Calculation of paid leave and European Union law: the employee may claim paid leave in respect of his period of eviction in the event of null dismissal, except when he was engaged in another employment during that period

01/12/2021

Ruling of 1 December 2021, appeal nos. 19-24.766, 19-26.269, 19-25.812

Dismissal and partial quashing

RULING OF THE SOCIAL CHAMBER OF 1 DECEMBER 2021, APPEAL NOS. 19-24.766, 19-26.269, 19-25.812

By ruling of 25 June 2020 (CJEU, ruling of 25 June 2020, Varhoven kasatsionen sad na Republika Bulgaria, C-762/18 and Iccrea Banca, C-37-19), the Court of Justice of the European Union ruled that Article 7, §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 precluding national case-law under by virtue of which a worker who was unlawfully dismissed then reinstated in his or heremployment, in accordance with national law, following the annulment of the dismissal by a decision of a court, is not entitled to paid annual leave for the period between the date of the dismissal and the date of the reinstatement in his of her employment, on the ground that, during that period, that worker did not actually carry out work for the employer. As a result, except when the employee has held another job during the period between the date of the invalid dismissal and the date of reinstatement in their employment, they may claim their rights to paid leave for this period pursuant to the provisions of Articles L. 3141-3 and L. 3141-9 of the Labour Code. Consequently, a ruling must be quashed which, in order to dismiss the employee's request that the employer be ordered to pay them remuneration for each month elapsed between their dismissal from the company and their reinstatement, together with the related paid leave, holds that the period between their dismissal and their reinstatement does not give rise to a right to acquire days of leave

COUR DE CASSATION (COURT OF CASSATION)

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Public hearing on 1 December 2021

Dismissal and partial quashing

Mr CATHALA, President

Ruling No. 1388 FP-B+R

Appeal nos.

N 19-24.766

W 19-26.269

Z 19-25.812 JOINED

F R E N C H R E P U B L I C

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IN THE NAME OF THE FRENCH PEOPLE

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RULING OF THE *COUR DE CASSATION* (COURT OF CASSATION), SOCIAL CHAMBER, OF 1 DECEMBER 2021

1. - Mr [O] [T], domiciled at [Address 2], lodged appeal nos. N 19-24.766 and W 19-26.269 against a ruling delivered on 25 September 2019 by the *cour d'appel* (Court of appeal) of Paris (Division 6, Chamber 9), in the dispute between him and Frost & Sullivan Limited, a company incorporated under English law, whose registered office is at [Location 3] (United Kingdom), at its place of business at [Address 1], respondent to the quashing.
2. - Frost & Sullivan Limited lodged appeal no. Z 19-25.812 against the same ruling delivered between the same parties,

In support of the cited appeal nos. N 19-24.766 and W 19-26.269, the appellant relies on the six identical pleas for quashing appended to this ruling.

The appellant, in appeal no. Z 19-25.812 cites the single plea for quashing in support of its appeal, and this plea is appended to this ruling.

The files have been sent to the Prosecutor-General.

On the report of Ms Capitaine, Judge, the observations of SCP Lyon-Caen and Thiriez, lawyer for Mr [T], of SCP Rousseau and Tapie, lawyer for Frost & Sullivan Limited, the pleadings of Mr Lyon-Caen, and the opinion of Ms Berriat, First Advocate-General, after the arguments at the public hearing of 14 October 2021 at which were present Mr Cathala, President, Ms Capitaine, Reporting Judge, Mr Huglo, Elder Judge, Ms Farthouat-Danon, Mr Schamber, Ms Mariette, Mr Rinuy, Mr Ricour, Mr Pietton, Ms Cavrois, Ms Pécaut-Rivolier, Ms Monge, Ms Le Lay, Judges, Mr Silhol, Ms Ala, Ms Prache, Ms Chamley-Coulet, Judge Referees, Ms Berriat, First Advocate-General, and Ms Piquot, Chamber Registrar,

the Social Chamber of the *Cour de cassation* (Court of cassation), composed, pursuant to Articles R. 421-4-1 et R. 431-5 of the Judicial Code, the aforementioned President and Judges, after having deliberated in accordance with the law, has rendered the present ruling.

Joining

1. Because of their connection, appeal nos. N 19-24.766, W 19-26.269 and Z 19-25.812 are joined.

Facts and procedure

2. According to the ruling under appeal (Paris, 25 September 2019), ruling on remand after quashing (Social Chamber, 6 October 2017, appeal no. 16-17.164), Mr [T], hired on 5 November 2008 as principal consultant for France, by Frost & Sullivan Limited (the company), and then from the amendment of 31 January 2011 for the sole activities of principal consultant, was the victim of a workplace accident on 24 June 2010 and was placed on sick leave until the following 5 July.
3. He was dismissed for professional incompetence on 10 August 2012.
4. Challenging his dismissal, he brought an action before the labour court.

Reviewing pleas

On the first, third, fourth, fifth and sixth pleas in appeal nos. N 19-24.766 and W 19-26.269, and on the plea in appeal no. Z 19-25.812, appended hereafter

5. Pursuant to Article 1014, section 2 of the Civil Procedure Code, there is no need to rule by a specially reasoned decision on these pleas, which are clearly not of a nature to lead to quashing.

But on the second plea in appeal nos. N 19-24.766 and W 19-26.269

Statement of plea

6. The employee objected to the ruling in that it dismissed his request that the company be ordered to pay him a remuneration of EUR. 8,491.66 for each month between his dismissal from the company and his reinstatement, together with the related paid leave, whereas "what is set aside is deemed never to have existed and the setting

aside requires re-establishing the status quo ante. By affirming that the period between dismissal and reinstatement did not give rise to the right to acquire days of paid leave after having noted that the employee's dismissal had to be set aside, which meant that he was entitled to request payment of all the sums and rights he would have benefited from had he not been dismissed, including his wages and the related days of paid leave, the *cour d'appel* (Court of Appeal) violated Article 1101 of the Civil Code, together with Article L. 1226-13 of the Labour Code. "

Court's response

Having regard to Articles L. 1226-9 and L. 1226-13 of the Labour Code:

7. According to the first of these texts, during periods of suspension of the employment contract, the employer may only terminate the contract if it can justify either serious misconduct on the part of the person concerned or their inability to maintain the contract for a reason unrelated to the accident or illness.
8. According to the second of these texts, any termination of the employment contract pronounced that infringes on the provisions of Articles L. 1226-9 and L. 1226-18 is null and void.
9. The *Cour de cassation* (Court of cassation) has ruled that since the period between dismissal and reinstatement entitles the employee not to an acquisition of days of leave but to an indemnity for the period between dismissal and reinstatement, the employee could not effectively benefit from days of leave for this period (Social Chamber, 11 May 2017, appeal no. 15-19.731, 15-27.554, Bull. 2017, V, no. 73; see also Social Chamber, 30 January 2019, appeal no. 16-25.672). It also ruled that an employee whose dismissal is null and void and who requests their reinstatement is entitled to the payment of a sum corresponding to the compensation of the totality of the damage incurred during the period between their dismissal and their reinstatement within the limit of the wages of which they were deprived and that they cannot acquire days of leave during this period (Social Chamber, 28 November 2018, appeal no. 17-19.004).
10. However, the Court of Justice of the European Union, in its ruling of 25 June 2020 (CJEU, 25 June 2020, Varhoven kasatsionen sad na Republika Bulgaria, case C-762/18 and Iccrea Banca, case C-37-19), ruled that Article 7, paragraph 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 precluding*national case-law under by virtue of which a worker who was unlawfully dismissed then reinstated in his or her employment, in accordance with national law, following the annulment of the dismissal by a decision of a court, is not entitled to paid annual leave for the period between the date of the dismissal and the date of the reinstatement in his of her employment, on the ground that, during that period, that worker did not actually carry out work for the employer.*
11. The Court of Justice clarified in this decision that, according to the Court's establishedcase-law, the right to annual leave, enshrined in Article 7 of Directive 2003/88, has a dual purpose of enabling the worker both to rest from carrying out the work he is required to do under his contract of employment and to enjoy a period of relaxation and leisure (ruling of 20 July 2016, Maschek, C-341/15, EU:C:2016:576, point 34 and cited case-law) (point 57).
12. That purpose, which distinguishes paid annual leave from other types of leave having different purposes, is based on the premiss that the worker actually worked during the reference period. The objective of allowing the worker to rest presupposes that the worker has been engaged in activities which justify, for the protection of his safety and health, as provided for in Directive 2003/88, his being given a period of rest, relaxation and leisureAccordingly, entitlement to paid annual leave must, in principle, be determined by reference to the periods of actual work completed under the employment contract (ruling of 4 October 2018, Dicu, C-12/17, EU:C:2018:799, point 28 and the cited case-law) (point 58).

13. However, in certain specific situations in which the worker is unable to perform his duties as he is, for instance, on duly certified sick leave, the right to paid annual leave cannot be made subject by a Member State to a condition that the worker has actually worked (see, to that effect, the ruling of 24 January 2012, Dominguez, C-282/10, EU:C:2012:33, point 20, and the cited case-law) (point 59).
14. This is particularly the case for workers who are absent from work due to sick leave during the reference period. Indeed, as is clear from the case-law of the Court, with regard to entitlement to paid annual leave, workers who are absent from work on sick leave during the reference period are to be treated in the same way as those who have in fact worked during that period (ruling of 4 October 2018, Dicu, C-12/17, EU:C:2018:799, point 29, and the cited case-law) (point 60).
15. It must be noted that, like the occurrence of incapacity for work due to illness, the fact that a worker has been deprived of the possibility of working because of a dismissal subsequently deemed unlawful is, in principle, unforeseeable and beyond the worker's control (point 67).
16. Therefore, the period between the date of the unlawful dismissal and the date of the reinstatement of the worker in their job, in accordance with domestic law, following the setting aside of that dismissal by a judicial decision, must be treated as a period of actual work for the purposes of determining entitlement to paid annual leave (point 69).
17. Finally, it should be noted that, if the worker concerned has taken up another job during the period between the date of the unlawful dismissal and the date of their reinstatement in their first job, they cannot claim, with regard to their first employer, the annual leave entitlements corresponding to the period during which they took up another job (points 79 and 88).
18. It now follows that, except when the employee has held another job during the period between the date of the null and void dismissal and the date of reinstatement in their job, they can claim their rights to paid leave for this period pursuant to the provisions of Articles L. 3141-3 and L. 3141-9 of the Labour Code.
19. By rejecting the employee's request that the company be ordered to pay him remuneration for each month between his dismissal from the company and his reinstatement, together with the related paid leave, the ruling held that the monthly salary to be taken into consideration for calculating the compensation for the period between dismissal and reinstatement amounted to EUR. 8,491.66, i.e. the average compensation received by the employee concerned prior to the termination of the contract, and that the period between dismissal and reinstatement did not give rise to the right to acquire days of leave.
20. In so ruling, the *cour d'appel* (Court of Appeal) infringed the above-mentioned texts.

Scope and consequences of the quashing

21. The quashing pronounced (on the second plea of appeal nos. N 19-24.766 and W 19-26.269) does not entail quashing of the operative parts of the ruling ordering the employer to pay costs as well as a sum under Article 700 of the Civil Procedure Code, which are justified by other decisions pronounced against the employer and not challenged.

ON THESE GROUNDS, the Court:

DISMISSES appeal no. Z 19-25.812;

QUASHES AND SETS ASIDE, but only insofar as it limits Mr [T]'s request concerning paid leave related to the indemnity for the period between dismissal and reinstatement, the

ruling of the Paris *cour d'appel* (Court of Appeal) of 25 September 2019, between the parties;

Returns, on this point, the case and the parties to the status existing prior to the said ruling and refers them to the Paris *cour d'appel* (Court of Appeal), otherwise composed;

Orders Frost & Sullivan Limited to pay costs;

Pursuant to Article 700 of the Civil Procedure Code, dismisses the requests formulated by Frost & Sullivan Limited and orders it to pay the sum of EUR. 3,000 to Mr [T];

Declares that according to the procedures of the Prosecutor-General at the *Cour de cassation* (Court of cassation), this ruling will be transmitted to be noted in the margin or at the end of the partially quashed ruling;

Thus decided by the *Cour de cassation* (Court of cassation), Social Chamber, and pronounced by the President at the public hearing of the first of December, two thousand twenty-one.

PLEAS APPENDED to this ruling

Identical pleas submitted in appeal nos. N 19-24.766 and W 19-26.269 by SCP Lyon-Caen and Thiriez, Supreme Court Lawyer, for Mr [T].

FIRST PLEA FOR QUASHING

The objection to the ruling under appeal concerns ordering FROST & SULLIVAN LIMITED to pay Mr [T] an indemnity for the period between dismissal on 15 November 2012 and the date of his reinstatement, from which the totality of the salaries and replacement income received by the employee between his dismissal and his reinstatement must be deducted, for which it will be up to him to provide the employer with proof within a period of two months following the notification of the ruling to allow enforcement;

ON THE GROUNDS THAT: "( ). If the dismissal is null and void, whatever the cause, the employee is entitled to claim reinstatement in his job or, failing that, in an equivalent job. The employer is only released from this obligation to reinstate if the company is no longer in operation or if it is absolutely impossible to do so. The employer qualifying the request for reinstatement made by the employee as shocking, and moreover only a few months after the termination of the employment contract, cannot constitute such an obstacle. The financial difficulties invoked by Frost & Sullivan Limited, both within the company and within the group to which it belongs, and the future consequences, qualified as irreversible of a possible decision by the court in favour of Mr [T], also cannot constitute such an obstacle. Since Mr [T]'s dismissal was set aside because it was notified during a period of suspension of the employment contract which had not ended due to the absence of a reinstatement visit and not because of a violation of a constitutional right, he is entitled to payment of a sum up to the amount of the wages of which he was deprived, after deduction of income from another activity and of the replacement income paid to him during the period between the dismissal and reinstatement. Mr [T] claims not to have found a new job. However, on the curriculum vitae posted by the person concerned on an online site accessible to all, in this case Viadeo, which is defined as a professional social network designed to facilitate dialogue between professionals, it appears that he was hired in 2015 as a business unit manager at Greenflex. Mr [T] also produced a certificate from this company establishing a period of employment from 16 January to 26 April 2017, which partly contradicts his claim of total inactivity during the period between dismissal and reinstatement. It is also clear from the Pôle Emploi [French national employment agency] documents for the period from 11 January 2013, the date on which compensation began, to 10 January 2015 that Mr [T] received back-to-work benefits amounting to EUR. 116,508. The tax returns also show that in 2015, the person concerned received a total of EUR. 5,970 in salaries or similar income, whereas he was only compensated for back-to-work benefits until 10 January 2015 and for EUR. 1,596, for 2016 a total of EUR. 13,227, and finally for 2017 a total of EUR. 26,833, and for 2018 no income was declared. It should therefore be

retained in the statement of replacement income for a total amount of EUR. 160,942 until 31 December 2018. It will be up to Mr [T], in the context of the recovery of the indemnity for the period between dismissal and reinstatement, to justify, in order to deduct them, in addition to the aforementioned sums, all the salaries and replacement income received as of 15 November 2012 and until his reinstatement. The monthly salary to be taken into consideration for calculating the indemnity for the period between dismissal and reinstatement amounts to EUR. 8,491.66, i.e. the average remuneration received by the person concerned before the termination of the contract and which is not subject to any particular dispute, even subsidiary, by the employer. On the other hand, since the period between dismissal and reinstatement does not give rise to the right to acquire days of leave, the monthly salary will not be increased, as Mr [T] requests, by an indemnity in lieu of paid leave. With regard to the requests for "summons to a medical examination by the occupational physician" and "re-enrolment in the company's mutual insurance scheme", it is up to the company to reinstate the employee in compliance with its legal and regulatory obligations, without the need for a penalty payment to be justified. As regards the requests for "upgrading of salary and classification" and "setting up a training programme to make up for the training not carried out since his dismissal", the evidence produced, the circumstances of the case and the vagueness of the claims do not allow the court to place obligations on the employer company that can be determined as they stand, therefore these requests will be dismissed. The claim for "lump-sum catch-up of general salary increases within the company between the dismissal from the company (14/11/2012) and the reinstatement", which is based solely on the summons to communicate made to Frost & Sullivan Limited (exhibit no. 96), is not sufficiently justified and will therefore be dismissed ()".

1. WHEREAS, what is null and void is deemed never to have existed and setting aside requires the status quo ante to be re-established. After having judged that Mr [T]'s dismissal on 15 November 2012 was null and void, by holding that it was necessary to deduct the income from another activity and the replacement income paid to him during the period between the dismissal and the reinstatement from the amount of the salaries of which Mr [T] had been deprived, the *cour d'appel* (Court of Appeal) infringed the above-mentioned principle, Article 1101 of the Civil Code, in its current formulation, together with Article L. 1226-13 of the Labour Code;
2. WHEREAS, IN ANY EVENT, when the dismissal pronounced by an employer is null and void, as characterising an infringement of the right to the protection of health, guaranteed by section 11 of the Preamble of the French Constitution of 27 October 1946, to which the Preamble of the French Constitution of 4 October 1958 refers, an employee who requests reinstatement is entitled to payment of an indemnity equal to the amount of remuneration that they should have received between their dismissal and the judgment ordering their reinstatement, regardless of whether or not they received wages or replacement income during this period. In this case, after having ruled that Mr [T]'s dismissal had to be declared null and void as it was pronounced in disregard of the protective provisions of Articles L. 1226-9 and L. 1226-13 of the Labour Code intended to ensure the protection of the health of employees who are victims of an accident at work or an occupational disease, the*cour d'appel* (Court of Appeal) considered that it was appropriate to deduct the income drawn from another activity and the replacement income which was paid to him during the period between the dismissal and the reinstatement from the amount of the wages of which he had been deprived, since the dismissal had been set aside during a period of suspension of the employment contract and not for infringement of a right of a constitutional nature. In so ruling, although the provisions relating to periods of suspension of the employment contract are intended to ensure the protection of the health of employees, a right of a constitutional nature, the*cour d'appel* (Court of Appeal) infringed Articles L. 1121-1 and L. 1226-13 of the Labour Code, together with section 11 of the Preamble to the Constitution of 27 October 1946, to which the Preamble to the French Constitution of 4 October 1958 refers.

3. WHILE IN THE FURTHER ALTERNATIVE, the *cour d'appel* (Court of Appeal) stated that a global amount of EUR. 160,942 should be retained in the statement of replacement income until 31 December 2018, while in its written

submissions, Frost & Sullivan Limited had not claimed any amount to be deducted, arguing on the contrary that the Pôle Emploi statements were unusable and that no document made it possible to calculate the extent of the income received by Mr [T] during the period between his dismissal and his reinstatement. In so ruling, the*cour d'appel* (Court of Appeal), which altered the nature of the terms of the dispute, infringed Articles 4 and 5 of the Civil Procedure Code.

4. WHEREAS AT THE VERY LEAST, the *cour d'appel* (Court of Appeal) retained ex officio a statement of replacement income for a total amount of EUR. 160,942 until 31 December 2018 and after having noted that at the hearing, the parties had orally supported their submissions and that it was not apparent from the submissions of Frost & Sullivan Limited that it had claimed an amount to be deducted on the basis of the*Pôle Emploi* statements, which it had, on the contrary, emphasised were unusable and that there was no document of a nature to allow the calculation of the income received during the period between dismissal and reinstatement. In so ruling, the*cour d'appel* (Court of Appeal), which raised this argument on its own motion, without having first heard the parties' observations in this regard, infringed Article 16 of the Civil Procedure Code.

SECOND PLEA FOR QUASHING

The objection to the ruling under appeal concerns the dismissal of Mr [T]'s claim that Frost & Sullivan Limited should be ordered to pay him remuneration of EUR. 8,491.66 for each month between his dismissal from the company and his reinstatement, together with the related paid leave;

ON THE GROUNDS THAT: "( ) If the dismissal is null and void, whatever the cause, the employee is entitled to claim reinstatement in their job or, failing that, in an equivalent job. The employer is only released from this obligation to reinstate if the company is no longer in operation or if it is absolutely impossible to do so. The employer qualifying the request for reinstatement made by the employee as shocking, and moreover only a few months after the termination of the employment contract, cannot constitute such an obstacle. The financial difficulties invoked by Frost & Sullivan Limited, both within the company and within the group to which it belongs, and the future consequences, qualified as irreversible of a possible decision by the court in favour of Mr [T], also cannot constitute such an obstacle. Since Mr [T]'s dismissal was set aside because it was notified during a period of suspension of the employment contract which had not ended due to the absence of a resumption visit and not because of a violation of a constitutional right, he is entitled to payment of a sum up to the amount of the wages of which he was deprived, after deduction of income from another activity and of the replacement income paid to him during the period between the dismissal and reinstatement. Mr [T] claims not to have found a new job. However, on the curriculum vitae posted by the person concerned on an online site that is publicly accessible, in this case Viadeo, which is defined as a professional social network designed to facilitate dialogue between professionals, it appears that he was hired in 2015 as a business unit manager at Greenflex. Mr [T] also produced a certificate from this company establishing a period of employment from 16 January to 26 April 2017, which partly contradicts his claim of total inactivity during the period between dismissal and reinstatement. It is also clear from the Pôle Emploi documents for the period from 11 January 2013, the date on which compensation began, to 10 January 2015 that Mr [T] received back-to-work benefits amounting to EUR. 116,508. The tax returns also show that in 2015, the person concerned received a total of EUR. 5,970 in wages or similar income, whereas he was only compensated for back-to-work benefits until 10 January 2015 and for EUR. 1,596, for 2016 a total of EUR. 13,227, and finally for 2017 a total of EUR. 26,833, and for 2018 no income was declared. It should therefore be retained in the statement of replacement income for a total amount of EUR. 160,942 until 31 December 2018. It will be up to Mr [T], in the context of the recovery of the indemnity for the period between dismissal and reinstatement, to justify, in order to deduct them, in addition to the aforementioned sums, all the salaries and replacement income received as of 15 November 2012 and until his reinstatement. The monthly salary to be taken into consideration for calculating the indemnity for the period between dismissal and reinstatement amounts to EUR. 8,491.66, i.e. the average remuneration received by the person concerned before the termination of the contract and which is not subject to any particular dispute, even of a subsidiary nature, by the employer. On the other hand, since the period from dismissal to reinstatement does not give rise to the right to acquire days of leave, the monthly salary will not be increased, as Mr [T] requests, by an indemnity in lieu of paid leave.

With regard to the requests for "summons to a medical examination by the occupational physician" and "re-enrolment in the company's mutual insurance scheme", it is up to the company to reinstate the employee in compliance with its legal and regulatory obligations, without the need for a penalty payment to be justified. As regards the requests for "upgrading of salary and classification" and "setting up a training programme to make up for the training not carried out since his dismissal", the evidence produced, the circumstances of the case and the vagueness of the claims do not allow the court to place obligations on the employer company that can be determined as they stand, therefore these requests will be dismissed. The claim for "lump-sum catch-up of general salary increases within the company between the dismissal from the company (14/11/2012) and the reinstatement", which is based solely on the summons to communicate made to Frost & Sullivan Limited (exhibit no. 96), is not sufficiently justified and will therefore be dismissed ()".

WHEREAS what is set aside is deemed never to have existed and setting aside requires the status quo ante to be restored. By affirming that the period between dismissal and reinstatement did not give rise to the right to acquire days of paid leave after having noted that Mr [T]'s dismissal had to be set aside, which meant that he was entitled to request payment of all the sums and rights he would have benefited from if he had not been dismissed, including his wages and the related days of paid leave, the *cour d'appel* (Court of Appeal) infringed Article 1101 of the Civil Code, together with Article L. 1226-13 of the Labour Code.

THIRD GROUND FOR QUASHING

The objection to the ruling under appeal concerns its stating that the indemnity for the period between dismissal and reinstatement will bear interest at the legal rate from the date of the present ruling;

ON THE GROUNDS THAT: "() If the dismissal is null and void, whatever the cause, the employee is entitled to claim reinstatement in his job or, failing that, in an equivalent job. The employer is only released from this obligation to reinstate if the company is no longer in operation or if it is absolutely impossible to do so. The employer qualifying the request for reinstatement made by the employee as shocking, and moreover only a few months after the termination of the employment contract, cannot constitute such an obstacle. The financial difficulties invoked by Frost & Sullivan Limited, both within the company and within the group to which it belongs, and the future consequences, qualified as irreversible of a possible decision by the court in favour of Mr [T], also cannot constitute such an obstacle. Since Mr [T]'s dismissal was set aside because it was notified during a period of suspension of the employment contract which had not ended due to the absence of a reinstatement visit and not because of a violation of a constitutional right, he is entitled to payment of a sum up to the amount of the wages of which he was deprived, after deduction of income from another activity and of the replacement income paid to him during the period between the dismissal and reinstatement. Mr [T] claims not to have found a new job. However, on the curriculum vitae posted by the person concerned on an online site that is publicly accessible, in this case Viadeo, which is defined as a professional social network designed to facilitate dialogue between professionals, it appears that he was hired in 2015 as a business unit manager at Greenflex. Mr [T] also produced a certificate from this company establishing a period of employment from 16 January to 26 April 2017, which partly contradicts his claim of total inactivity during the period between dismissal and reinstatement. It is also clear from the Pôle Emploi documents for the period from 11 January 2013, the date on which compensation began, to 10 January 2015 that Mr [T] received back-to-work benefits amounting to EUR. 116,508. The tax returns also show that in 2015, the person concerned received a total of EUR. 5,970 in wages or similar income, whereas he was only compensated for back-to-work benefits until 10 January 2015 and for EUR. 1,596, for 2016 a total of EUR. 13,227, and finally for 2017 a total of EUR. 26,833, and for 2018 no income was declared. It should therefore be retained in the statement of replacement income for a total amount of EUR. 160,942 until 31 December 2018. It will be up to Mr [T], in the context of the recovery of the indemnity for the period between dismissal and reinstatement, to justify, in order to deduct them, in addition to the aforementioned sums, all the salaries and replacement income received as of 15 November 2012 and until his reinstatement. The monthly salary to be taken into consideration for calculating the indemnity for the period between dismissal and reinstatement amounts to EUR. 8,491.66, i.e. the average remuneration received by the person concerned before the termination of the contract and which is not subject to any particular dispute, even of a subsidiary nature, by the employer. On the other hand, since the period from dismissal to reinstatement does not give rise to the right to acquire days of leave, the monthly salary will not be increased, as Mr [T] requests, by an indemnity in lieu of paid leave.

With regard to the requests for "summons to a medical examination by the occupational physician" and "re-enrolment in the company's mutual insurance scheme", it is up to the company to reinstate the employee in compliance with its legal and regulatory obligations, without the need for a penalty payment to be justified. As regards the requests for "upgrading of salary and classification" and "setting up a training programme to make up for the training not carried out since his dismissal", the evidence produced, the circumstances of the case and the vagueness of the claims do not allow the court to place obligations on the employer company that can be determined as they stand, therefore these requests will be dismissed. The claim for a "lump-sum catch-up of general salary increases within the company between the dismissal from the company (on 14/11/2012) and the reinstatement", which is based solely on the summons to communicate made to Frost & Sullivan Limited (exhibit no. 96), is not sufficiently justified and will therefore be dismissed. On the other claims: Beyond his assertion that the warnings and the dismissal for insufficient results had deeply affected him psychologically, no evidence was produced to justify the existence of "psychological consequences" that continue today because of the ongoing legal proceedings and the employer's behaviour, from which there is nothing to show that it prevented him from finding a job. It should also be noted that Mr [T] was employed by Greenflex from at least 16 January to 26 April 2017. As well it should be noted that the manner in which Frost & Sullivan Limited obtained the curriculum vitae posted by Mr [T] was not irregular and wrongful, it being further observed that the company was guided by a legitimate concern to prove that, contrary to the employee's claim, he had at least on one occasion found a job. Mr [T]'s request for compensation for non-material damage will therefore be dismissed. With regard to the claim for compensation for the alleged tax loss, it is not clear from the evidence submitted that the loss resulting from the deferral of taxation of the sums to be received by the employee in execution of the present decision is certain. The claim on this count will therefore be dismissed. The request for the company to hand over social documents, which are not specified, but which usually consist of the statement intended for Pôle Emploi and the work certificate, is, under the conditions of the present proceedings which aim at the resumption of the employment contract, unfounded. On the other hand, the request for a pay slip summarising the sums to be paid to Mr [T] in execution of this ruling should be granted. The penalty payment, the necessity of which is not justified, will not be ordered. If a labour court can by exception reserve the assessment of a penalty payment which the law attributes to the enforcement judge, it cannot on the other hand derogate from the competence of the latter set by Article L. 213-6 of the Judicial Code and Article R. 121-1 of the Civil Execution Proceedings Code as regards the other conditions related to the future execution of the present decision. This request will also be rejected. The circumstances of the present case do not justify a derogation from the provisions of Articles 1231-6 and 1231-7 of the Civil Code, pursuant to which compensation claims bear interest at the legal rate from the date of the decision establishing the principle and the amount. It should therefore be held that the amounts allocated shall bear interest from the date of this ruling. The interest due will produce interest from the day of the request expressly presented in the first instance, as long as it is due for at least a whole year, in accordance with the provisions of Article 1343-2 of the Civil Code.

1. WHEREAS, by application of the provisions of Article 624 of the Civil Procedure Code, the censure that will inevitably occur in respect of the first plea will entail, consequentially, the censure of the ruling insofar as it has stated that the indemnity for the period between dismissal and reinstatement will bear interest at the legal rate from the date of the present ruling.
2. WHEREAS, in any event, pursuant to Article 1153 of the Civil Code, now Article 1231-6, wage claims bear interest at the legal rate from the day on which the employee formalises their claim; The sum allocated to an employee whose dismissal has been set aside and who requests reinstatement has, regardless of whether or not it is reduced by the amount of replacement income, the character of a wage claim and not of an indemnity. The*cour d'appel* (Court of Appeal) ruled that the indemnity for the period between dismissal and reinstatement due to Mr [T] will bear interest at the legal rate from the date of this ruling in accordance with the provisions of Articles 1231-6 and 1231-7 of the Civil Code, pursuant to which indemnity claims bear interest at the legal rate from the date of the decision establishing the principle and the amount. In so ruling, the*cour d'appel* (Court of Appeal) infringed Article 1153, which became Article 1231-6 of the Civil Code, and by misapplication of Article 1153-1, which became Article 1231-7 of the Civil Code.

3. WHEREAS, at the very least, the sum allocated to an employee whose dismissal has been set aside and who requests reinstatement has, whether or not it is reduced by the amount of replacement income, the character of a wage claim and not of an indemnity. By stating, in order to set the starting point for interest at the legal rate, that the indemnity for the period between dismissal and reinstatement had the character of an indemnity, the*cour d'appel* (Court of Appeal) infringed Article L. 242-1 of the Social Security Code, in its applicable formulation in the case.

FOURTH PLEA FOR QUASHING

The objection to the ruling under appeal concerns the dismissal of Mr [T]'s request that Frost & Sullivan Limited be ordered to bring his salary and classification up to standard and to set up a training programme to make up for the training not carried out since he was dismissed, subject to a penalty payment of EUR. 100 per day of delay at the end of a period of one month from the notification of the ruling;

ON THE GROUNDS THAT: "() If the dismissal is null and void, whatever the cause, the employee is entitled to claim reinstatement in his job or, failing that, in an equivalent job. The employer is only released from this obligation to reinstate if the company is no longer in operation or if it is absolutely impossible to do so. The employer qualifying the request for reinstatement made by the employee as shocking, and moreover only a few months after the termination of the employment contract, cannot constitute such an obstacle. The financial difficulties invoked by Frost & Sullivan Limited, both within the company and within the group to which it belongs, and the future consequences, qualified as irreversible of a possible decision by the court in favour of Mr [T], also cannot constitute such an obstacle. Since Mr [T]'s dismissal was set aside because it was notified during a period of suspension of the employment contract which had not ended due to the absence of a reinstatement visit and not because of a violation of a constitutional right, he is entitled to payment of a sum up to the amount of the wages of which he was deprived, after deduction of income from another activity and of the replacement income paid to him during the period between dismissal and reinstatement. Mr [T] claims not to have found a new job. However, on the curriculum vitae posted by the person concerned on an online site that is publicly accessible, in this case Viadeo, which is defined as a professional social network designed to facilitate dialogue between professionals, it appears that he was hired in 2015 as a business unit manager at Greenflex. Mr [T] also produced a certificate from this company establishing a period of employment from 16 January to 26 April 2017, which partly contradicts his claim of total inactivity during the period between dismissal and reinstatement. It is also clear from the Pôle Emploi documents for the period from 11 January 2013, the date on which compensation began, to 10 January 2015 that Mr [T] received back-to-work benefits amounting to EUR. 116,508. The tax returns also show that in 2015, the person concerned received a total of EUR. 5,970 in wages or similar income, whereas he was only compensated for back-to-work benefits until 10 January 2015 and for EUR. 1,596, for 2016 a total of EUR. 13,227, and finally for 2017 a total of EUR. 26,833, and for 2018 no income was declared. It should therefore be retained in the statement of replacement income for a total amount of EUR. 160,942 until 31 December 2018. It will be up to Mr [T], in the context of the recovery of the indemnity for the period between dismissal and reinstatement, to justify, in order to deduct them, in addition to the aforementioned sums, all the salaries and replacement income received as of 15 November 2012 and until his reinstatement. The monthly salary to be taken into consideration for calculating the indemnity for the period between dismissal and reinstatement amounts to EUR. 8,491.66, i.e. the average remuneration received by the person concerned before the termination of the contract and which is not subject to any particular dispute, even of a subsidiary nature, by the employer. On the other hand, since the period from dismissal to reinstatement does not give rise to the right to acquire days of leave, the monthly salary will not be increased, as Mr [T] requests, by an indemnity in lieu of paid leave. With regard to the requests for "summons to a medical examination by the occupational physician" and "re-enrolment in the company's mutual insurance scheme", it is up to the company to reinstate the employee in compliance with its legal and regulatory obligations, without the need for a penalty payment to be justified. As regards the requests for "upgrading of salary and classification" and "setting up a training programme to make up for the training not carried out since his dismissal", the evidence produced, the circumstances of the case and the vagueness of the claims do not allow the court to place obligations on the employer company that can be determined as they stand, therefore these requests will be dismissed. The claim for "lump-sum catch-up of general salary increases within the company between dismissal from the company (14/11/2012) and reinstatement", which is based solely on the summons to communicate made to

Frost & Sullivan Limited (exhibit no. 96), is not sufficiently justified and will therefore be dismissed."

1. WHEREAS when the calculation and determination of the rights due to the employees depend on elements held by the employer, the latter is required to produce them with a view to an adversarial discussion. By rejecting Mr [T]'s claim for the upgrading of his wages, his classification and the setting up of a training programme on the grounds that the elements provided by the employee did not allow the employer to be held responsible for the payment of the wages, the *cour d'appel* (Court of Appeal), which reversed the burden of proof, infringed Article 1315 of the Civil Code, which became Article 1353.
2. WHEREAS ALSO the court cannot refuse to assess the amount of damage or an obligation which it has established exists in principle. In the present case, in order to dismiss Mr [T]'s request that Frost & Sullivan Limited be ordered to upgrade his salary and classification and to set up a training programme to make up for the training not carried out from the date of his dismissal until the date of reinstatement, the *cour d'appel* (Court of Appeal) affirmed that the elements produced and the vagueness of the claims did not allow it to impose obligations on the employer that could be determined as they stood. In so ruling, without evaluating, even if only by ordering an investigation, the salary, classification and training plan to which Mr [T] could have been entitled if he had not been dismissed, the *cour d'appel* (Court of Appeal) infringed Article 4 of the Civil Code.
3. WHEREAS MOREOVER, by holding that Mr [T]'s request was imprecise, whereas he had clearly requested that his reinstatement be accompanied by the salary, classification and training from which he should have benefited if he had not been unlawfully dismissed, the *cour d'appel* (Court of Appeal), which altered the nature of his written submissions, infringed Article 4 of the Civil Procedure Code, together with the principle according to which the court is prohibited from altering the nature of the written word.
4. WHEREAS FINALLY, by affirming, in order to determine as it did, that the circumstances of the case did not allow it to place obligations on the employer that were determinable as they stood, without explaining itself on this point, the *cour d'appel* (Court of Appeal) infringed Article 455 of the Civil Procedure Code.

FIFTH PLEA FOR QUASHING

The objection to the ruling under appeal concerns the dismissal of Mr [T]'s claim that Frost & Sullivan Limited should be ordered to pay him the sum of EUR. 24,000 in respect of the lump-sum catch-up of general salary increases within the company between his dismissal and his reinstatement;

ON THE GROUNDS THAT: "() If the dismissal is null and void, whatever the cause, the employee is entitled to claim reinstatement in his job or, failing that, in an equivalent job. The employer is only released from this obligation to reinstate if the company is no longer in operation or if it is absolutely impossible to do so. The employer qualifying the request for reinstatement made by the employee as shocking, and moreover only a few months after the termination of the employment contract, cannot constitute such an obstacle. The financial difficulties invoked by Frost & Sullivan Limited, both within the company and within the group to which it belongs, and the future consequences, qualified as irreversible of a possible decision by the court in favour of Mr [T], also cannot constitute such an obstacle. Since Mr [T]'s dismissal was set aside because it was notified during a period of suspension of the employment contract which had not ended due to the absence of a reinstatement visit and not because of a violation of a constitutional right, he is entitled to payment of a sum up to the amount of the wages of which he was deprived, after deduction of income from another activity and of the replacement income paid to him during the period between the dismissal and reinstatement. Mr [T] claims not to have found a new job. However, on the curriculum vitae posted by the person concerned himself on a publicly accessible online site, in this case Viadeo, which defines itself as a professional social network designed to facilitate dialogue between professionals, it appears that he was hired in 2015 as a business unit manager within the company Greenflex. Mr [T] also produced a certificate from this company establishing a period of employment from 16 January to 26 April 2017, which partly contradicts his claim of total inactivity during the period between dismissal and reinstatement. It is also clear from the Pôle Emploi documents for the period from 11 January 2013, the date on which

compensation began, to 10 January 2015 that Mr [T] received back-to-work benefits amounting to EUR. 116,508. The tax returns also show that in 2015, the person concerned received a total of EUR. 5,970 in wages or similar income, whereas he was only compensated for back-to-work benefits until 10 January 2015 and for EUR. 1,596, for 2016 a total of EUR. 13,227, and finally for 2017 a total of EUR. 26,833, and for 2018 no income was declared. It should therefore be retained in the statement of replacement income for a total amount of EUR. 160,942 until 31 December 2018. It will be up to Mr [T], in the context of the recovery of the indemnity for the period between dismissal and reinstatement, to justify, in order to deduct them, in addition to the aforementioned sums, all the salaries and replacement income received as of 15 November 2012 and until his reinstatement. The monthly salary to be taken into consideration for calculating the indemnity for the period between dismissal and reinstatement amounts to EUR. 8,491.66, i.e. the average remuneration received by the person concerned before the termination of the contract and which is not subject to any particular dispute, even of a subsidiary nature, by the employer. On the other hand, since the period from dismissal to reinstatement does not give rise to the right to acquire days of leave, the monthly salary will not be increased, as Mr [T] requests, by an indemnity in lieu of paid leave. With regard to the requests for "summons to a medical examination by the occupational physician" and "re-enrolment in the company's mutual insurance scheme", it is up to the company to reinstate the employee in compliance with its legal and regulatory obligations, without the need for a penalty payment to be justified. As regards the requests for "upgrading of salary and classification" and "setting up a training programme to make up for the training not carried out since his dismissal", the evidence produced, the circumstances of the case and the vagueness of the claims do not allow the court to place obligations on the employer company that can be determined as they stand, therefore these requests will be dismissed. The claim for "lump-sum catch-up of general salary increases within the company between dismissal from the company (14/11/2012) and reinstatement", which is based solely on the summons to communicate made to Frost & Sullivan Limited (exhibit no. 96), is not sufficiently justified and will therefore be dismissed."

1. WHEREAS when the calculation and determination of the rights due to the employees depend on elements held by the employer, the latter is obliged to produce them with a view to an adversarial discussion. By rejecting Mr [T]'s claim for a lump-sum catch-up of the general salary increases between the dismissal and the reinstatement, on the grounds that it was based solely on the summons to communicate made to the company and was not sufficiently justified, the *cour d'appel* (Court of Appeal) reversed the burden of proof and violated Article 1315 of the Civil Code, which became Article 1353.
2. WHEREAS ALSO the court may not refuse to assess the amount of damage or an obligation which it has established in principle. In the present case, in order to reject Mr [T]'s request that Frost & Sullivan Limited be ordered to pay him the sum of EUR. 24,000 as a lump-sum catch-up of the general salary increases between dismissal and reinstatement, the *cour d'appel* (Court of Appeal) stated that it was based solely on the summons to communicate made to the company and is not sufficiently justified. In so ruling, without evaluating, even if only by ordering an investigation, the salary increases to which Mr [T] could have claimed if he had not been dismissed, the *cour d'appel* (Court of Appeal) infringed Article 4 of the Civil Code.

SIXTH PLEA FOR QUASHING

The objection to the ruling under appeal concerns the dismissal of Mr [T]'s claim that Frost & Sullivan Limited should be ordered to pay him the sum of EUR 205,000 as compensation for tax loss;

ON THE GROUNDS THAT: "() If the dismissal is null and void, whatever the cause, the employee is entitled to claim reinstatement in his job or, failing that, in an equivalent job. The employer is only released from this obligation to reinstate if the company is no longer in operation or if it is absolutely impossible to do so. The employer qualifying the request for reinstatement made by the employee as shocking, and moreover only a few months after the termination of

the employment contract, cannot constitute such an obstacle. The financial difficulties invoked by Frost & Sullivan Limited, both within the company and within the group to which it belongs, and the future consequences, qualified as irreversible of a possible decision by the court in favour of Mr [T], also cannot constitute such an obstacle. Since Mr [T]'s dismissal was set aside because it was notified during a period of suspension of the employment contract which had not ended due to the absence of a resumption visit and not because of a violation of a constitutional right, he is entitled to payment of a sum up to the amount of the wages of which he was deprived, after deduction of income from another activity and of the replacement income paid to him during the period between the dismissal and reinstatement. Mr [T] claims not to have found a new job. However, on the curriculum vitae posted by the person concerned himself on a publicly accessible online site, in this case Viadeo, which defines itself as a professional social network designed to facilitate dialogue between professionals, it appears that he was hired in 2015 as a business unit manager within the company Greenflex. Mr [T] also produced a certificate from this company establishing a period of employment from 16 January to 26 April 2017, which partly contradicts his claim of total inactivity during the period between dismissal and reinstatement. It is also clear from the Pôle Emploi documents for the period from 11 January 2013, the date on which compensation began, to 10 January 2015 that Mr [T] received back-to-work benefits amounting to EUR. 116,508. The tax returns also show that in 2015, the person concerned received a total of EUR. 5,970 in wages or similar income, whereas he was only compensated for back-to-work benefits until 10 January 2015 and for EUR. 1,596, for 2016 a total of EUR. 13,227, and finally for 2017 a total of EUR. 26,833, and for 2018 no income was declared. It should therefore be retained in the statement of replacement income for a total amount of EUR. 160,942 until 31 December 2018. It will be up to Mr [T], in the context of the recovery of the indemnity for the period between dismissal and reinstatement, to justify, in order to deduct them, in addition to the aforementioned sums, all the salaries and replacement income received as of 15 November 2012 and until his reinstatement. The monthly salary to be taken into consideration for calculating the indemnity for the period between dismissal and reinstatement amounts to EUR. 8,491.66, i.e. the average remuneration received by the person concerned before the termination of the contract and which is not subject to any particular dispute, even of a subsidiary nature, by the employer. On the other hand, since the period from dismissal to reinstatement does not give rise to the right to acquire days of leave, the monthly salary will not be increased, as Mr [T] requests, by an indemnity in lieu of paid leave. With regard to the requests for "summons to a medical examination by the occupational physician" and "re-enrolment in the company's mutual insurance scheme", it is up to the company to reinstate the employee in compliance with its legal and regulatory obligations, without the need for a penalty payment to be justified. As regards the requests for "upgrading of salary and classification" and "setting up a training programme to make up for the training not carried out since his dismissal", the evidence produced, the circumstances of the case and the vagueness of the claims do not allow the court to place obligations on the employer company that can be determined as they stand, therefore these requests will be dismissed. The claim for a "lump-sum catch-up of general salary increases within the company between dismissal from the company (14/11/2012) and the reinstatement", which is based solely on the summons to communicate made to Frost & Sullivan Limited (exhibit no. 96), is not sufficiently justified and will therefore be dismissed. On the other claims: Beyond his assertion that the warnings and the dismissal for insufficient results had deeply affected him psychologically, no evidence was produced to justify the existence of "psychological consequences" that continue today because of the ongoing legal proceedings and the employer's behaviour, from which there is nothing to show that it prevented him from finding a job. It should also be noted that Mr [T] was employed by Greenflex from at least 16 January to 26 April 2017. As well it should be noted that the manner in which Frost & Sullivan Limited obtained the curriculum vitae posted by Mr [T] was not irregular and wrongful, it being further observed that the company was guided by a legitimate concern to prove that, contrary to the employee's claim, he had at least on one occasion found a job. Mr [T]’s request for compensation for non-material damage will therefore be dismissed. With regard to the claim for compensation for the alleged tax loss, it is not clear from the evidence submitted that the loss resulting from the deferral of taxation of the sums to be received by the employee in execution of the present decision is certain. The claim on this count will therefore be dismissed. The request for the company to hand over social documents, which are not specified, but which usually consist of the statement intended for Pôle Emploi and the work certificate, is, under the conditions of the present proceedings which aim at the resumption of the employment contract, unfounded. On the other hand, the request for a pay slip summarising the sums to be paid to Mr [T] in execution of this ruling should be granted. The penalty payment, the necessity of which is not justified, will not be ordered. If a labour court can by exception reserve the assessment of a penalty payment which the law attributes to the enforcement judge, it cannot on the other hand derogate from the competence of the latter set by Article L. 213-6 of the Judicial Code and Article R. 121-1 of the Civil Execution Proceedings Code as regards the other conditions related to the

future execution of the present decision. This request will also be dismissed. The circumstances of the present case do not justify a derogation from the provisions of Articles 1231-6 and 1231-7 of the Civil Code, pursuant to which compensation claims bear interest at the legal rate from the date of the decision establishing the principle and the amount. It should therefore be held that the amounts awarded shall bear interest from the date of this ruling. The interest due will produce interest from the day of the request expressly presented in the first instance, as long as it is due for at least a whole year, in accordance with the provisions of Article 1343-2 of the Civil Code."

1. WHEREAS, by affirming that the evidence produced did not show the certainty of a tax loss, after having ruled that Frost & Sullivan Limited should be ordered to pay Mr [T] the monthly sum of EUR. 8,491.66 over at least seven years, i.e., a lump-sum payment of more than EUR. 700,000, which will be subject to taxation, the *cour d'appel* (Court of Appeal), which did not draw the legal conclusions from its own findings, from which it necessarily resulted that Mr [T] would be subject to much greater taxation than if he had declared his salaries annually, infringed Article 1147 of the Civil Code, which became Article 1231-1.
2. WHEREAS, IN ANY EVENT, in support of his claim, Mr [T] had produced the tax brackets according to income, the difference between the total of the taxable amounts for each year and the total for the entire period between dismissal and reinstatement, which was supported by an official simulation on the French Ministry of Finance website, all of which established the certainty of the tax loss resulting from his unlawful dismissal. By merely stating peremptorily that it is not apparent from the elements produced, official simulations of the certainty of the loss that would result from the deferral of taxation, without examining and explaining the documents that Mr [T] had taken care to produce during arguments, the *cour d'appel* (Court of Appeal) infringed Article 455 of the Civil Procedure Code.
3. ALTHOUGH AT THE VERY LEAST, in support of his claim, Mr [T] had produced the tax brackets according to income, the difference between the taxable amount for one year and for the entire period between dismissal and reinstatement, which was supported by an official simulation on the Ministry of Finance website, all of which established the certainty of the tax loss resulting from his unlawful dismissal. By merely stating peremptorily that it is not apparent from the elements produced, official simulations, that the loss resulting from the deferral of taxation is certain, without explaining how all the elements produced by Mr [T] and confirmed by the Ministry of Finance did not allow it to be considered that his tax loss was not certain, the *cour d'appel* (Court of Appeal), which did not give reasons for its decision, once again infringed Article 455 of the Civil Procedure Code. Plea produced in appeal no. Z 19-25.812 by SCP Rousseau and Tapie, Supreme Court Lawyer, for Frost & Sullivan Limited.

The objection to the ruling under appeal concerns the overturning of the judgment insofar as it dismissed the request for nullity of the dismissal and the subsequent requests and, ruling again, for having set aside the dismissal of Mr [T] by Frost & Sullivan Limited, for having ordered, consequently, that Frost & Sullivan Limited reinstate him in the job previously held or, failing that, in the equivalent of the job previously held in compliance with its legal and regulatory obligations regarding the organisation of a medical examination and reinstatement of his membership in the company's mutual health insurance scheme, setting the reference salary for calculating the indemnity for the period between dismissal and reinstatement at EUR. 8,491.66, ordering the company to pay Mr [T] an indemnity for the period between dismissal and reinstatement from 15 November 2012 to the date of reinstatement, from which the totality of the wages and replacement income received by the employee between his dismissal and his reinstatement is to be deducted, for which it will be up to him to provide the employer with proof within a period of two months following the notification of the ruling in order to allow the decision to be executed.

On the grounds that on the nullity of the dismissal and its consequences, in the absence of the resumption visit provided for in Articles R 4624-1 and R 4624-22 of the Labour Code in their formulation in force at the time, Mr [T]'s employment contract was still suspended following the workplace accident of which he was a victim on 24 June 2010 and his absence of at least eight days for this reason. His dismissal for professional inadequacy, notified on 10 August 2012, either for a reason other than one of those provided for in Article L. 1226-9 of the same code, serious misconduct or the impossibility

of maintaining the employment contract for a reason unrelated to the accident or illness, during the suspension of the employment contract, must therefore be considered null and void, regardless of his return to work on 5 July 2010, his qualification or his position in the hierarchy, his failure to approach the employer or the occupational health service to organise this resumption visit, which cannot be considered as constituting a waiver by the person concerned to avail himself of this right, or his alleged refusal to attend the occupational health examinations in 2011, as the employer maintains without establishing this. The judgment will be reversed insofar as it dismissed the employee's request to have this nullity declared. In case of nullity of his dismissal, whatever the cause, the employee is entitled to claim reinstatement in his job or, failing that, in an equivalent job. The employer is only released from this obligation to reinstate if the company has disappeared or if it is absolutely impossible to do so. The employer qualifying the request for reinstatement made by the employee as shocking, and moreover only a few months after the termination of the employment contract, cannot constitute such an obstacle. The financial difficulties invoked by Frost & Sullivan Limited, within the company and within the group to which it belongs, and the future consequences, qualified as irreversible, of a possible decision by the court in favour of Mr [T] also cannot constitute such an obstacle. Since Mr [T]'s dismissal was set aside for having been notified during a period of suspension of the employment contract which had not ended due to the absence of a resumption visit and not for violation of a constitutional right, he is entitled to payment of a sum up to the amount of the wages of which he was deprived, after deduction of income from another activity and of the replacement income which was paid to him during the period between dismissal and reinstatement. Mr [T] claims not to have found a job. However, on the curriculum vitae posted by the person concerned on a publicly accessible online site, in this case Viadeo, which is defined as a professional social network designed to facilitate dialogue between professionals, it appears that he was hired in 2015 as a business unit manager within the company Greenflex. Mr [T] also produced a certificate from this company establishing a period of employment from 16 January to 26 April 2017, which partly contradicts his claim of total inactivity during the period between dismissal and reinstatement. It is also clear from the Pôle Emploi documents for the period from 11 January 2013, the date on which compensation began, to 10 January 2015 that Mr [T] received back-to-work benefits amounting to EUR. 116,508. The tax returns also show that in 2015, a total of EUR. 5,970 in wages or similar income was received, whereas the person concerned only received back-to-work benefits until January 2015 and for EUR. 1,596. For 2016, a total of EUR. 13,227 was received, and finally for 2017, a total of EUR. 26,833 was received, and for 2018, no income was declared. It should therefore be retained in the statement of replacement income for a total amount of EUR. 160 until 31 December 2018. It will be up to Mr [T], in the context of the recovery of the indemnity for the period between dismissal and reinstatement, to justify, in order to deduct them, in addition to the aforementioned sums, all the wages and replacement income received as from 15 November 2012 and until his reinstatement. The monthly salary to be taken into consideration for calculating the indemnity for the period between dismissal and reinstatement amounts to EUR. 8,491.66, i.e. the average remuneration received by the person concerned before the termination of the contract and which is not subject to any particular dispute, even of a subsidiary nature, by the employer. On the other hand, since the period between dismissal and reinstatement does not give rise to the right to acquire days of leave, the monthly salary will not be increased, as Mr [T] requests, by an indemnity in lieu of paid leave.

Whereas 1°) the renunciation of a right may be express or tacit in nature and result from acts performed with full knowledge of the facts and unequivocally expressing the will to renounce. A tacit and unequivocal renunciation is understood when an employee who, after a 15-day cessation of work due to an accident at work, resumes their work, does not request the organisation of a resumption visit nor denounce their absence and who, incompatible with the suspension of their employment contract, performs their work and receives their remuneration for two years before raising the issue, two years later, of the absence of a resumption visit after having been dismissed for professional inadequacy. In the present case, the *cour d'appel* (Court of Appeal) held that in the absence of the resumption visit provided for in Articles R. 4624-1 and R. 4624-22 of the Labour Code, Mr [T]'s employment contract was still suspended following his workplace accident on 24 June 2010 and that his dismissal notified on 10 August 2012, for a reason other than one of those provided for in Article L. 1226-9 of the same code was null and void, regardless of his return to work on 5 July 2010, his qualification or position in the hierarchy, or his failure to take steps to organise this resumption visit, which could not constitute a waiver by the person concerned of this right (ruling, pg. 3, last §). In so ruling, although Mr [T], by deciding to return to work, without requesting a resumption visit as was available to him, by working for more than two years and by collecting his wages, had tacitly but unequivocally waived the rights he could have derived from the absence of a resumption visit and its consequences, the *cour d'appel* (Court of Appeal) infringed the principle

according to which the waiver of a right can only result from acts that unequivocally express the will to waive, together with Articles L. 1226-7, and L. 1226-9 of the Labour Code, and R. 4624-21 and R. 4624-22 of the same code.

Whereas 2°) the court may not dismiss or allow the applications before it without examining the documents produced by the parties. In the present case, by stating that the employer maintained "without establishing it" that Mr [T] had refused to attend the occupational health examinations in 2011 (ruling, pg. 4, 1st section), without having analysed the certificate produced by the employer, invoked in its conclusions and referred to in the list of documents (exhibit 05-a: proof of Mr [T]'s absence from the medical examination), which showed that the employee had not attended an examination organised by the occupational health physician, the *cour d'appel* (Court of Appeal) infringed Article 455 of the Civil Procedure Code.

Whereas 3°) and in the alternative, the court must, in all circumstances, have observed or observe themselves the adversarial principle. It cannot limit the rights of a party on the grounds that documents do not appear in their file, without inviting the parties to explain the absence in the file of documents appearing on the list of communicated documents and whose communication has not been challenged. By ruling without inviting the parties to explain the absence from the file of the proof of Mr [T]'s absence from the 2011 medical examination, which appeared in the list appended to the employer's submissions and the communication of which had not been challenged by Mr [T], the *cour d'appel* (Court of Appeal) infringed Article 16 of the Civil Procedure Code.

Whereas 4°) and in the alternative, in the event of nullity of the dismissal resulting from Article L. 1226-13 of the Labour Code, the employee benefits from a right to be reinstated in the company in their job or, failing that, in an equivalent job, except when such reinstatement is impossible, in particular when it leads to the inevitable disappearance of the company. In the present case, the *cour d'appel* (Court of Appeal) stated that the financial difficulties invoked by Frost & Sullivan Limited, both within the company and within the group to which it belongs, and the future consequences, qualified as irreversible, of a possible decision by the court in favour of Mr [T] did not characterise such an impossibility (ruling, pg. 4, 4th §), although Frost & Sullivan Limited had suffered a cumulative loss of EUR. 4,051,986 for the three financial years 2014-2016, the parent company's deficit was approximately EUR. 14 million, the employees' bonuses were no longer paid, the company, on the verge of bankruptcy, was financially incapable of supporting Mr [T]'s reinstatement, the *cour d'appel* (Court of Appeal) infringed Article L. 1226-13 of the Labour Code.

Whereas 5°) and in the alternative, by not having precisely investigated, as it was invited to do by Frost & Sullivan, whether the reinstatement of Mr [T] and the payment of the considerable sums requested would not lead to its judicial liquidation and the dismissal of all employees working in France, so that the company was unable to proceed with any reinstatement (conclusions of appeal pgs. 14 and 15), the *cour d'appel* (Court of Appeal) deprived its decision of a legal basis under Article L. 1226-13 of the Labour Code.

Whereas 6°) it is for the court to verify in practice that the application of a rule of domestic law does not disproportionately or excessively affect the applicant's rights under Article 1 of Protocol 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which recognises everyone's right to "the peaceful enjoyment of his possessions", in order to ensure that they have an effective remedy. In domestic law, the case-law of the *Cour de cassation* (Court of cassation) deduces from Articles L. 1226-7, L. 1226-9, L. 1226-13, R. 4624-21 and R. 4624-22 of the Labour Code that only the examination carried out by the occupational physician, which the employee must undergo at the end of the period of suspension when resuming work, puts an end to the suspension of the employment contract, and that in the absence of such an examination, dismissal for a reason other than those listed in Article L. 1226-9 is null and void, which allows the employee to be reinstated and to obtain compensation for all damage incurred between dismissal and reinstatement, up to the limit of the wages of which they were deprived. In this case, the *cour d'appel* (Court of Appeal) ruled that "(t)he employer qualifying the request for reinstatement made by the employee as shocking, and moreover only a few months after the termination of the employment contract" and "the financial difficulties invoked by Frost & Sullivan Limited, both within the company and within the group to which it belongs, and the future consequences, qualified as irreversible, of a possible decision by the court in favour of Mr [T]" (ruling pg. 4, 4th

§) were without consequence. By expressly refusing to review the appropriateness of the measure pronounced against the employer, taking into account the circumstances of the case, from which it resulted that if the employee had not benefited from a resumption visit at the end of his 15-day work stoppage, he had nevertheless resumed his work for two years without any suspension of his contract or work stoppage, had never requested a resumption visit, had even refused to go to a visit organised by his employer, and had only been dismissed two years later for professional inadequacy, the *cour d'appel* (Court of Appeal) did not act fully within the scope of its powers (*excès de pouvoir négatif*) and disregarded said scope, depriving Frost & Sullivan Limited of the right to an effective remedy, in violation of Article 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Article 1 of Protocol 1 to the European Convention on Human Rights.

Whereas 7°) the automatic application of the rule of domestic law according to which dismissal without a prior resumption visit is null and void, which allows the employee to be reinstated in their job even several years after the termination of their contract, is disproportionate and excessively prejudicial to the employer's right under Article 1 of Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, which recognises the right of every person to 'the peaceful enjoyment of his possessions', and to be paid a sum corresponding to the compensation for the totality of the damage incurred during the period between the termination and the reinstatement, when the reinstatement and the payment of the sums requested would irremediably lead to the judicial liquidation of the employer and the dismissal of all the employees of the latter, whereas the absence of a resumption visit had not prevented the employee from resuming his work for several years. In this case, although the employee had not received a resumption visit at the end of his work cessation of 15 days, he had nevertheless returned to work for two years without any suspension of his contract or work stoppage, that he had never requested a resumption visit, had even refused to go to a visit organised by his employer, and had only been dismissed two years later for professional inadequacy. In these conditions, it is an excessive and disproportionate infringement of Frost & Sullivan Limited's rights under Article 1 of Protocol 1 to the European Convention on Human Rights to punish the mere omission of a resumption visit, which had no consequences, by ordering the company to reinstate Mr [T] and to pay him the sums requested (approximately EUR. 800,000), which would irrevocably lead to the liquidation of the company and to the dismissal of all the employees working in France. In so ruling, the court infringed Article 1 of Protocol 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms.

President : Mr Cathala
Reporting Judge : Ms Capitaine, Judge
First Advocate-General : Ms Berriat
Lawyer(s) : SCP Lyon-Caen and Thiriez - SCP Rousseau and Tapie

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