

Obstruction offences: which employee representative bodies? (Ruling n° 1180 – 22–84.021)

17/10/2023



Ruling No. 1180

Dismissal

FRENCH REPUBLIC

ON BEHALF OF THE FRENCH PEOPLE

RULING OF THE CRIMINAL CHAMBER OF THE *COUR DE CASSATION* (COURT OF CASSATION) OF 17 OCTOBER 2023

□ The company [5] lodged an appeal against the ruling of the *cour d'appel* (Court of Appeal) of Paris, Chamber 2-13, dated 13 May 2022, which, on referral following cassation proceedings (Crim., 18 September 2018, Appeal No. 15-80.735), found it guilty of undeclared work, illegal supply of workers, obstruction and unlawful employment of seagoing personnel, ordered it to pay a fine of €200,000 and civil damages, together with the publication and posting of the decision.

Written submissions were filed in support of the claim and defence, together with additional comments.

On the report of Mr Maziau, judge, the observations of SCP Richard, lawyer of the company [5], the observations of SCP Gatineau, Fattaccini and Rebeyrol, lawyer of URSSAF Provence-Alpe-Côte d'Azur, successor to the rights of URSSAF des Bouches-du-Rhône, the observations of SCP Lyon-Caen and Thiriez, lawyer of the *Caisse de retraite du personnel navigant professionnel de l'aviation civile* (pension fund for civil aviation flight crews), of Messrs [G] [F], [P] [I], [D] [A], [X] [T], of the National Syndicate of Airline Pilots [2], of [6] and of the Job Centre agency, the observations of SCP Spinosi, lawyer of the *Fédération de l'équipement, de l'environnement, des transports et des services de force travail* (equipment, environment, transport and services federation), and the submissions of Mr Lagauche, advocate-general, the lawyers having had the floor last, after deliberations in the public hearing of 19 September 2023 attended by Mr Bonnal, president, Mr Maziau, judge-rapporteur, Ms Labrousse, chamber judge, and Ms Boudalia, Chamber Registrar,

the criminal chamber of the *Cour de cassation* (Court of Cassation), composed of the above-mentioned President and judges pursuant to Article 567-1-1 of the Criminal Procedure Code, after having deliberated in accordance with the law, has delivered the present ruling.

Account of the dispute

Facts and Procedure

1. The following results from the ruling under appeal and the documents of the proceedings.
2. On 16 October 2009, the OCLTI (Central Office for Combating Illegal Employment) sent the Public Prosecutor an official transcript stating that the company [5] had set up an establishment at the airport of [Town/City 4] in [Town/City 3], where four of its aircraft were based.
3. In the official transcript, the OCLTI noted that the company [5] had not registered its establishment with the Trade Register (RCS) and had not declared the employees it had hired to URSSAF.
4. Two trade unions also filed a complaint claiming that the company [5] had carried on its business in French territory with the assistance of around one hundred employees, and avoiding labour legislation.
5. In turn, the Civil Aviation Staff Pension Fund filed a complaint arguing that the company's staff [5] were affiliated to the Irish insurance scheme when they should have been affiliated to its scheme.
6. At the end of the preliminary investigation, an investigation was opened under the supervision of an investigating judge (juge d'instruction) on 8 April 2010 on charges of concealed employment, unlawful provision of workers, obstructing the operation of staff representative bodies and unlawful employment of flight crew.
7. The Investigating Judge ordered that the company [5] be referred to the Criminal Court for offences committed from 2007 to 2010.
8. By judgement of 2 October 2013, the Criminal Court found the company [5] guilty of all the acts of which it was accused, ordered it to pay a fine of 200,000 euros and ruled on the civil action.
9. The company [5] appealed against said decision. The public prosecutor lodged a cross-appeal.

[...]

Pleas

On the fourth plea

Statement of plea

34. The plea objects to the ruling under appeal for declaring the company [5] guilty of the offence of obstructing the functions of the health, safety and working conditions committee, the works council and staff representatives, and the exercise of trade union rights, and then ordered it to pay a fine of 200,000 euros and to compensate the civil parties, whereas:

"1. The law of the employment contract, chosen by the parties, can only be set aside as far as staff representation is concerned if it deprives employees of the protection afforded to them by the provisions of the law that would apply to them, in the absence of choice, by virtue of the Rome Convention of 19 June 1980 on the law applicable to contractual obligations; by virtue of the principle of the presumption of innocence, the burden of proving the constituent elements of the offence lies with the prosecuting party; in deciding nevertheless that the Company [5] did not demonstrate that the employees had the freedom to form trade unions in accordance with Irish trade union law and to contact Irish trade unions, the offence of obstructing staff representative bodies and the exercise of trade union rights was characterised, the *cour d'appel* (Court of Appeal), which reversed the burden of proof and disregarded the principle of the presumption of innocence violated Articles 6 § 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Preliminary, 427 and 593 of the Criminal Procedure Code, together with Articles 3 and 6 of the Rome Convention of 19 June 1980 on the law applicable to contractual obligations, L 2141-4, L 2141-9, L 2146-1, L 2316-1, L 2322-1 and L 2322-4, in their tenor prior to Law No. 2012-387 of 22 March 2012, L 2328-1 and L 4742-1 of the Labour Code;

2. The law of the employment contract, chosen by the parties, can only be set aside as far as staff representation is concerned if it deprives employees of the protection afforded to them by the provisions of the law that would apply to them, in the absence of choice, by virtue of the Rome Convention of 19 June 1980 on the law applicable to contractual obligations; unless the rule is deprived of all scope, the mere physical distance of the employee from the headquarters of the staff representative institutions does not characterise an impossibility of benefiting effectively from the support of those institutions; in deciding nevertheless that, as the staff representative institutions of the Company [5] were located in Ireland, the flight crew attached to the site at [Town/City 4] could not, because of the distance, benefit from their support, in order to deduce that the Company [5] had committed the offence of obstructing the staff representative institutions and the exercise of trade union rights, the *cour d'appel* (Court of Appeal) violated Articles 3 and 6 of the Rome Convention of 19 June 1980 on the law applicable to contractual obligations, L 2141-4, L 2141-9, L 2146-1, L 2316-1, L 2322-1 and L 2322-4, in their tenor prior to Law No. 2012-387 of 22 March 2012, L 2328-1 and L 4742-1 of the Labour Code."

Court's response

35. According to Article 27 of the Charter of Fundamental Rights of the European Union, workers or their representatives must at the appropriate levels, be guaranteed information and consultation in good time in the cases and under the conditions provided for by Union law and national laws and practices.

36. The CJEU has ruled that, under the terms of Article 5 of Directive 2002/14 of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community, Member States may commission the employer and the employee's representatives, at the appropriate level, with the task of freely defining, at any time and by means of a negotiated agreement, the channels for informing and consulting employees. It points out that the existence

of differences between the Member States, and even within one and the same Member State, as regards the channels for informing and consulting employees referred to in Directive 2002/14, cannot be ruled out since the latter leaves a wide margin of discretion to the Member States and the social partners as regards the definition and implementation of those channels (CJEU, judgment of 11 February 2010, *Ingeniørforeningen i Danmark*, C-405/08).

37. It can be deduced from Articles L. 2311-1 et seq. of the Labour Code, in the version applicable at the time of the facts, that any legal entity whose registered office is abroad and which, in order to carry on its business, hires employees on French territory, is responsible as an employer under French law and must apply the laws relating to employee representation at the company.

38. The *Cour de cassation* (Court of Cassation)'s case law provides that the laws relating to the representation of employees and the defence of their rights and interests are overriding mandatory rules that apply to all undertakings and similar bodies operating in France, which are therefore obliged to set up the institutions provided for in the rules at all levels of the production sectors located on national territory, where these institutions fulfil all the functions defined by the law, with the sole exception of those that would be incompatible with the head office being located abroad (*Soc.*, 3 March 1988, Appeal No. 86-60.507, Bull. 1988, V, No. 164).

39. In order to retain the offences of obstructing staff representative bodies, the ruling under appeal states that the rules on the establishment of employee representative bodies and on trade union rights are a matter of public policy.

40. The judges add that the company [5] had a base at [Town/City 4] airport, with one hundred and twenty-seven permanent employees working in a stable situation.

41. They state that, given in particular the scale of the infrastructure in question, i.e. between two and four aircraft, 300 square metres of premises, the number of employees concerned could not be fewer than fifty under any circumstances, regardless of the strategy used by the respondent company to conceal the situation.

42. They note that the conditions were met, at the base of [5] in [Town/City 4], for setting up a works council, a health, safety and working conditions committee and staff representatives.

43. They conclude that the material element of the offences had been established for the entire period of prevention, while the moral element could necessarily be deduced from the voluntary nature of the acts observed, as the company [5] had always refused to apply French legislation in this area and had refused to comply with the requests it had received from the employees' unions.

44. They state that company [5] could not argue, in the absence of proof of its feasibility, that the employees were free to form trade unions in accordance with Irish trade union law and to contact Irish trade unions.

45. They point out that in terms of employee representation, French and European laws lay down the fundamental rule that the framework for exercising the powers of employee representatives must be as close as possible to the employee community, in particular as regards the defence of their rights.

46. They deduced from this that the flight crew attached to the [Town/City 4] site worked and lived in France and that it was therefore impossible for them to benefit effectively from staff representative bodies in Ireland, so that the elements constituting the offence of obstruction were present.

47. In making this determination, on the basis of its sovereign assessment of the evidence presented in the adversarial proceedings, the *cour d'appel* (Court of Appeal), which did not reverse the burden of proof or infringe the principle of the presumption of innocence, justified its decision on the following grounds.

48. On the one hand, the employees of a company with its registered office in another Member State of the European Union who are permanently employed at a company in France, as defined in Articles L. 1262-3 of the Labour Code and R. 330-2-1 of the Civil Aviation Code, in the versions applicable at the time of the facts, have the right to be represented at

the most appropriate level. Such a level is the State in which the employees are actually employed.

49. On the other hand, the offences of obstructing employee representative bodies are characterised both by the failure to set up these bodies and by deliberate and repeated actions or abstentions of the company designed to prevent its employees working at the bases in [Town/City 4] [Town/City 3] from having their representatives on French territory.

50. The plea, which is irrelevant in that it objects to the *cour d'appel* (Court of Appeal) having held, on superfluous grounds, that the company [5] had not demonstrated the feasibility of representation in Ireland of the employees hired in France, must be rejected.

51. Moreover, the ruling is procedurally correct.

ON THESE GROUNDS, the Court:

DISMISSES the appeal;

SETS the amount the company [5] has to pay to URSSAF PACA at 2,500 euros, pursuant to Article 618-1 of the Criminal Procedure Code;

SETS the total sum the company [5] has to pay to the parties represented by SCP Lyon-Caen and Thiriez, lawyer to the Court, at 2,500 euros, pursuant to Article 618-1 of the Criminal Procedure Code;

SETS the sum the company [5] has to pay to the *Fédération de l'équipement, de l'environnement, des transports et des services force ouvrière* (equipment, environment, transport and services federation) at 2,500 euros, pursuant to Article 618-1 of the Criminal Procedure Code;

Thus decided by the criminal chamber of the *Cour de cassation* (Court of Cassation) and pronounced by the president at the public hearing of the seventeenth day of the month of October of the year two thousand and twenty-three.

President : Mr Bonnal

Advocate-general : M. Lagauche

Judge : M. Maziau

Lawyer(s) : SCP Richard – SCP Gatineau, Fattaccini and Rebeyrol – SCP Lyon-Caen
and Thiriez – SCP Spinosi

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