

Thus decided by the Social Chamber of the *Cour de cassation* (Court of Cassation), and delivered by the President at the public hearing on the nineteenth day of the month of October of the year two thousand and twenty-two.

**Pleas attached**

**PLEAS ATTACHED to this ruling**

Pleas submitted by SCP Marc Lévis, Supreme Court Lawyer, for Etablissements Decayeux

**FIRST PLEA FOR QUASHING**

The company Decayeux objects to the ruling under appeal for HAVING ordered Decayeux to pay Mr [O] the sums of EUR 26,103.38 as back pay for commissions and EUR 2,610.33 in respect of paid leave and consequently, for HAVING declared the judicial termination of the employment contract against Decayeux and for having ordered the latter to pay Mr [O] the other sums of EUR 8,725.18 in statutory compensation in lieu of notice, EUR 872.51 for paid leave, EUR 4,965.10 in statutory compensation for dismissal and EUR 25,000 in damages for dismissal without actual and serious basis;

WHEREAS the parties to the employment contract may decide to make the payment of variable remuneration subject to the signature of a subsequent amendment providing for said payment; whereas the employment contract between Decayeux and Mr [O] expressly provided that, in the absence of agreement by the parties setting, by way of amendment, numerical targets for invoicing orders to customers, the employee would receive a monthly fixed remuneration without variable remuneration; whereas, by ordering the employer to pay variable remuneration for the financial years 2013/2014 after having noted the absence of an amendment concluded for said periods, the *cour d'appel* (Court of Appeal) infringed Article L. 1221-1 of the Labour Code and Article 1134 of the Civil Code, in its wording prior to the order of 10 February 2016, which became Article 1103 of the Civil Code.

**SECOND PLEA FOR QUASHING**

The company Decayeux complains that the ruling under appeal dismissed Decayeux's request for it to order Mr [O] to reimburse it with the sum of EUR 15,989.62 in respect of undue commissions;

(1) WHEREAS the parties to the employment contract may decide to make the payment of variable remuneration subject to the signature of a subsequent amendment providing for said payment; whereas the employment contract between Decayeux and Mr [O] expressly provided that, in the absence of agreement by the parties setting, by way of amendment,

numerical targets for invoicing orders to customers, the employee would receive a monthly fixed remuneration without variable remuneration; whereas, by dismissing Decayeux's claim for reimbursement of commissions paid to the employee for the financial years 2013/2014 after having noted the absence of an amendment concluded for said periods, the *cour d'appel* (Court of Appeal) infringed Article L. 1221-1 of the Labour Code and Article 1134 of the Civil Code, in its wording prior to the order of 10 February 2016, which became Article 1103 of the Civil Code.

(2) WHEREAS the payment made in full knowledge of the facts does not prevent the payer from bringing an action for the recovery of sums unduly paid, once it has been proven that what had been paid was not due; whereas, by holding, in order to reject the company's claim for reimbursement of commissions unduly received, that the company had paid the sums considered in full knowledge of the facts, the *cour d'appel* (Court of Appeal) infringed Articles 1235 and 1376 of the Civil Code in their wording prior to the order of 10 February 2016, which became Articles 1302 and 1302-1.

### THIRD PLEA OF QUASHING

The company Decayeux objects to the ruling under appeal for HAVING ordered Decayeux to pay Mr [O] the sums of EUR 22,000 for the back pay of overtime and EUR 2,200 in respect of related paid leave, for HAVING, consequently, ordered Decayeux to pay Mr [O] the sum of EUR 24,825.54 as a lump-sum legal compensation for concealed employment and for HAVING consequently declared the judicial termination of the employment contract against Decayeux and ordered the latter to pay Mr [O] the other sums of EUR 8,725.18 in statutory compensation in lieu of notice, EUR 872.51 for paid leave, EUR 4,965.10 in statutory compensation for dismissal and EUR 25,000 in damages for dismissal without actual and serious basis;

WHEREAS professional travel time to get from home to the places where the employment contract is performed is not actual working time and is only entitled to financial consideration or rest if it exceeds the normal travel time between home and the habitual place of work; whereas, by ordering the employer to pay back pay for overtime and paid leave relating to the travel time carried out by the employee to go to the places where the employment contract is performed, the *cour d'appel* (Court of Appeal) infringed Article L. 3121-4 of the Labour Code in its wording prior to that resulting from Law 2016-1088 of 8 August 2016.

### FOURTH PLEA OF QUASHING, subsidiary

The company Decayeux objects to the ruling under appeal for HAVING ordered Decayeux to pay Mr [O] the sum of EUR 24,825.54 as a lump-sum legal compensation for concealed employment;

WHEREAS the intentional element of concealed employment cannot be inferred from a count of the hours of work carried out in accordance with applicable legal regulations and case law on the date they are carried out; whereas, by ordering the employer to pay compensation for concealed employment in view of the lack of accounting for hours corresponding to travel time, where the actual working time was excluded by the applicable legal provisions and case law on the date they were carried out, the *cour d'appel* (Court of Appeal) infringed Articles L. 8221-1 and L. 8221-5 of the Labour Code.

### FIFTH PLEA OF QUASHING

The company Decayeux complains that the ruling under appeal ordered Decayeux to pay Mr [O] EUR 5,000 as damages for unjustified disciplinary action;

WHEREAS, if the court that sets aside a disciplinary sanction can order the employer to pay damages, it is on condition that it is a matter of different damages that are not remedied by the annulment of the sanction; whereas, by ordering Decayeux to pay Mr [O] EUR 5,000 as damages for unjustified disciplinary sanction, without characterising the employee as having suffered separate damages, the *cour d'appel* (Court of Appeal) infringed Article L. 1331-1 of the Labour Code

and 1147 of the Civil Code in its wording prior to the order of 10 February 2016, which became Article 1231-1 of the Civil Code.

President : Mr Sommer  
Advocate-general referee : Ms Molina  
Judge referee : Ms Techer  
Lawyer(s) : SCP Rocheteau, Uzan-Sarano and Goulet



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