Clarification of the burden of proof for teleworking employees: the burden of proof lies with the employer (Ruling n° 1352 - 21-18.139)

14/12/2022

Ruling No. 1352

PARTIAL QUASHING

FRENCH REPUBLIC

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ON BEHALF OF THE FRENCH PEOPLE

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RULING OF THE SOCIAL CHAMBER OF THE *COUR DE CASSATION* (COURT OF CASSATION) OF 14 DECEMBER 2022

1) Ms [O] [K],

2) Ms [P] [K], 3) Ms [R] [K], all three of whom are domiciled at [Address 1] and act as beneficiary of [E] [K], deceased,

lodged appeal No. A 21-18.139 against the ruling delivered on 15 April 2021 by the *Cour d'appel* (Court of Appeal) of Versailles, 11th Chamber, in the dispute between them and Atos Integration, a simplified joint-stock company with registered offices at [Address 1], respondent to the quashing.

In support of their appeal, the appellants rely on the three pleas of quashing appended to this ruling.

The case file was sent to the prosecutor-general.

On the report of Ms Cavrois, judge, the observations of SCP Lyon-Caen and Thiriez, lawyer of Mr and Ms [K] in their respective capacities, of SARL Boré, Salve de Bruneton and Mégret, lawyer of Atos Integration, after discussions in the public hearing of 26 October 2022, attended by Ms Monge, elder judge acting as President, Ms Cavrois, elder judge, Mr Rouchayrole, judge, and Ms Dumont, Chamber Registrar,

The Social Chamber of the *Cour de cassation* (Court of Cassation), composed of the above-mentioned President and judges, after having deliberated in accordance with the law, has issued this ruling.

Account of the dispute

Facts and Procedure

1. According to the ruling under appeal (Versailles, 15 April 2021), Mr [K] was hired on 27 March 2000 by Atos integration management as a design engineer.
2. At the later stages of the employment relationship, the employee was project manager and, as of 1 July 2013, his contract was transferred to the company Atos Integration. According to an amendment dated 12 November 2013, as part of his telework, he worked two days a week on site and three days at home.
3. On 4 March 2014, Mr [K] took his own life on the journey between his home and his workplace.
4. On 16 June 2016, the employee's beneficiaries brought an action before the industrial tribunal for payment of unpaid overtime, damages for infringment of the right to rest and for infringment of the right to private and family life.

Pleas

Examination of the pleas

On the first plea

Statement of plea

5. The employees' beneficiaries challenge the ruling for rejecting their requests for the employer to be ordered to pay them certain sums by way of back pay for overtime, related paid leave and compensation for concealed employment, whereas:

"(1) In the event of a dispute relating to the existence or number of hours of work completed, it is up to the employee to submit, in support of his request, sufficiently precise elements regarding the unpaid hours he claims to have completed so that the employer, who supervises the hours of work carried out, can respond effectively by producing his own elements; whereas, in this case, by asserting, in order to reject their claim for overtime, that the tables of work time accounts produced by Ms [O] [K], Ms [P] [K] and Ms [R] [K] did not contain sufficiently precise prior elements as to unpaid hours, the *cour d'appel* (Court of Appeal), which placed the burden of proof of overtime on the employee alone, infringed Articles L. 3171-2, paragraph 1, L. 3171-3 and L. 3171-4 of the Labour Code;

"(2) whereas, in the event of a dispute relating to the existence or number of hours of work completed, it is up to the employee to submit, in support of his request, sufficiently precise elements regarding the unpaid hours he claims to have completed so that the employer, who supervises the hours of work carried out, can respond effectively by producing his own elements; whereas, in this case, by asserting, in order to reject their claim for overtime, that the tables of work time accounts produced by Ms [O] [K], Ms [P] [K] and Ms [R] [K] did not contain sufficiently precise prior elements as to unpaid hours, after having nevertheless noted, on the one hand, that Ms [O] [K], Ms [P] [K] and Ms [R] [K] had produced the labour inspection report giving the start and end times of Mr [K], and stating a considerable and almost permanent daily range of work, a statement of the hours worked during the period from June 2011 to February 2014 and a set of documents, in particular the case file relating to the suicide of Mr [K], the CHSCT investigation, and various written testimonies that concordantly, precisely and thoroughly demonstrated that Mr [K] was permanently working well beyond the legal duration of the work time and, secondly, that the Company Atos Integration, which was obliged to ensure control of its employee's work time, did not produce any element such as to establish the hours actually worked by Mr [K], the *cour d'appel* (Court of Appeal), which imposed the burden of proof regarding the overtime on the employee alone, again infringed Articles L. 3171-2, paragraph 1, L. 3171-3 and L. 3171-4 of the Labour Code."

Statement of reasons

Court's response

In view of Article L. 3171-4 of the Labour Code:

6. Under the terms of Article L. 3171-2, paragraph 1 of the Labour Code, when all employees occupied in a service or workshop do not work the same collective time, the employer shall draw up the necessary documents to account for the work time, the compensatory rest acquired and actually taken for each of the employees concerned. According to Article L. 3171-3 of the same code, in its wording prior to that resulting from Law No. 2016-1088 of 8 August 2016, the employer must keep at the disposal of the labour inspector or supervisor the documents that make it possible to count the work time completed by each employee. The nature of the documents and the length of time they are kept available shall be determined by regulation.
7. Finally, according to Article L. 3171-4 of the Labour Code, in the event of a dispute relating to the existence or number of hours of work completed, the employer shall provide the judge with elements such as to justify the hours actually worked by the employee. In the light of these elements and those provided by the employee in support of his request, the court draws its conclusion after having ordered, if necessary, all the investigations it considers useful. If the hours worked by each employee are counted by an automatic recording system, this system must be reliable and tamper-proof.

8. It follows from these provisions that, in the event of a dispute relating to the existence or number of hours of work completed, it is up to the employee to submit, in support of his request, sufficiently precise elements regarding the unpaid hours he claims to have completed so that the employer, who supervises the hours of work carried out, can respond effectively by producing his own elements. The court draws its conclusion by taking all of these factors into account in light of the requirements set out in the above-mentioned legal and regulatory provisions. After analysing the documents produced by both parties, in the event that it upholds the existence of overtime, it makes an independent assessment—without being required to specify the details of its calculation—of the importance of said overtime and sets the related salary claims.
9. In order to dismiss the request of the employee's beneficiaries for payment of back pay for additional hours

and compensation for undeclared work, after noting that the interested parties produced a table showing the employee's working hours from June 2011 to 2014, the labour inspectorate report giving his start and end times on a number of non-consecutive days in 2013 and 2014, email statements sent by the employee between September 2013 and March 2014, and various certificates, the court held that the certificates produced were insufficient to determine the employee's working hours, and that the indication that the employee worked a lot was not a valid answer.

10. It notes that the information provided by the labour inspectorate gives a few scattered examples, that the sending of emails does not demonstrate that the employee worked continuously and that the table of the work time account merely states that the employee systematically worked 56.25 hours week after week, except for weeks where he took a day off or rest day (RTT) without mentioning the hours worked, and only gives a daily average of 11.15 hours after having deducted a lunch break, and that this table does not mention taking a holiday in 2011 and 2012, unlike 2013.
11. The ruling concludes that these documents do not contain sufficiently specific information about the unpaid hours that the employee would have worked to allow the employer to respond to them by providing his own information.
12. In so ruling, when it was clear from the findings, on the one hand, that the employee's beneficiaries presented sufficiently precise elements to allow the employer to respond, and on the other, that the latter did not produce any element of control of work time, the *cour d'appel* (Court of Appeal), which placed the burden of proof solely on the employee's beneficiaries, infringed the above-mentioned provision.

Pleas

On the second part of the second plea

Statement of plea

13. The employee's beneficiaries object to the ruling under appeal dismissing their request for the employer to be ordered to pay them a certain amount in damages for violation of the right to rest, whereas: "In view of the purpose assigned to leave and rest periods by Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003, on certain aspects of the organization of work time, it is up to the employer to take measures to ensure that the employee is able to effectively exercise his right to leave and rest, and, in case of dispute, to justify that he has carried out the diligence legally required of him for that purpose; whereas it follows that, in

relation to weekly rest, it is up to the employer to establish that he has fulfilled his obligations; whereas, by holding, in order to dismiss Ms [O] [K], Ms [P] [K] and Ms [R] [K]'s claim relating to the infringement of Mr [K]'s right to rest, that they did not demonstrate the alleged infringement, the *cour d'appel* (Court of Appeal) infringed Articles L. 3131-1 and L. 3132-1 of the Labour Code."

Statement of reasons

Court's response

Pursuant to Article L. 3131-1 of the Labour Code, in its wording prior to Law No. 2016-1088 of 8 August 2016 and Article 1315, which became Article 1353 of the Civil Code:

14. According to the first of said texts, every employee is entitled to a daily rest period of at least eleven consecutive hours.
15. According to the second text, the person who claims to be exempt must justify the payment or the fact that led to the extinction of his obligation.
16. As a result, proof of compliance with the thresholds and ceilings provided for by EU law and with the maximum working hours laid down by national law is the responsibility of the employer.
17. In order to reject the employee's beneficiaries' claim for damages for infringement of the employee's right to rest, the ruling maintains that it follows from the evidence produced that if the employee was working "a lot", it was not demonstrated that the employer had infringed legislation on the right to rest, whereas the employee was working two days from home and retained freedom of organisation of his work time according to his movements. It adds that the hours between the first email sent by the employee and the latter, without having sufficient knowledge of its content to see whether it corresponded to actual work on his part, does not make it possible to state that the employee was permanently at his work station and that he did not normally benefit from his daily rest. It deduced that the employee's beneficiaries did not justify the alleged infringement.
18. In so ruling, the *cour d'appel* (Court of Appeal), which reversed the burden of proof, infringed the above-mentioned texts.

Pleas

And on the first part of the third plea

Statement of plea

19. The employee's beneficiaries object to the ruling under appeal dismissing their request for the employer to be ordered to pay them a certain amount in damages for violation of the right to private and family life, whereas "the disapproval that will arise on the account of the first and/or second plea will consequently result in the ruling being disapproved insofar as it dismissed their request for confirmation of the judgement sought insofar as it ordered Atos Integration to pay them the sum of EUR 34,000 in damages for violation of right to private and family

life."

Statement of reasons

Court's response

Pursuant to Article 624 of the Code of Civil Procedure:

20. The quashing pronounced on the first and second pleas leads to the consequential quashing on the part of the operative part that rejects the claim made by the employee's beneficiaries for damages for infringement of the employee's right to private and family life, which is connected thereto by a link of necessary dependence.

Operative part of the ruling

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

QUASHES AND SETS ASIDE, except where it says that there is no need to produce documents and considers that Ms [O] [K], Ms [P] [K] and Ms [R] [K]'s salary claims are not time-barred as of 15 June 2011, the ruling delivered by the*cour d'appel* (Court of Appeal) of Versailles on 15 April 2021 between the parties;

Refers, except on these points, the case and the parties to the status existing before said ruling and refers them back to the *cour d'appel* (Court of Appeal) of Versailles, otherwise composed;

Orders Atos Integration to pay the costs;

Pursuant to Article 700 of the Code of Civil Procedure, dismisses the claim made by Atos Integration and orders it to pay Ms [O] [K], Ms [P] [K] and Ms [R] [K], in their respective capacities, 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 Social Chamber of the *Cour de cassation* (Court of Cassation), and delivered by the President at the public hearing on the fourteenth day of the month of December of the year two thousand and twenty-two.

Pleas attached

PLEAS ATTACHED to this ruling

Pleas submitted by SCP Lyon-Caen and Thiriez, Supreme Court Lawyer, for Mr and Ms [K], in their respective capacities

FIRST PLEA FOR QUASHING

Ms [O] [K], Ms [P] [K] and Ms [R] [K] complain that the ruling under appeal, which reversed the judgement rejecting their requests got ATOS INTEGRATION to be ordered to pay them the sums of EUR 122,890 as back pay for overtime, EUR 12,289 as related paid leave and EUR 57,259 as legal compensation for concealed employment;

1. WHEREAS, in the event of a dispute relating to the existence or number of hours of work completed, it is up to the employee to submit, in support of his request, sufficiently precise elements regarding the unpaid hours he claims to have completed so that the employer, who supervises the hours of work carried out, can respond effectively by producing his own elements; whereas, in this case, by asserting, in order to reject their claim for overtime, that the tables of work time accounts produced by Ms [O] [K], Ms [P] [K] and Ms [R] [K] did not contain sufficiently precise prior elements regarding unpaid hours, the *cour d'appel* (Court of Appeal), which placed the burden of proof of overtime on the employee alone, infringed Articles L. 3171-2, paragraph 1, L. 3171-3 and L. 3171-4 of the Labour Code;
2. WHEREAS, FURTHERMORE, in the event of a dispute relating to the existence or number of hours of work completed, it is up to the employee to submit, in support of his request, sufficiently precise elements regarding the unpaid hours he claims to have completed so that the employer, who supervises the hours of work carried out, can respond effectively by producing his own elements; whereas, in this case, by asserting, in order to reject their claim for overtime, that the tables of work time accounts produced by Ms [O] [K], Ms [P] [K] and Ms [R] [K] did not contain sufficiently precise prior elements as to unpaid hours, after having nevertheless noted, on the one hand, that said parties had produced the labour inspection report giving the start and end times of Mr [K], and stating a considerable and almost permanent daily range of work, a statement of the hours worked during the period from June 2011 to February 2014 and a set of documents, in particular the case file relating to the suicide of Mr [K], the CHSCT investigation, and various written testimonies that concordantly, precisely and thoroughly demonstrated that Mr [K] was permanently working well beyond the legal duration of the work time and, secondly, that the Company ATOS INTEGRATION, which was obliged to ensure control of its employee's work time, did not produce any element such as to establish the hours actually worked by Mr [K], the *cour d'appel* (Court of Appeal), which imposed the burden of proof regarding the overtime on the employee alone, again infringed Articles L. 3171-2, paragraph 1, L. 3171-3 and L. 3171-4 of the Labour Code.

SECOND PLEA FOR QUASHING

Ms [O] [K], Ms [P] [K] and Ms [R] [K] complain that the ruling under appeal, which reversed the judgement rejecting their request for the judgement under appeal to be upheld in so far as it condemned ATOS

INTEGRATION to pay them the sum of EUR 34,000 in damages for infringement of the right to rest;

1. WHEREAS, pursuant to Article 624 of the Code of Civil Procedure, the quashing, which will intervene on the basis of the first plea, will consequently uphold the disapproval of the ruling insofar as it rejected Ms [O] [K], Ms [P] [K] and Ms [R] [K]'s request for ATOS INTEGRATION to be ordered to pay them the sum of EUR 34,000 for infringement of the right to rest;
2. WHEREAS, FURTHERMORE, in view of the purpose assigned to leave and rest periods by Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003, on certain aspects of the organization of work time, it is up to the employer to take measures to ensure that the employee is able to effectively exercise his right to leave and rest, and, in case of dispute, to justify that he has carried out the diligence legally required of him for that purpose; whereas it follows that, in relation to weekly rest, it is up to the employer to establish that he has

fulfilled his obligations; whereas, by holding, in order to dismiss Ms [O] [K], Ms [P] [K] and Ms [R] [K]'s claim relating to the infringement of Mr [K]'s right to rest, that these did not justify the alleged violation, the *cour d'appel* (Court of Appeal) violated Articles L. 3131-1 and L. 3132-1 of the Labour Code;

3. WHEREAS, FURTHERMORE, failure to observe the rules of daily and weekly rest creates a disturbance in the employees' personal life and may create risks for their health and safety; whereas, by holding, in order to reject Ms [O] [K], Ms [P] [K] and Ms [R] [K]'s application, that they in no way specify the damage for which they are seeking compensation, after having nevertheless found that Mr [K] had taken his own life after having indicated to his psychiatrist the day before that he was exhausted by his work, the *cour d'appel* (Court of Appeal), which did not draw the legal consequences of its own findings, again violated Articles L. 3131-1 and L. 3132-1 of the Labour Code, together with Article 1147 of the Civil Code, in its then-applicable wording;
4. WHEREAS, FURTHERMORE, in asserting that Ms [O] [K], Ms [P] [K] and Ms [R] [K] in no way specify the damages for which they seek compensation, even though, in their written submissions, they had stated that the infringement of Mr [K]'s right to rest had led to his exhaustion, which had been noted by his medical psychiatrist, and then, to his suicide, the *cour d'appel* (Court of Appeal), which altered the nature of Ms [O] [K], Ms [P] [K] and Ms [R] [K]'s written submissions, violated Article 4 of the Code of Civil Procedure, together with the principle that it is forbidden for the judge to alter the nature of written submissions.

THIRD PLEA OF QUASHING

Ms [O] [K], Ms [P] [K] and Ms [R] [K] object to the ruling under appeal, which reversed the judgement rejecting their request for the judgement to be upheld insofar as it ordered ATOS INTEGRATION to pay them the sum of EUR 34,000 in damages for infringement of the right to private and family life;

1. WHEREAS, the disapproval that will arise on the basis of the first and/or second plea will consequently entail disapproval of the ruling insofar as it dismissed Ms [O] [K], Ms [P] [K] and Ms [R] [K]'s request for the judgement to be confirmed insofar as it ordered ATOS INTEGRATION to pay them the sum of EUR 34,000 in damages for infringement of the right to private and family life;
2. WHEREAS, FURTHERMORE, Ms [O] [K], Ms [P] [K] and Ms [R] [K] in no way specify the damages for which they seek compensation, even though, in their written submissions and supporting documents, they had established that Mr [K] was in such a state that he could not normally enjoy his family life during the week, at weekends and during holidays, the *cour d'appel* (Court of Appeal), which altered the nature of said written submissions, violated Article 4 of the Code of Civil Procedure, together with the principle that it is forbidden for the judge to alter the nature of written submissions;
3. WHEREAS, by asserting, in order to determine as it did, that Mr [K] had never personally complained about his capacity to enjoy his family life normally, the *cour d'appel* (Court of Appeal), which ruled on ineffective grounds, infringed Article 8 of the European Agreement for the Protection of Human Rights and Fundamental Freedoms, together with Article 1147 of the Civil Code, in its then-applicable wording;
4. WHEREAS, in their pleadings and supporting documents, Ms [O] [K], Ms [P] [K] and Ms [R] [K] had established that Mr [K]'s workload was such that he rarely saw his wife and daughters, left early in the morning and returned late in the evening and had to continue working on weekends and on his rest days, the *cour d'appel* (Court of Appeal), which did not examine these decisive elements of the dispute, violated Article 455 of the Code of Civil Procedure;
5. WHEREAS, FINALLY, by asserting that Ms [O] [K], Ms [P] [K] and Ms [R] [K]'s written testimonies could not be upheld because no person can constitute proof on their own behalf, even though in labour matters, evidence is unrestricted, the *cour d'appel* (Court of Appeal) violated Article 1315 of the Civil Code, in its then-applicable

wording, together with Article L. 1221-1 of the Labour Code.

Elder judge acting as President : Ms Monge
Elder judge : Mr Rouchayrole
Judge : Ms Cavrois
Lawyer(s) : SCP Lyon-Caen and Thiriez - of SARL Boré, Salve de Bruneton and Mégret

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