

Right to evidence and right to protection of personal data: right for an employee to obtain, under certain conditions, the pay slips of other employees in order to prove discrimination.
(Ruling n° 231 - 21-12.492)

08/03/2023



Ruling No. 231

Dismissal

ON BEHALF OF THE FRENCH PEOPLE

RULING OF THE SOCIAL CHAMBER OF THE COURT OF CASSATION OF 8 MARCH 2023

1) The company Exane,

2) The company Exane Derivatives, both of which have their registered offices at [Address 1],

brought appeal No. 21-12.492 against the ruling delivered on 3 December 2020 by the *Cour d'appel* (Court of Appeal) of Paris, Division 6, Chamber 2 in the dispute between them and Ms [I] [R], domiciled at [Address 2], respondent in the quashing.

In support of their appeal, the appellants rely on the two grounds of quashing attached to this ruling.

The case file has been sent to the prosecutor-general.

On the report by Mr Seguy, judge, the observations of SARL Cabinet Munier-Apaire, lawyer of Exane and Exane Derivatives, SCP Thouvenin, Coudray and Grevy, lawyer of Ms [R], and the advisory opinion of Mr Gambert, advocate-general, after discussions in the public hearing of 17 January 2023 attended by Mr Sommer, president, Mr Seguy, reporting judge, Ms Mariette, elder judge, Mr Pietton, Mr Barincou, Ms Grandemange, Ms Douxami, judges, Mr Le Corre, Ms Prior, Ms Marguerite, Ms Carillon, judge referees, Mr Gambert, advocate-general, and Ms Pontonnier, Chamber Registrar,

the Chamber for Social and Labour Matters of the *Cour de cassation* (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.

Account of the dispute

Facts and procedure

1. According to the ruling under appeal (Paris, 3 December 2020), Ms [R] was hired by Exane Derivatives, a subsidiary of the Exane group, as a structurer on 5 January 2009. Between 1 February 2013 and 22 January 2017, she held the position of chief operating officer (COO) before being appointed, on 23 January 2017, to the position of director of strategy and group projects at the company Exane.
2. Dismissed on 22 February 2019 and considering that she was unequal in salary compared to certain male colleagues who held or had held positions as COO, she referred the matter to the interim bench of the industrial tribunal on 31 October 2019 on the basis of Article 145 of the Civil Procedure Code in order to obtain the disclosure of comparative information held by her two successive employers.

Pleas

Examination of the pleas

Concerning the first and second bases of the first and second pleas, attached hereto

Statement of reasons

3. Pursuant to Article 1014(2) of the Code of Civil Procedure, it is not necessary to rule on the basis of a specially reasoned decision regarding these pleas, which are clearly not susceptible to quashing.

Pleas

On the third and fourth bases of the second plea

Statement of plea

4. The companies appeal the ruling for ordering them to provide the interested party, under obligation, with the pay slips of eight employees for the periods from February 2013 to January 2017 for the first four, from March 2017 to May 2019 for the fifth and from January 2017 to May 2019 for the last three, with the concealment of personal data, except for first names and surnames, the conventional classification, the detailed monthly remuneration and the total cumulative gross remuneration per calendar year, when:

"(3) pursuant to Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 (GDPR), personal data collected by the employer for specified, explicit and legitimate purposes must be further processed in a manner compatible with those purposes in a lawful, fair and transparent manner with regard to the data subject, in such a way as to ensure an appropriate level of security for their confidentiality and integrity, and must be retained only for as long as is strictly necessary for those purposes; the court, which may only rule on legally admissible investigations pursuant to Article 145 of the Civil Procedure Code, cannot therefore order the disclosure to a third party of personal data under conditions that are contrary to the above-mentioned regulation; by ordering the disclosure to the employee of pay slips for eight other employees over a period between 2013 and 2019, showing their first names and surnames, their conventional classifications, their detailed monthly remuneration (fixed and variable) and their total gross remuneration accumulated per calendar year, without verifying whether this disclosure was contrary to the requirements of the aforementioned European regulation that is binding on the court, in that it led to the disclosure to a third party of all the remuneration of the employees concerned over several years for a purpose that was very different from the legal purpose for which they had been collected by human resources, without the employees having been able to anticipate the measure and without the judge issuing any guarantee of security, confidentiality and a limitation of the retention period, the *Cour d'appel* (Court of Appeal) infringed Articles 145 of the Civil Procedure Code and Articles 4, 5, 6 and 32 of the abovementioned European regulation;

(4) The right to evidence can only justify the production in court of elements that infringe on the right to privacy provided that such production is indispensable to the exercise of this right and that the infringement on the privacy of the employees concerned is proportionate to the objective pursued. This is not the case when the employee is already in a position to present elements of fact likely to lead to the presumption of the existence of the alleged discrimination; in this case, by simply stating that the employee justified a legitimate reason for disclosure of the pay slips, when she already noted that the gender equality reports demonstrated a minority proportion of women in the workforce, pay gaps between men and women and a gender equality index for the year 2018, leaving a margin of progression, without verifying whether the additional production she requested, of eight employees over several years, was indispensable to the employee's right of evidence and proportionate to the right to privacy of the employees concerned, the *Cour d'appel* (Court of Appeal) violated Articles 145 of the Civil Procedure Code, 9 of the Civil Code, 8 of the European Agreement for the Protection of Human Rights and Fundamental Freedoms and L. 1132-1, L. 134-1, L. 1142-1, L. 1144-1 of the Labour Code."

Statement of reasons

Court's response

5. It follows from point (4) of the introduction to Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016, on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (GDPR), that the right to the protection of personal data is not an absolute right and must be considered in relation to its function in society and be balanced against other fundamental rights, in accordance with the principle of proportionality. It adds that this Regulation respects all fundamental rights and observes the freedoms and principles recognised by the Charter and enshrined in the Treaties, in particular the right to an effective remedy and to a fair trial.
6. According to article 145 of the Civil Procedure Code, if there is a legitimate reason to retain or establish before any trial the evidence of facts on which the resolution of a dispute might depend, legally admissible investigations may be ordered at the request of any interested party.
7. Then, it follows from Articles 6 and 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, Article 9 of the Civil Code and Article 9 of the Civil Procedure Code, that the right to evidence may justify the production in court of elements that infringe on their privacy, provided that such production is indispensable to the exercise of this right and that the infringement is proportionate to the objective pursued.
8. It is therefore up to the court hearing a request for disclosure of documents on the basis of Article 145 of the Code of Civil Procedure, firstly, to ascertain whether such disclosure is necessary for the exercise of the right to evidence of the alleged inequality of treatment and proportionate to the aim pursued and whether there is thus a legitimate reason to preserve or establish, prior to any legal proceedings, evidence of facts on which the outcome of a dispute may depend; then, if the information requested is likely to affect the personal lives of other employees, to verify which measures are essential to the exercise of the right to evidence and proportionate to the aim pursued, if necessary by limiting the scope of the production of documents requested.
9. The *Cour d'appel* (Court of Appeal) noted that, in order to present elements suggesting the existence of the alleged salary inequality between her and some of her male colleagues, the employee was entitled to obtain disclosure of the salary statements of eight other employees occupying positions of a level comparable to her in managerial, commercial or market functions, with the concealment of personal data except for first names and surnames, the contractual classification, the detailed monthly remuneration and the total gross remuneration accumulated per calendar year.
10. In light of these findings and statements, the *Cour d'appel* (Court of Appeal) pointed out that this communication of elements infringing on the privacy of other employees was indispensable to the exercise of the right to evidence and proportionate to the objective pursued, namely the defence of the employee's legitimate interest in equal treatment for men and women in matters of employment and occupation.
11. The plea is therefore unfounded.

Operative part of the judgment

ON THESE GROUNDS, the Court:

DISMISSES the request;

Orders the companies Exane and Exane Derivatives to pay the costs;

In accordance with Article 700 of the Civil Procedure Code, dismisses the application made by the companies Exane and Exane Derivatives and orders them to pay Ms [R] the sum of EUR 3,000;

Thus decided by the Chamber for Social and Labour Matters of the *Cour de cassation* (Court of Cassation) and pronounced by the president at the public hearing of the eighth day of the month of March of the year two thousand and twenty-three.

President : Mr Sommer
Advocate-general : Mr Gambert
Reporting Judge : Mr Seguy
Lawyer(s) : SARL Cabinet Munier-Apaire – SCP Thouvenin, Coudray and Grevy

[Redacted]

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