Prohibiting male flight attendants from wearing a hairstyle that is nevertheless permitted for female flight attendants constitutes discrimination based directly on physical appearance in relation to gender. (Ruling nº 1329 - 21-14.060)

23/11/2022

Ruling No. 1329

PARTIAL QUASHING

FRENCH REPUBLIC

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ON BEHALF OF THE FRENCH PEOPLE

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RULING OF THE CHAMBER FOR SOCIAL AND LABOUR MATTERS OF THE *COUR DE CASSATION* (COURT OF CASSATION) OF 23 NOVEMBER 2022

Mr [U] [T], domiciled at [Address 1], brought appeal No. S 21-14.060 against the ruling delivered on 6 November 2019 by the *cour d'appel* (Court of Appeal) of Paris (Section 6, Chamber 3) in the dispute between himself and Air France, a public limited company, whose registered office is [Address 2], respondent to the quashing.

Intervener:

The association *SOS Racisme - touche pas à mon pote*, whose registered office is [Address 3].

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

The case file was sent to the Prosecutor-General.

Concerning the report by Mr Barincou and Ms Sommé, judges, the comments made by SCP Thouvenin, Coudray and

Grevy, lawyers of Mr [T], of SARL Le Prado-Gilbert, lawyers of Air France, of SCP Ricard, BendelVasseur, Ghnassia, lawyers of the association *SOS Racisme-touche pas à mon pote*, the arguments put forward by the lawyer Grevy for Mr [T] and those of the lawyer Le Prado for Air France, and the advisory opinion of Ms Laulom, Advocate-General, after discussions in the public hearing of 20 October 2022, attended by Mr Sommer, President, Mr Barincou, co- reporting judge , Ms Sommé, co-reporting judge , Mr Huglo, elder judge, Ms Capitaine, Ms Monge,

Ms Mariette, Mr Rinuy, Mr Pion, Ms Van Ruymbeke, Mr Pietton, Mr Sornay, Mr Rouchayrole, judges, Ms Ala, Ms Chamley-Cou - let, Ms Valéry, Ms Prieur, judge referees, Ms Laulom, Advocate-General, and Ms Piquot, Chamber Registrar,

the Chamber for Social and Labour Matters 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.

Intervention

1. The intervention of the association *SOS Racisme - touche pas à mon pote* is hereby acknowledged.

Account of the dispute

Facts and Procedure

2. According to the ruling under appeal (Paris, 6 November 2019) and the exhibits, Mr [T] was hired as a steward by Air France on 7 May 1998.
3. As of 2005, the employee arrived wearing African braids tied in a bun at boarding, which was refused by the employer on the grounds that such a hairstyle was not authorised by the rules on uniforms for male commercial flight personnel. Subsequently and until 2007, the employee wore a wig to carry out his duties.
4. Claiming to be the victim of discrimination, he brought various claims before the labour court on 20 January 2012.

5. On 13 April 2012, the employer notified the employee of a five-day suspension without pay for arriving at work in breach of the rules on wearing the uniform.
6. On 17 February 2016, the employee was declared definitively unfit to carry out the duties of commercial flight personnel on the grounds of a depressive syndrome recognised as an occupational disease by the Local Sickness Insurance Fund.
7. After having been on leave for vocational retraining and confirming that he did not wish to be redeployed as ground personnel, he was dismissed on 5 February 2018 for permanent unfitness and inability to be redeployed.
8. On appeal, the employee requested that the employer be ordered to pay a sum in damages for discrimination, psychological harassment and unfair conduct , back pay for the period from 1 January 2012 to 28 February 2014 and the related paid leave, the nullity of his dismissal and, consequently, the employer be ordered to pay the corresponding damages, compensation in lieu of notice with the related paid leave and compensation for dismissal.

Pleas

Review of the plea

On the eighth and ninth parts of the plea

Statement of plea

9. The employee objects to the ruling dismissing his claim for damages for discrimination, psychological harassment and disloyalty, and his claim for back pay from 1 January 2012 to 28 February

2014, together with his claims for the nullity of his dismissal and the payment of subsequent sums in damages, compensation in lieu of notice, related paid leave and severance pay, whereas:

"(8) if it falls to the employee who claims to be harmed by a discriminatory measure to submit to the court the facts that lead to the existence of direct or indirect discrimination, it falls to the employer, if he challenges the discriminatory nature of the treatment reserved for the employee, to establish that his decision is justified by objective elements not related to any discrimination. whereas, in ruling out discrimination without specifying in what way the African braids would damage the image of Air France, the *cour d'appel* (Court of Appeal) did not legally justify its decision under Article L. 1132-1 of the Labour Code;

(9) whereas, if it falls to the employee who claims to be harmed by a discriminatory measure to submit to the court the facts that lead to the existence of direct or indirect discrimination, it falls to the employer, if he challenges the discriminatory nature of the treatment reserved for the employee, to establish that his decision is justified by objective elements not related to any discrimination. whereas it follows from the statements made in the ruling under appeal that the employee had not been able to carry out his duties and had had to wear a wig to be able to board the flights he had to work on because of his hairstyle made of African braids, even though it was authorised for women, and that "the facts brought by Mr [T] imply harassment based on discrimination"; whereas, in order to rule out discrimination on grounds of sex, the *cour d'appel* (Court of Appeal) limited itself to stating that "a difference in appearance admitted at a given period between men and women in terms of clothing, hairstyles, footwear and make-up" and that "this type of difference, which is based on applicable rules, cannot be described as discrimination". whereas, by thus justifying the difference in treatment found to exist by commonly accepted discrimination, the *cour d'appel* (Court of Appeal) infringed Articles L.

1132-1 and L. 1134-1 of the Labour Code."

Statement of reasons

Court's response

In view of Articles L. 1121-1, L. 1132-1, in their wording prior to Law No. 2012-954 of 6 August 2012, and L. 1133-1 of the Labour Code, implementing in national law Articles 2(1) and 14(2) of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the principle of equal opportunities and equal treatment of men and women in employment and occupation:

10. It follows from these texts that differences in treatment on grounds of sex must be justified by the nature of the task to be performed, must meet a genuine and determining occupational requirement and must be proportionate to the aim sought.
11. It also follows from the case law of the Court of Justice of the European Union (CJEU, 14 March 2017, Micropole Univers, C-188/15), that by analogy with the concept of "genuine and determining occupational requirement" provided for in Article 4(1) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, the concept of "genuine and determining occupational requirement", as defined in Article 14(2) of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006, refers to a requirement objectively dictated by the nature or conditions of the occupational activity in question. It follows from the English-language version of the two abovementioned directives that the provisions at issue are written in the same way: "such a characteristic constitutes a genuine and determining occupational requirement".
12. In order to dismiss the employee's claim for damages in respect of discrimination, psychological harassment and unfair conduct, for back pay and for the nullity of the dismissal and for the payment of the subsequent sums, the ruling, after having found that the manual for wearing the uniform of male commercial flight personnel states that, "the hair must be combed extremely well. Limited in volume, hairstyles must retain a natural and homogeneous appearance. The length is limited at the neck to the upper edge of the shirt collar. Discoloration and/or apparent coloration are not permitted. The length of the sideburns must not exceed the middle part of the ear. Miscellaneous accessories: not authorised", holds that this manual does not introduce any difference between straight, wavy or curly hair and therefore no difference between the origin of the employees, and that the employee is reproached because of his hairstyle, which has nothing to do with the nature of his hair.
13. It adds that while having African braids tied in a bun is authorised for female flight personnel, the existence of this difference in appearance, admitted at a given period between men and women in terms of clothing, hairstyles, shoes and make-up, in accordance with the applicable rules, cannot be characterised as discrimination.
14. The ruling further states that the appearance of commercial flight personnel is an integral part of the company's brand image, that the employee is in contact with the customers of a large air transport company which, like all other airlines, requires the wearing of the uniform and a certain immediately recognisable brand image, that as a steward, he plays a commercial role in his contact with customers and represents the company, and that the company's willingness to safeguard its image is valid cause for limiting its employees' freedom of appearance.
15. The ruling deduced that Air France's actions are not motivated by direct or indirect discrimination

and are justified by reasons that are completely unrelated to any harassment.

16. In so ruling, the *cour d'appel* (Court of Appeal), which had found that Air France had prohibited the employee from arriving at boarding with long hair styled in African braids tied in a bun and that, in order to be able to carry out his duties, the employee had had to wear a wig masking his hairstyle on the grounds that it was not inconformity with the reference system for male commercial flight personnel, from which it resulted that the prohibition on the employee wearing a hairstyle, even though authorised by the same reference system for female staff, characterised discrimination directly based on physical appearance related to gender, which, on the one hand, ruled on grounds relating to the wearing of the uniform, which were ineffective in justifying that the restrictions imposed on male staff regarding hairstyle were necessary to identify the Air France personnel and to preserve the latter's image, and which, on the other hand, was based on the social perception of the physical appearance of the male and female genders, which cannot constitute a genuine and determining occupational requirement justifying a difference in treatment relating to hairstyles between women and men, as defined in Article 14(2) of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006, infringed the above-mentioned texts.

Operative part of the ruling

ON THESE GROUNDS, and without the need for ruling on the other pleas, the Court:

QUASHES AND SETS ASIDE, but only insofar as it dismisses Mr [T]'s claims for damages in respect of discrimination, psychological harassment and unfair conduct, back pay from 1 January 2012 to 28 February 2014, together with his claim for the nullity of his dismissal and for the payment of damages in respect thereof, compensation in lieu of notice and related paid leave and compensation for dismissal, and orders Mr [T] to pay Air France the sum of EUR 500 in accordance with Article 700 of the Code of Civil Procedure and to pay the appeal costs, the ruling delivered on 6 November 2019, between the parties, by the *cour d'appel* (Court of Appeal) of Paris;

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

Orders Air France to pay the costs;

In application of Article 700 of the Code of Civil Procedure, dismisses Air France's claim and orders it to pay SCP Thouvenin, Coudray and Grevy the sum of EUR 3,000;

At the request of the Prosecutor-General of the *Cour de cassation* (Court of Cassation), this ruling shall be forwarded for transcription in the margin or at the bottom of the partially quashed ruling;

Thus decided by the Chamber for Social and Labour Matters 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

PLEA ATTACHED to this ruling

Plea submitted by SCP Thouvenin, Coudray and Grevy, Supreme Court Lawyer, for Mr [T]

Mr [T] appeals against the confirmatory ruling under appeal DISMISSING his claim for damages in respect of discrimination, psychological harassment and unfair conduct, his claim for back pay from 1 January 2012 to 28 February 2014, together his claim for nullity of his dismissal and for payment of the subsequent sums in damages, compensation in lieu of notice and related paid leave and compensation for dismissal.

(1) WHEREAS no one may restrict the rights of individuals and individual and collective freedoms in a way that is not justified by the nature of the task to be performed or proportionate to the aim sought; whereas an employer who prohibits the employee in contact with customers from having his hair in African braids tied in a bun constitutes an unjustified and disproportionate infringement of individual freedoms. whereas, in holding that Air France was entitled to prohibit the employee from wearing this hairstyle, which, moreover, was not alleged to have been clean and neat, the *cour d'appel* (Court of Appeal) infringed Article L. 1121-1 of the Labour Code.

(2) WHEREAS, in any case, no one may restrict the rights of individuals and individual and collective freedoms in a way that is not justified by the nature of the task to be performed or proportionate to the aim sought; whereas, in holding that the employer was entitled to prohibit the employee from wearing braids tied in a bun without specifying how this restriction on the employee's individual freedoms would be justified by the nature of the task to be performed, nor how the prohibition of this hairstyle would be proportionate to the aim sought by the employer, the*cour d'appel* (Court of Appeal) deprived its decision of a legal basis under Article L. 1121-1 of the Labour Code.

(3) WHEREAS no one may restrict the rights of individuals and individual and collective freedoms in a way that is not justified by the nature of the task to be performed or proportionate to the aim sought; whereas the*cour d'appel* (Court of Appeal), which merely stated that, "the company's desire to safeguard its image is a valid cause for limiting the free appearance of employees and that the standards that have strict rules of appearance is not disproportionate to the aim sought", did not specify how the wearing of so-called African braids tied in a bun would affect the image of Air France and did not legally justify its decision on a legal basis in light of Article L. 1121-1 of the Labour Code.

(4) WHEREAS neither the internal regulations nor Air France's internal notes prohibit the wearing of braids tied in a bun; whereas, by holding that the "standards that have strict rules of appearance are not disproportionate to the aim sought", suggesting that the employer was entitled to prohibit the employee from wearing braids tied in a bun, the*cour d'appel* (Court of Appeal) infringed Article 1103 of the Civil Code and Article L. 1121-1 of the Labour Code.

(5) WHEREAS, in any case, by holding that "standards that have strict rules of appearance are not disproportionate to the aim sought" without specifying how the wearing of braids tied in a bun would not comply with the provisions of said standards, the *cour d'appel* (Court of Appeal) did not legally justify its decision in light of Articles 1103 of the Civil Code and L.1121-1 of the Labour Code.

(6) WHEREAS, moreover, service notes or any other document containing general and permanent obligations regarding the matters referred to in Articles L. 1321-1 and L. 1321-2 constitute an addition to the internal regulations and are only enforceable against the employee when they have been submitted for the advisory opinion of the staff representation bodies, forwarded to the labour inspectorate and subject to the deposit and publicity formalities provided for in texts for internal regulations; whereas, by holding that the standards at issue are integrated into the employment contract and the internal regulations and are enforceable against the employee solely on the basis of the latter's commitment to compliance with the provisions of the manuals and application of the specific work instructions and guidelines, the*cour d'appel* (Court of Appeal) infringed Articles L. 1321-1 et seq. of the Labour Code.

(7) WHEREAS, moreover, if it falls to the employee who claims to be harmed by a discriminatory measure to submit to the court the facts that lead to the existence of direct or indirect discrimination, it falls to the employer, if he challenges the discriminatory nature of the treatment reserved for the employee, to establish that his decision is justified by objective elements not related to any discrimination; whereas it follows from the statements made in the ruling under appeal that the employee had not been able to carry out his duties and had had to wear a wig to be able to board the flights he had to work on because of his hairstyle made of African braids, and that "the facts brought by Mr [T] imply harassment based on discrimination"; In order to rule out any discrimination, the*cour d'appel* (Court of Appeal) limited itself to stating the

company's willingness to protect its image. In so ruling, when a company's desire to protect its image cannot objectively justify the prohibition of a clean and neat hairstyle that in no way contravenes this company's numerous requirements in terms of appearance and, more particularly, in terms of hairstyle, the *cour d'appel* (Court of Appeal) infringed Articles L. 1132-1 and L. 1134-1 of the Labour Code.

(8) WHEREAS, at the very least, if it falls to the employee who claims to be harmed by a discriminatory measure to submit to the court the facts that lead to the existence of direct or indirect discrimination, it falls to the employer, if he challenges the discriminatory nature of the treatment reserved for the employee, to establish that his decision is justified by objective elements not related to any discrimination; whereas, in ruling out discrimination without specifying in what way the African braids would damage the image of Air France, the cour d'appel (Court of Appeal) did not legally justify its decision under Article L. 1132-1 of the Labour Code.

(9) WHEREAS, moreover, if it falls to the employee who claims to be harmed by a discriminatory measure to submit to the court the facts that lead to the existence of direct or indirect discrimination, it falls to the employer, if he challenges the discriminatory nature of the treatment reserved for the employee, to establish that his decision is justified by objective elements not related to any discrimination; whereas it follows from the statements made in the ruling under appeal that the employee had not been able to carry out his duties and had had to wear a wig to be able to board the flights he had to work on because of his hairstyle made of African braids, even though it was authorised for women, and that "the facts brought by Mr [T] suggest harassment based on

discrimination"; whereas, in order to rule out discrimination on grounds of sex, the *cour d'appel* (Court of Appeal) limited itself to stating that "a difference in appearance admitted at a given period between men and women in terms of clothing, hairstyles, footwear and make-up" and that "this type of difference, which is based on applicable rules, cannot be described as discrimination". whereas, by thus justifying the difference in treatment found to exist by commonly accepted discrimination, the *cour d'appel* (Court of Appeal) infringed Articles L. 1132-1 and L. 1134-1 of the Labour Code.

(10) WHEREAS, as soon as the employee concerned establishes facts that make it possible to presume the existence of harassment, it falls to the respondent, in the light of such facts, to prove that said acts do not constitute such harassment and that its decision is justified by objective factors unrelated to any form of harassment; whereas, in respect of the psychological harassment he denounced, the employee stated in particular that he had been forced to wear a wig of stiff hair intended, in the employer's own terms, to "make his hairstyle appear smooth", a wig that did not comply with the standards and was described as grotesque by Mr [T]; whereas, in order to rule out psychological harassment, after having found that the employee had had to wear a wig to be able to board the flights he had to work on and that this gave rise to a presumption of the existence of psychological harassment, the *cour d'appel* (Court of Appeal) limited itself to stating the employer's willingness to protect its image; whereas, in so ruling, even though the protection of the employer's image cannot justify violation of that of the employee and his submission to humiliating and degrading treatment, the *cour d'appel* (Court of Appeal) infringed Articles L. 1152-1 and L. 1154-1 of the Labour Code.

President : Mr Sommer

Advocate-general : Ms Laulom

Co- reporting judge : Mr Barincou - Ms Sommé

Lawyer(s) : SARL Le Prado-Gilbert - SCP Ricard, BendelVasseur, Ghnassia

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