

HOTTEST NEWS ON FRENCH EMPLOYMENT LAW

New challenges for global groups
with French operations

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2012

Facts and figures (1/2)

Evolution of case law linked to the current economic context:

- Global economic crisis
- Breaking news surrounding global groups shutting down French plants and moving to countries with low labor costs
- Resulting costs borne by State : termination costs (when the French company goes into bankruptcy) + unemployment costs following the termination + deindustrialization of geographic areas + subcontractors going bankrupt in chain

Consequences for global groups and private equity funds:

- **Stereotypes of the so-called “*patrons voyous*” (“rogue managers”)**
- **Primary targets for French Courts and employees’ lawyers as scapegoats for globalization**

Facts and figures (2/2)

Recent case law :

- Upholds extensive concept of group
- Encourages corporate veil piercing
- Shift from indemnification logic to “employing duty” logic

(I)

**LARGER CONCEPTION OF GROUP AND PIERCING OF
THE CORPORATE VEIL**

Economical grounds at the group level

When they look at a French subsidiary of a global group, whose layoffs are challenged, French Supreme Court judges check :

1/The reality of the economical grounds at the French company level

2/The reality of the economical grounds at the global group level, within the business line where the French company operates

Layoffs additional measures must fit with the group financial capabilities

Measures contained in a collective layoff (called PSE) must be adequate with respect to the financial capabilities of the company AND of the group

Foreign parent companies may be considered as the joint-employer of French employees (1/4)

French Supreme Court recently abandoned the traditional “subordination link” definition...

“subordination link” characterizes the bond of obedience on the part of the employee toward the employer and the employer’s authority over the employee

Foreign parent companies may be considered as the joint-employer of French employees (2/4)

... for a new wider “business oriented” definition of employer

New definition based on a confusion of:

- (i) interest,
- (ii) activity
- (iii) management

Between the parent company and its subsidiary

- ✓ *Aspocomp* Supreme court, June 19th 2007
- ✓ *Jungheinrich* Supreme Court, January 18th, 2011
- Supreme Court, November 30th, 2011

Foreign parent companies may be considered as the joint-employer of French employees (3/4)

Possible hints cited by French case law to demonstrate the existence of this triple criteria :

- Sharing of directors between the subsidiary and the parent company
- Confusion as to the headquarters of the subsidiary and the parent company
- Lack of economic and financial autonomy on the part of the subsidiary
- Holding of at least 80% of the subsidiary's share capital by the parent company
- Definition of the subsidiary's strategy by the parent company
- Interference of the parent company in the relationship between the subsidiary and its employees

Foreign parent companies may be considered as the joint-employer of French employees (4/4)

Greater application of the new triple criteria by the French Supreme Court :

- **1st step:** *Aspocomp case 2007*

Application of CJUE case law by adding to the triple criteria the fact that the employees used to work, at least for a limited period of time, for and under the direction of the parent company

- **2nd step:** *Jungheinrich case 2011*

Joint-employment characterized exclusively by reference to the triple criteria. Direct work criteria is given up

Business shutdown : no ground for lay offs (1/3)

- Until 2011, case law accepted logically that closing a business was in itself a valid ground to lay off employees.
Exception : if the shut down is the result of the employer's fault or lack of consideration. (sort of duty of care)
- **Since 2011, business shutdown can no longer be safely contemplated by global groups.**

Business shutdown : no ground for lay offs (2/3)

1st limit : joint employer theory

Jungheinrich case

- Business shutdown within a global group is not sufficient ground for lay off anymore, unless it is justified by :
 - 1/ economic difficulties, or
 - 2/ technological changes, or
 - 3/ the need to salvage the company / business competitiveness which is threatened on its market (the latter being scanned globally wherever the group business line operates)

Business shutdown : no ground for lay offs (2/3)

2nd limit: Impact of the group control over the subsidiary

Goodyear Dunlop case - 2011

- Goodyear was seen as having taken some of the decisions driving its French subsidiary to difficulties (= lack of consideration for employees)
- Subsidiary had not objected to the group's decision to shut down plant (= business negligence)

Conclusion : no valid grounds for layoffs, and huge damages sentence against Goodyear, although Subsidiary incurred constant losses

(II)

“EMPLOYING DUTY”
FOR GLOBAL GROUPS FRENCH SUBSIDIARIES

Shift from indemnification logic to “employing duty” logic (1/2)

Previously, French Courts ruled that :

- Judges cannot interfere in economical grounds for collective layoffs process before layoffs have occurred and are challenged in court by employees
- Annulment of the PSE can be judged only in case of absence or insufficiency of PSE (insufficiency of PSE dedicated measures given the financial capabilities of the group)

Shift of indemnification logic to “employing duty” logic (2/2)

Since 2011, First Courts and Courts of Appeal :

- Have annuled PSE at early stage, before layoffs have happened, arguing economical motivation grounding the contemplated layoffs are not evidenced or even inexistent

- ✓ Viveo *Paris Court of Appeal, May 12th, 2011*
- ✓ Ethicon *Nanterre Civil Court, October 21st, 2011*
- ✓ Sodimedical *Troyes Civil court, July 30th, 2010 and February 4st, 2011*
Reims Court of appeal, August 31st, 2011 and January 3rd, 2012

- Have in the same time rejected bankruptcy or chapter 11 like protection, to companies belonging to a group when these companies had little autonomy

- ✓ Sodimedical *Reims Court of appeal, March 14th, 2011*
Reims Court of appeal, October 25th, 2011

As a result, French operations belonging to profitable global groups
are banned from laying off their French employees

(III)

IMPACT OF NEW CASE LAW

- **Litigation angles:**

- Recent case law violates the constitutional freedom of enterprise and the freedom of ownership.
- Legal action before French Constitutional Court and/or the European Court of Justice may be contemplated.

- **Lay offs:**

- Current impossibility to lay off in France within profitable global groups (even though French ops incur losses)
- Supreme Court decision expected on February 28th, 2012

- **Solutions to shut down :**

- Can be found
- Not exempt from risks (damage and/or offence)



FACTS AND FIGURES

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