

## **DISCRIMINATION LAW IN FRANCE**

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The principle of non discrimination is a core aspect of French labour law. The sources of discrimination law are diverse. The first is constituted of EC law, that has largely determined the French law of discrimination. The second comes from the French constitution. The principle of non discrimination has constitutional value, by virtue of the Preamble to the Constitution of 1946 that prohibits discrimination with regard to criteria of sex, race, belief and trade union activity, and of the current Constitution (1958) that contains a provision according to which "the nation ensures equality before the law of all citizens, whatever their ethnic origin, race or religion (article 2). Moving from the Constitution to statute law, the labour code contains several provisions on discrimination, especially a provision that lists all grounds of prohibited discrimination : article L 122-45.

Two preliminary remarks are necessary. First, French labour law has largely been influenced by EC law relative to discrimination, and the case law of the European Court of Justice is at least as important as that of the Cour de cassation to understand the law of discrimination applicable in France. Second, although discrimination law has considerably increased in importance in French law, due to the influence of the European Union, French labour law is not built around discrimination law. And the focus on discrimination is regularly criticised in the name of workers protections. For instance, an attempt has been made to see harassment as an issue of sex discrimination, which would certainly have weakened the law of harassment, especially the possibility to rule against psychological harassment which is not at first a problem of discrimination. Again, it has been suggested that, for certain contracts, the control of the fair ground of dismissal should be limited to discrimination; the current requirement of a fair ground for dismissal goes far beyond mere discrimination. More fundamentally, it is feared that discrimination law might lead to focusing on individual rights of employees rather than on the collective architecture of labour law, which is a core aspect of French labour law.

## **I. THE PROHIBITION OF DISCRIMINATION**

### **A. The main discriminatory grounds**

According to article L 122-45, “No one can be excluded from a procedure of recruitment or from access to a training course or a period of training in a company, no employee can be sanctioned, dismissed or be the subject of a discriminatory, direct or indirect measure, in particular as regards to remuneration, within the meaning of the article L. 140-2, to profit-sharing or distribution of actions, to training, reclassification, assignment, qualification, classification, professional promotion, change or renewal of contract because of its origin, its sex, its manners, its sexual orientation, its age, its family circumstances or pregnancy, its genetic characteristic, its belonging or not, true or supposed, to an ethnic group, a nation or a race, its political opinions, its trade-union or mutualist activities, its religious convictions, its physical appearance, or because of its handicap or health.

No employee can be sanctioned, dismissed or be the subject of a discriminatory decision provided for at the preceding subparagraph because of the normal exercise of the right to strike.

No employee can be sanctioned, dismissed or be the subject of a discriminatory measure for having testified to the intrigues defined in the preceding subparagraphs or having reported them.

In the event of litigation relating to the application of the preceding subparagraphs, the employee concerned or the candidate for a recruitment, a training course or a period of training in a company presents elements in fact letting suppose the existence of a direct or indirect discrimination. Within sight of these elements, it falls on the defendant part to prove that its decision is justified by foreign objective elements irrelevant to any discrimination. The judge forms his conviction after having ordered, where necessary, all measurements of instruction which he considers useful. Any provision or any contrary act with regard to an employee is null and void.”

Approximately all types of decisions are covered by this provision : hiring, training period, trial period, dismissal, disciplinary measures, retirement and all measures relative to the life of the contract of employment. The list of grounds prohibited by French law is considerable. These do not include employment status (part time, ...) that is essentially an issue of indirect discrimination on

the basis of sex (See the case law of the EC<sup>1</sup>). The main grounds will be exposed in the following developments. In proportion with the discrimination that exists in companies, the number of actions before the courts is quite limited, especially with regard to equality between men and women which appears as the main discriminatory ground. The only ground that is frequently invoked is trade union discrimination, especially since the extension of the rules of burden of proof to trade union discrimination<sup>2</sup>.

## 1 / Sex

Discrimination between men and women traditionally constitutes the main issue of discrimination law. The influence of EC law has been essential.

### *a / Contributions of EC Law to French law*

The principle of equality between men and women at work was enacted by the Rome Treaty; several directives have completed its enactment : the 1975 directive concerning remuneration<sup>3</sup>, the 1976 directive concerning equality between men et women in access to employment, training and work conditions<sup>4</sup>, the 1992 directive relative to pregnant women, the 1996 directive that concerns parental leave, the 1997 directive relative to the burden of proof in case of discrimination on the basis of sex<sup>5</sup>, the 2002 directive that modifies that of 1976<sup>6</sup>, the 2006 directive that modifies, clarifies and completes existing directives concerning equality between men and women"<sup>7</sup>. The main contributions of EC law to French law relative to sex discrimination have been the following:

- **Equality of remuneration** : the determination of the remuneration of employees should be the same for men and women. Any discrimination resulting from collective agreements should be eliminated, which means that a bonus based on sex should be bilateralised.

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1 Bilka, CJCE, 13 May 1986, aff 170/84); ., December 6<sup>th</sup>, 2007, aff. C-300/06, Voß c/ Land Berlin

2 Premier bilan de la loi du 16 novembre 2001 relative à la lutte contre les discriminations, rapport de M T Lanquetin et M Grevy, pour la Direction de la Population et des Migrations (DPM) du ministère de l'Emploi et de la Solidarité, 2005.

3 Directive of 10 February 1975, JOCE n°L45 du 19 February 1975

4 Directive of 9 February 1976, JOCE n° L 39 du 14 February 1976

5 Directive of 15 December 1997, 97/80/CE, JOCE of 20 January 1998

6 Directive of 23 September 2002, JOCE, 5 October 2002

7 Directive of 5 July 2006, n° 2000/54, JOCE 25 July 2006.

- **indirect discrimination** : for the same work all discrimination, including indirect discrimination, should be eliminated. Indirect discrimination plays an essential role, notably with regard to part-time work, considering far more women work part-time than men<sup>8</sup>. The 1997 Directive defined indirect discrimination as follows : it is sufficient that the decision (neutral in appearance) affects in fact far more persons of one sex than the other, for there to be a presumption of indirect discrimination. Nevertheless, objective elements, independent of sex; can justify the decision, that must be "appropriate and necessary" (art 2,2).

- **Proof** : the employee has to prove facts that, in appearance at least, let believe that a discrimination exists. Then, the employer must prove that the difference of treatment is justified. (directive 1997)

- **Positive action** : EC law admits positive actions that are temporary, in favour of a sex under-represented. According to the European Court of Justice, these positive actions must be strictly interpreted. Nevertheless, EC law, through the case law of the European Court of Justice, is more and more open to positive action. Under the Kalanke case law<sup>9</sup>, directives promoting equality of chances (which can implicate positive action) had to be strictly interpreted, and not be "absolute nor unconditional". According to more recent case law, the ECJ tends to balance equality of treatment and equality of chances, through a control of proportionality<sup>10</sup>.

Although EC law is essentially targeted towards sex discrimination, it contains a wider principle of discrimination. Directive June 29th 2000 concerns the principle of equality of treatment between persons, without any distinction on the basis of race or ethnic origin<sup>11</sup>. Directive November 20th 2000 covers a wide range of discriminatory grounds (those provided for in the Amsterdam Treaty) that go beyond work. As a consequence, EC discrimination law is not limited to sex discrimination.

*b / In French law*

French provisions on discrimination are directly influenced by EC law. Two periods may be isolated : the pre 2001 directive, and the post 2001 directive period. This directive has indeed

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8 CJCE March 7,1996 ; 2 oct 1997.

9 CJCE October 17, 1995, aff C-450/93, Eckhard Kalanke

10 CJCE September 30,2004, aff C-319/03, Briheche.

11 Directive, June 29,2000, JO L 180, July 19,2000.

considerably developed discrimination law.

#### b.1. equality between men and women : first period

Concerning equality between men and women in general, the first statute law of implementation of EC law relative to sex discrimination is the law of July 13rd 1983, that constitutes a chapter of the labour Code called "professional equality between women and men". It lays down the principle of non discrimination, the possibility to carry out "positive discrimination" through temporary measures, in order to favour equality of chances for women (art L 123-3 Labour code).

All discriminatory provisions, even indirect, inserted in a collective agreement, are void (Art L 123-2 Labour code ; Cass. soc. April 9<sup>th</sup> 1996, CSB 1996, A44, 203)

Concerning remuneration, the title of the labour Code relative to remuneration contains a preliminary chapter entitled "equality of remuneration between men and women". As a result of these provisions, a provision that would create a disparity of remuneration between men and women is void; the highest remuneration of the two will be substituted<sup>12</sup>. For example, if a contribution for the payment of a day-care centre is granted exclusively to women, it shall be also given to men<sup>13</sup>;

Concerning proof, it is stated that "the employer must provide the judge with the elements likely to justify the inequality of remuneration ...; doubt shall be interpreted in favour of the employee".

On the basis of the EC directive, the French Cour de cassation considered that the reasoning should be the following : the employee has to prove facts that, in appearance at least, let believe that a discrimination exists. Then , the employer must prove that the difference of treatment is justified.

The same reasoning has been applied by the French court to trade union discrimination, although no legal basis existed in French law<sup>14</sup>

#### b.2. Generalisation of the system : second step

The statute law of November 16th 2001, that has also been enacted to implement EC law has considerably enriched French law relative to non discrimination. Its main contributions are the

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12 Art L 140-4 Labour code

13 Cass. soc. February 17, 1971, CSB 1991, n°29, A 3

14 Cass. soc. March 28, 2000, Droit social 2000, 593.

following :

- widening of the scope of discrimination law to other grounds of discrimination, in particular age
- adoption of the rules of the 1997 directive relative to proof. The Cour de cassation had already applied similar rules, before the implementation of the directive (see above).

## 2 / Race

Race discrimination is prohibited and litigation essentially concerns hiring in private companies. Most of the cases interest the criminal judge, and proof is mostly brought through testing<sup>15</sup>

## 3/ Trade union membership

Trade union membership was the first prohibited discrimination, considering the important degree of exposure of trade union members to discrimination. Any person who is involved in trade-unions is protected, even those who have no mandate for a union<sup>16</sup>. The most current examples of trade union discrimination are :

- disparity of remuneration in favour of non unionists
- substantial change in the evaluation of the employee since he has been unionised.
- refusal of a promotion without justification

The judge will have to verify that the employer invokes objective elements, unrelated to union discrimination.

## 4. Sexual orientation

Article L 122-45 prohibits discrimination on the basis of sexual orientation, essentially homosexuality. Yet, the issue is not always treated as one of discrimination but more often as one of privacy.

## 5 / Origin, nation

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15 L. Collet-Askri, Testing or not testing? , D. 2003, n°20, chron.

16 Cass. soc., sept.28,2005, no 04-40.048

Case law is rare relative to origin or nation. A recent case has been given much publicity : the Cour de cassation has admitted that a bonus can be given exclusively to foreign workers without any discrimination. Indeed, by facilitating the hiring of foreign workers, this bonus enables the creation of areas of scientific excellence<sup>17</sup>.

## 6 / Handicap

The law n°2005-102 of February 11<sup>th</sup> 2005 states new rules in order to favour access to employment for handicapped people. Is considered as a handicapped worker, any person whose possibilities to obtain or keep a job are effectively reduced following poor or diminished physical and mental capacities. (art L 323-10 Labour Code).

Handicapped persons can ask for specific working hours to facilitate their access to employment. Those in charge of helping these people have the same advantages. Wages of handicapped people cannot be lower than the minimum wage. No diminishing of wages is admitted due to the possible weaker efficiency of the work of handicapped persons. However, the employer, after approval by the administration, can benefit from state aids.

Employers must take all proportionate measures to adapt the worker and his working environment to the handicap, the absence of appropriate measures being likely to constitute discrimination (art L 323-9-1 Labour code).

Moreover, all companies of 20 employees or more are obliged by the law to hire handicapped people, in a proportion of 6 % of the total workforce. Employers can however replace this obligation by paying a contribution to an association, which most companies choose to do.

The French body in charge of discrimination (HALDE) has adopted a series of recommendations concerning handicap :

- the breach of the trial period because of the incapacity of the employee (recognised by doctors) to accomplish most of the tasks of the job offered is not a discrimination on the basis of handicap (Délib. Halde n° 2007-294, 13 nov. 2007)

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17 Cass. soc., nov.9, 2005, no 03-47.720, Bull. civ. V, no 312

- the non recognition by the employer of diploma delivered to handicapped persons constitutes an indirect discrimination based on handicap (Délib. Halde n° 2007-239, 1er oct. 2007)
- the decision of the employer not to reinstate a handicapped employee who has been declared invalid, without taking the appropriate measures to enable him to continue his job, constitutes a discrimination (Délib. Halde n° 2006-226, 23 oct. 2006).

## 7 / Health

Discrimination on the basis of health is prohibited since a statute law of July 12<sup>th</sup> 1990. An employee cannot be dismissed because of his sickness. But, through recent case law, he can be dismissed if long or repeated absences from work have cause trouble to the functioning of the company and make his permanent replacement necessary<sup>18</sup>.

## 8 / Family situation

Discrimination is prohibited where it concerns the family situation of the employee (married, divorced ...), including the child/parent relationship. In a case of June 1<sup>st</sup> 1999, the employer had announced that he would not accept to hire children of employees of the companies. In that case, it was proved that the true reason for the dismissal of an employee was that it was discovered that she was the daughter of a company employee<sup>19</sup>

## 9 / Age

### *a) Prohibition of age discrimination*

Article 13 of the Amsterdam Treaty includes age among the prohibited discriminations. Age discrimination is recognised since 2001 in France. But before, the courts were not indifferent to it, as proves a famous case concerning the "Folies Bergères". Article 35 of the company agreement of the Folies Bergères provided that 39 was the maximum age for dancers. Although age was not, even before 2001, a fair ground for dismissal, the Court of Appeal of Paris considered that the dismissal

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18 Cass. soc. July 16, 1998, Droit social 1998, p. 950, A. Mazeaud

19 Cass soc June 1,1999, Bull. Civ. V n°249



of a dancer who had reached 39 was justified for reason of the specificity of the job, of the consequences of age on the job of dancer. The decision of the Court of appeal was quashed by the Cour de cassation on the ground that "the dismissal could only be justified by a ground independent of the age of the employee"<sup>20</sup>.

Today, age discrimination interests several provisions of the labour Code. A statute law of November 16<sup>th</sup> 2001, that implements the EC directive of November 27<sup>th</sup> 2000, has added age to article L 122-45 of the labour Code that contains a list of prohibited discriminations, and declares void any decision in violation of anti discrimination rules. This modification of the provision has had direct impact on the case law.

What happens if an employer puts out to pasture an employee in violation of the rules on retirement ? On the basis of French statute law, the retirement becomes a dismissal in such case, which raises the question of the nature of the dismissal. In French law, illegality of the grounds for dismissal gives rise to damages (unfair dismissal : "licenciement sans cause réelle et sérieuse"), and in very specific cases that include discrimination and more generally violation of fundamental rights, nullity of dismissal. Before the 2001 statute law, the sanction of such dismissals (putting out to pasture someone in breach of the rules on retirement) was the payment of damages (unfair dismissal). The Court of cassation changed its position in a case of December 21<sup>st</sup> 2006, deciding that the dismissal was void. This case is a direct consequence of the 2001 statute law that includes age among discriminations<sup>21</sup>. Why is this decision an age discrimination case ? Because once it is considered that the decision of the employer cannot be based on retirement, there only remains age, which is a prohibited ground for dismissal.

By virtue of Article L 122-14-2 Labour code, the prohibition to dismiss someone on the ground of age is completed by the prohibition of provisions in contracts of employment or collective agreements that define an age at which the contract will end ("clauses couperet"). All provisions that would put an end to the contract of employment on the ground of age are void.

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20 Cass. soc. December 6,1995, Bull V n°331

21 **Cass. soc., 21 déc. 2006 : D. 2007, p. 4, obs. J. Cortot**

By virtue of article L 321-13 of the labour Code, an employer who would dismiss an employee of 50 or more has to pay a contribution to the national employment organisms, which can deter employers to dismiss elderly employees : the contribution sometimes reaches a year of wages.

#### *b) Prevention of age discrimination*

Proof of age discrimination is so difficult, despite the rules on the burden of proof, that prevention is essential. According to art. L. 132-27 of the labour Code (as modified following the reform of the law of retirement in 2003), age as well as race and sex, must be taken into account in the works of the national commission for collective bargaining.

### **B/ The justification of differences of treatment<sup>22</sup>**

#### 1/ Justification of indirect discrimination

The issue of justification mainly concerns indirect discrimination. Indirect discrimination is expressly prohibited by French law, since 2001, under article L 122-45 Labour code. But, French courts have traditionally been reluctant towards acknowledging the existence of indirect discrimination, which has had the effects that most cases lead to the conclusion that the difference was objectively justified. A case decided by the Cour de cassation in January 2007 ruled, for the first time, in favour of indirect discrimination. The provision of a collective agreement, that instituted a complex mechanism of bonus, was considered "apparently neutral, but as constituting indirect discrimination on the basis of the health of the employee"<sup>23</sup>. This decision opens a new era in the fight against discrimination in collective agreements, since numerous provisions of such agreements might be scrutinised on the basis of indirect discrimination. Provisions, that were not intended to be discriminatory, may be considered as such<sup>24</sup>.

According to case law (essentially decisions from the ECJ considering the limited application of indirect discrimination before French courts) several elements constitute a justification of indirect

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22 (with regard to EC law) : M. A. Moreau, Les justifications des discriminations, Dr. soc. 2002, p. 1112; (with regard to French law) : La Semaine Juridique Social n° 12, 20 Mars 2007, 1179 ; F. Héas, Discrimination et admission de différences de traitement entre salariés, JCP S 2007, 1179.

23 Cass. soc. 9 janv 2007, n° 05-43.962, RDT 2007, p. 245, obs. Miné

24 M. Miné, préc.

discrimination :qualification, seniority, professional skills, diploma, experience, responsibilities.

First, the legal situation of the employee or applicable norms within the company can justify differences of wages. For example, a collective agreement can organise differences of wages due to the experience of the employee in the type of job accomplished<sup>25</sup>.

Second, the difference of treatment can result from criteria based on the person of the employee. Seniority and diploma can justify differences of treatment. An employer can hire a candidate with more diploma and who occupied similar functions in his former company, rather than promoting someone from the company<sup>26</sup>. As to seniority, the ECJ has limited its scope in the Cadman case (CJCE, 3 octobre 2006, aff. C-17-05 ) : the claimant was paid, for equal work, less than four male employees, the difference being justified by their length of service. The employer accepted that the salary scale had a disparate impact on female employees but maintained it was necessary to reward increased expertise arising from experience on the job. The ECJ, approving Danfoss<sup>27</sup>, held that an employer does not have to provide specific justification for using length of service as a criterion in a pay system unless an employee can raise serious doubts about whether greater length of service enables a job holder to perform better.

Third, the difference of treatment can also be justified with regard to the working conditions and the working environment. A difference of remuneration is thus non discriminatory if it is justified by a promotion decided through an objective procedure before an independent jury<sup>28</sup>.

## 2/ Justification of direct discrimination

Justification of direct discrimination is exceptional. It originates essentially from case law. The Conseil d'Etat (the highest administrative court in France) has refused to consider as

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25 Cass. soc., May 3, 2006, n° 03-42.920 : Juris-Data n° 2006-033329 ; Bull. civ. 2006, V, n° 160 ; JCP S 2006, 1496.

26 Cass. soc., October 25, 2006, n° 04-45.536.

27 CJCE October 17, 1989, aff. 109/88.

28 Cass. soc., October 17, 2006, n° 05-40.393

discriminatory the provisions of the decree of December 23<sup>rd</sup> 2004 concerning the maximum age to be a pilot in air transport. It said that the age restriction (55) responds to a legitimate and proportionate objective of the good functioning of air transport and protection of workers. It adds that pilots may be offered, then, a job that would not involve flying<sup>29</sup>.

Another example is offered by the possibility to favour foreign workers that apply for a job in France, the justification being the creation of areas of scientific excellence<sup>30</sup>. This case is nevertheless very criticised with regard to EC law (articles 12 and 39 of the Treaty) that prohibits "all discrimination for reason of nationality".

### **C / The principle : Equal work, equal pay**

The principle of equality goes further than the only prohibition of discriminations, in the field of remuneration, by requiring effective equality of treatment. In a famous case Ponsolle (October 29<sup>th</sup>1996), the Cour de cassation gave birth to the principle "equal work, equal pay". Since then, this principle is frequently repeated by the French court. It requires equality of treatment, not only between persons of different sex, but also between workers of the same sex : it requires, as a consequence, equality between two men, or between two women. As soon as it was recognised by the courts, the principle "equal work, equal pay" was largely invoked by employees before the courts.

It rapidly appeared too broad, and too restrictive of the power of the employer, who was about to loose his power of individualisation of the remuneration of workers. As a consequence, the Cour de cassation introduced possible justifications. Differentiation is thus possible on the basis of seniority, efficiency or quality of work, or any element that shows disparity in the value of the work of two employees. These limits are broadly interpreted, as proved by a case decided on June 21<sup>st</sup> 2005. An employee, back from sickness leave, required the same wages as the employee who had been hired to replace her. The employer succeeded before the court by arguing that the

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29 CE, Apr. 25, 2006, Assoc. « Avenir navigant » et a. : JCP S 2006, act. 191 ; [Europe 2006, comm. 239](#).

30 Cass. soc., Nov. 9, 2005, no 03-47.720, Bull. civ. V, no 312.

employee had to be hired in urgency (the administrative authorities had threatened to close the establishment) and that finding an employee of the required skill was difficult (head of a day-care centre<sup>31</sup>).

#### **D / Positive action**

A recent decision of the Constitutional council proves its reluctance towards positive action. A statute law had required a move to parity within boards with private and public companies, through positive action. The statute law was intended to give more decision-making power to women within companies. The Council states that the consideration of sex should not prevail the merits and talent of workers<sup>32</sup>.

## **II. PROOF AND REMEDIES**

The right to appeal before a court is protected both by French law and by EC law (Concerning discrimination, see Directive 2006, art 17). Nevertheless, it is proved that the judge cannot be the sole actor in the fight against discrimination. Notably, social partners have an essential role to play, through the conclusion of collective agreements concerning equality and non discrimination.

#### **A / Proof**

The rules relative to proof, introduced in French law in 2001, have been adopted through the implementation of EC Law. The system, considered favourable to employees, does not consist of putting the burden of proof on the employer, but shares the burden of proof between both employee and employer. The employee, the applicant for a job, or the trainee, has to prove facts that, in appearance at least, let believe that a discrimination exists. For example, an employee, from Cameroon, will establish that he is the only employee of the establishment who has not been given a bonus in December. If the judge considers that it establishes an appearance of discrimination, it

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31 Cass . soc. June 21, 2005, n° 02-42658

32 Déc. n° 2006-533 DC, 16 mars 2006, AJDA 2006, p. 632); Revue de droit du travail 2006 p. 72

will be to the employer to prove that the difference of treatment is not discriminatory, but based on objective grounds.

The rules relative to proof apply to all forms of discrimination, even if they were conceived concerning sex discrimination.

## **B / Remedies**

The legislator has chosen the most radical sanction for discriminations : the decision taken by the employer is void. This sanction concerns decisions adopted by the employer (notably dismissals) but also provisions of collective agreements, works rules. If a dismissal is void, the employee will be reinstated, eventually through an urgency procedure (*référé*s). He will be granted compensation equivalent to the wages he would have earned between his dismissal and the day of reinstatement. If the employee chooses not to be reinstated, he will have the indemnities applicable to all dismissals (should they be fair or unfair) as well as an indemnity covering the irregularity of the dismissal; the latter indemnity should repair the whole damages suffered by the employee.

If the discriminatory measure is not a dismissal, the sanction may be different. If an employee has not been granted a bonus, or a leave, he can ask to be given this bonus or leave.

## **C/ Measures of protection of victims of discrimination**

The law relative to discrimination is completed by specific rules of protection of workers in a context of discrimination

### 1/ collective protection

#### *a) Right of alert*

It was created by a statute law of December 31<sup>st</sup> 1992, and codified at article L 422-1-1 Labour code. It can be used by the *Délégués du personnel* who are Employee representatives within the company. In case of breach of rights of the person or individual freedoms within the company, resulting from discriminatory measure relative to hiring, remuneration, training, ....disciplinary

measure, dismissal, staff delegates can require the employer to investigate and put an end to the situation. If the employer remains silent, an action can be brought before the judge by the employee, or the staff delegate if he has the approval of the employee.

*b) Substitutive action*

In certain situations, including discrimination, statute law authorises trade unions to sue the employer instead of the employee, without having to prove any mandate by that employee.

2 / individual protection

*a) protection of witnesses*

Article L 122-45 indented line 3 protects the workers who testify in favour of an employee who makes a complaint of discrimination. It applies even if the complaint turned out to be unjustified.

*b) protection of the victim of discrimination*

A dismissal following an action of the employee against his employer is void, should the action of the employee reveal unjustified ([Cass. soc., Nov. 28 th 2000, no 97-43.715, Bull. civ. V, no 395](#) )

*c) work inspectors*

Work inspectors have access to all document useful to detect discrimination, and can issue a charge sheet if they observe discriminatory facts.

*d) The HALDE*

Since 2004, a special body has been created, that has an essential role in the fight against discrimination : HALDE. Any discrimination case, direct or indirect, prohibited by statute law or by an international convention to which France is a party, can be brought before the HALDE. The

main task of the HALDE is to ensure the efficacy of the legal mechanisms prohibiting discrimination.

Any person who considers to be victim of discrimination can submit a case to the HALDE, as well as any association officially declared for at least five years before the occurrence of the facts.

The HALDE has been given four main tasks:

- Investigation, which authorizes the members of the HALDE to require informations, explanations and the necessary documents.
  
- Assistance (consists of advising the victim as to a possible action before the courts) and mediation (the HALDE can itself carry out mediation)
  
- Issue recommendations to put an end to practices : the author of such practices is obliged to inform the HALDE of his compliance to such recommendations. If not, there will be an official report which will be harmful to the reputation of the company.
  
- Promotion of equality through various actions (training, meetings...)

Due to the success of the HALDE, the legislator has reinforced the attributes of the HALDE by granting it a power to conclude with the employee and the employer a transaction, which will notably include damages.

### **III. DISCRIMINATION AND EMPLOYMENT**

#### **A. Legal provisions**

Age discrimination has been recognised as the principle source of discrimination in French companies. According to a recent study by the French Observatory of discriminations, age



constitutes the first cause of discrimination in hiring, very closed to ethnic discrimination that comes second. According to this study, a candidate aged 50 will receive three times less positive answers for a hiring meeting than a male aged 30. The same study shows that an Arabic candidate has only 36% chances to be asked to attend an interview for the job.<sup>33</sup> The method adopted to reach such results was "testing". Six candidates were selected for the test : a man aged 30, whose name suggests that he is of French origin (his curriculum vitae contains no photo); a man aged 50 ; a mother of three children ; a man whose name is from Arabic origin; a candidate registered as handicapped, a candidate with an ill-favoured face. These candidates have answered to 1340 job offers of all types, in enterprises of all sizes, in all regions of France and all sectors.

### 1 / Age and hiring of workers

For a long time, the link between age and employment policy was limited to a provision of the labour code that prohibits a maximum age, as a criteria for hiring workers<sup>34</sup>. The problems encountered by elderly persons to find a job has led to new provisions, in the statute law of November 16<sup>th</sup> 2001, that allow exceptions to the prohibition of discrimination on the basis of age.

"Differences of treatment on the basis of age do not constitute discrimination where they are objectively and reasonably justified by a legitimate objective and that the means to reach this objective are appropriate and necessary.

These differences can notably consist of :

- prohibiting access to employment or to introduce specific work conditions in order to protect young and workers of a certain age.
- stating a maximum age for hiring, based on the training required for the proposed job or on the necessity of reasonable training period before retirement " (art L 122-45-3).

### 2 / Age and dismissal

Age is an element the employer is obliged to take into account in case of Economic dismissal. In selecting the employees who will be dismissed, the employer must take into consideration, notably the "situation of employees with social characteristics that make their reinsertion difficult, notably

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33 Les Cahiers Lamy du CE - 2007 - n°56 01-2007

34 Art L 311-4 C. trav.

handicapped persons and elderly people (Art L 321-1 Labour Code)

## **B/ Contracts of employment**

1/ Favouring the employment of the elderly :

There exists since a statute (decret) of August 29<sup>th</sup> 2006 a fixed term contract exclusively intended to aged workers : the "CDD Seniors". It is limited to senior workers of 57 at least, and cannot be longer than 36 months. Any employer can have recourse to this specific contract. This mechanism is intended to promote the employment of aged workers, and has been conceptualised by the social partners in a national collective agreement in 2005. A recent study shows that, after one year of application, about twenty employees were offered such a contract, which is evidently an indication that the CDD senior failed.

This mechanisms was feared to be contrary to EC law, in the light of the Mangold case that concerned a German statute law on the employment of senior people. German law intended to authorise, without restrictions, the conclusion of successive fixed term contracts where workers were at least 52. The only exception was that the fixed term contract was in close connection with an unfixed term contract previously concluded with the same employer. This statute law was considered contrary to EC law (CJCE, Nov. 22<sup>nd</sup> 2005, aff. C-144/04, Mangold c. Rüdiger Helm). In that case, the ECJ agrees with the German government that the contract intends to help access to employment for people of a certain age, which is considered as a legitimate purpose. But for the ECJ, the breach of EC law did not concern the purposes of the regulation, but the means utilised to reach that purpose : age was the sole criterion to allow an employer to conclude such contracts, which is considered by the European court as insufficient.

In its reasoning, the ECJ demonstrates that three elements should be taken into account when appraising a device, likely to be criticised in terms of discrimination : equality, professional integration, and stability of employment (point 64 of the Mangold case). The latter point should raise attention : to what extent should access to employment prevail over precariousness of the employment offered ? It is an essential point in the current French debate on employment law. The French government has enacted new contracts (Contrat nouvelle embauche, Contrat première embauche) that can be terminated at will (which means a lack of stability for the employee) but are

supposed to encourage companies to hire workers. One of these contracts, the CPE, requires attention since it focuses on young workers.

## 2 / Favoring the employment of the young

The Contrat Première embauche, called CPE, was restricted to applicants to a job aged under 26. Under this contract, the employer could terminate at will during the first two years, in derogation to French labour law which requires a fair ground of dismissal. This new contract was clearly aimed at favouring the hiring of young persons, with limited experience. It never entered into force due to massive demonstrations against it, notably within French universities. The main criticism against the CPE concerned the derogation to the requirement of a fair ground for dismissal, but age discrimination was another issue about this contract. Even if the issue was not raised before the ECJ, is such a device possible, since the Mangold case ?<sup>35</sup>

With regard to the 2000/78 directive, the CPE raises questions as to its compliance with EC law. The criticism does not concern the objective pursued by the French legislator. It is not in doubt that the French legislator intended, considering the precarious situation of young people in France with regard to employment, to facilitate their access to employment, notably for those with low qualifications. Indeed, this constituted a "legitimate", "appropriate and necessary" difference of treatment. Moreover, the directive endorses this objective and the ECJ has confirmed in the Mangold case the possibility to enact a derogation to EC law on the basis of this objective. Again, the difficulty would concern, not the objectives, but the means : are they appropriate and necessary ? Is the CPE not too rigid with regard to the objective of helping young people to find employment, and inappropriate to the objective pursued ? In the Mangold case, the ECJ condemned a regulation whose application exclusively depended on age, without taking account of the structure of the labour market and the personal situation of the person, notably his situation with regard to unemployment.

Could French law base itself exclusively on the age of the worker, without taking account of the difficulties he may have encountered to find previous employment, his absence of experience in the proposed job, his lack of competence or the inadequacy of his competence ? It is not clear that a legislation that favours dismissal is adequate to fight against unemployment. If the CPE had survived, such questions would have probably been raised before national French courts that are

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35 P. Rodière, *Semaine Sociale Lamy* - 2006 - n°1266 19-06-2006

competent to judge the conformity of statute law to EC law.

Yet, any device aimed at favouring young or older employees will have to be confronted to EC law, and is subject to scrutiny as to both its objectives and its means.

#### **IV. CURRENT ISSUES**

##### **A. Points of focus**

###### 1) The position of the HALDE

###### *a) 2007 Report* <sup>36</sup>

The report shows an improvement : numerous companies have shown willingness to move towards diversity, by signing documents such as codes of ethics ; some of them have created a body or designated a person in charge of these problems. Reasons appear to be frequently the image of the company. Despite this improvement, there appears that companies, as a whole, have not developed a global policy of promoting diversity. According to the HALDE, such a politics should contain an organization dedicated to the objective of diversity, agreements with trade unions.

- yet, whistle-blowing, that has been introduced in some companies, seems not to succeed due to the lack of acculturation of workers to this mechanism

- companies, in their policy in favour of diversity, tend to favour sex and handicap. People originating from certain urban areas (with social difficulties) have given rise to specific actions. On the opposite, companies are reluctant towards mores and sexual orientation . \*

It is said in the report that these policies in favour of diversity and non discrimination are nearly exclusively developed by large companies, involved in the world market and who have developed,

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36 C. Sachs-Durand, Analyse rapide du dernier rapport de la HALDE : « Des pratiques pour l'égalité des chances : que répondent les entreprises à la Halde ? », Revue de droit du travail 2007 p. 659

in a way or the other, a policy of "social responsibility".

*b) Proposals of the HALDE for 2008 ( 17 December 2007), concerning employment*

- promote the access of young people to work experience schemes and season work
- promote the employment of seniors and their access to professional training
- suppress all form of discrimination as to the family situation of employees, notably with regard to employees who are "Pacsés". The PACS is a contract concluded between 2 persons of different sex, or of the same sex (it was mainly created to enable gays to have an official situation) that organises their personal life (notably with regard to capital)
- give an institutional basis to social dialogue relative to non discrimination, including subjects such as seniors, social orientation, or minorities. More precisely, the objective to develop discrimination as a normal topic for collective bargaining at both sector and company level.
- improve transparency and efficiency of the process of hiring (in the private sector, adoption of the decree enabling the entry into force of the anonymous CV; in the public sector, reflection on the contents of exams and the composition of the panels that select the applicants)
  
- promoting whistle-blowing in the field of moral harassment

2) The anonymous CV

A statute law of March 31<sup>st</sup> 2006 has introduced the anonymous CV in the Labour code. According to the law, " in companies of 50 employees or more, the information referred to article L 121-6 and communicated by a written document by the applicant for the job have to be examined in a way that protects anonymity. The modalities of application of the current provision will be laid down by a decree". For now, the decree has not been passed.

Certain companies have adopted the anonymous CV, even before the coming to force of the statute law. A famous insurance company has introduced the anonymous CV since June 1<sup>st</sup> 2005. The CVs received through internet have been made anonymous before being transmitted to the recruiters. The pieces of information not transmitted to recruiters are : name, age, sex, place of

birth, nationality, address and e-mail address. The anonymisation is carried out automatically through computer programs and supervised by an independent administrator.

### 3) Fighting new forms of discrimination

- New forms of discretion have raised some focus : they concern social practices and relations within the company : prejudices towards certain employees, not invited to some meetings, informed later than the others of jobs that may be opened in the company .... These practices, that can in particular affect elderly employees, cannot be fought against on the basis of classical discriminatory grounds<sup>37</sup>

### 4) the role of collective actors

Each year, in all companies of 50 employees at least, the employer is bound to present to worker representatives a report on the compared situation of men and women in the company, on the basis of appropriate criteria<sup>38</sup>. The report indicates the measures taken to ensure equality and the aims for the coming year, and if necessary the reasons why the actions that had been announced in the name of equality have not been realised. This report is transmitted to the work inspector, which proves the importance attached by the law to this document. The works council can, in companies of more than 200 employees, constitute a commission for equality.

Alongside this report, collective bargaining is encouraged in the field of non discrimination, and national<sup>39</sup> as well as company agreements have been signed for this purpose<sup>40</sup>. The legislator included, in 2005, equality among the subjects of the duty to bargain<sup>41</sup>

## **B. General issue : fundamental rights and the control of power within the company**

The employment relationship has a two-tiered nature : it is both a contractual and a power relationship. Discrimination is not essentially an issue of contract, but of power. Individuals who

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37 M. Mercat-Bruns, La discrimination fondée sur l'âge : un exemple d'une nouvelle génération de critères discriminatoires, *Revue de droit du travail* 2007 p. 360

38 Art L 432-3-1 , D 432-1 Labour code;

39 ANI, 1 March 2004; M Miné, L'accord sur l'égalité professionnelle au regard du droit européen, *Liaisons soc. europe*, n°101, 14 April 2004.

40 At Peugeot, EDF ...

41 Art L 132-27-2 Labour code

are subject to power, should it be public (that of the State) or private (that of the employer for example) should be treated equally. The control of power is indeed one of the main issues for labour law, and an essential evolution of French labour law consists of an increase in the control of the power of the employer. The most topic aspect of this evolution concerns the insertion of fundamental rights within the employment relationship. The employee is not seen as a mere contracting party, but most of all as a person with all the attributes of a person : a sex, a race, a family, an age ... Contrary to contract law or company law that has a very limited vision of the individual, labour law approaches the individual as a true person, with all its attributes. Discrimination law has played an essential role in this mutation.

The counterpart is the duty of the employer to take account of the fundamental rights of the person in his decisions. More precisely, power must be exercised according to two series of values : on the one side, the fundamental rights of employees, on the other the interest of the enterprise. This combination is realised through a principle of proportionality provided for by article L 120-2 Labour code : "no one can limit the rights of persons, the individual and collective freedoms in a way that would not be justified by the nature of the task to accomplish nor proportionate to the aim pursued". This provision has followed a report by Gerard Lyon-Caen aimed at improving the respect for civil liberties inside the company, especially at the moment of hiring. Article L 120-2 is now, alongside article L 122-45 relative to discrimination, the most essential tool of protection of fundamental rights in the employment relationship.

This provision has introduced a general duty of justification of employer decisions, in other words a duty to justify the exercise of power in the company for all types of decisions (should it concern dismissal, hiring or any other aspect or period of the employment relationship). For example, an employee may oppose the application of a mobility clause, because the change of place of work has consequences on her or his family life. The right to a normal family life, as laid down by article 8 of the European Convention on Human Rights has been recognised by the Court of cassation as a limit to the power of the employer concerning changes in the employment relationship<sup>42</sup>.

On the other side, article L 120-2 also means that restrictions to fundamental rights are legitimate if they are justified and proportionate. Indeed, it is accepted that the employer can limit fundamental rights if it is justified and proportionate with regard to the interest of the enterprise. This reasoning

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42 Cass. soc. January 12, 1999, Bull civ V n°7.

extends to discrimination cases. Two examples may be given. The first concerns discrimination based on health. The dismissal of a sick employee may be justified where the absence of an employee due to sickness objectively affects the good functioning of the company and renders necessary the replacement of the sick employee. Here, we can see a shift from a prohibited personal ground ( health) to an objective ground (the interest of the enterprise) : the dismissal is not grounded on health (discriminatory) but on the functioning of the company, and is thus valid if the principle of proportionality is satisfied. The second example concerns discrimination on the basis of religion, with the specific issue of the Islamic veil. How should courts deal with the issue of the veil ? Several courts of appeal have dealt with the issue; the Cour de cassation has not yet. First, it is likely that the question of the veil will be dealt with as a religious issue, and not only as an issue of clothing (the Cour de cassation recognises the "freedom to dress as one wishes" as an individual liberty protected by article L 120-2). Second, the issue is that of the justification of the prohibition of wearing the veil : the existing decisions develop a test of proportionality, taking account of the consequences of the veil on the image and reputation of the company<sup>43</sup>.

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43 Paris; June 19, 2003, D. 2004, somm. 174; Cons. prud'h Lyon, January 19, 2004 and Conseil prud'h Paris, December 17, 2002, Dr. Soc. 2007, p. 358, obs Savatier